18. h. 1

PARERGON
JURIS CANONICI ANGLICANI:
OR, A
COMMENTARY,
By Way of
SUPPLEMENT
TO THE
Canons and Conſtitutions
OF THE
CHURCH of ENGLAND.

Not only from the Books of the CANON and CIVIL-LAW, but likewiſe from the STATUTE and COMMON-LAW of this REALM.

Whereunto is Prefix'd, by Way of INTRODUCTION,

Firſt, A brief Account of the CANON-LAW in general; how and from whence it had its Riſe and Beginning in the Church; and how it advanced itſelf, by the Subtlety of the *Romiſh* Clergy, after the Seat of the *Roman* Empire was removed to *Conſtantinople*, and Barbariſm had invaded the Politer Nations of *Europe*.

Secondly, The Reader has alſo here a Particular of the Books wherein this Law was written: With the ſeveral Authors Names, the reſpective Times wherein they compiled them, and the beſt Commentators thereon: With many other Curious and Hiſtorical Remarks on this Law, *&c.*

By JOHN AYLIFFE, L. L. D.
And late Fellow of *New College* in *Oxon.*

Behold! I have not laboured for my ſelf alone, but for all them that ſeek after Knowledge. Eccleſiaſticus, Chap. xxiv. Ver. 34.

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To the following

W O R K.

I HAVE at length, for certain Reaſons, been induced to publiſh a Supplement to the Canons and Conſtitutions of the Church of *England*, from a large Collection of Readings and Obſervations principally drawn from the Books of the *Canon-Law*, when I was a Practitioner in the Eccleſiaſtical Courts, and had a Proſpect of ſucceeding to ſome Chancellorſhip, or other Preferment in the Church of the like Nature. And as I firſt undertook this Labour for my own Sake and private Advantage alone, ſo, now having finiſh'd it without any Good to my Self, I humbly offer it up, as a Sacrifice of my Studies, to the Publick; not only with a Deſign of doing ſome Service to my Country, by illuſtrating the Force and Practice of the *Canon-Law*, as far as it has been receiv'd, and is now obſerv'd among *Engliſhmen*, but alſo with a Purpoſe of expoſing the Errors and Superſtition of the *Romiſh* Church; and of ſetting forth the Pride, Ambition, and Tyranny of the Clergy over the Members of its Communion: than which, nothing can be more abſurd and wicked in Men, who would be thought to embrace the true Chriſtian Religion, under a Spirit of Piety, Holineſs, and Humility.

I have, in the Introduction to this Work, given ſome Account of the *Canon-Law* in general; how and from whence it had its Riſe and Beginning in the Church, and how it advanced itſelf apace by the Subtlety and Cunning of the Clergy under the See of *Rome*, after the Seat of the *Roman* Empire was transferred and removed to *Conſtantinople*, and after the utmoſt Barbariſm had invaded the politer Nations of *Europe*.

have likewiſe herein atttempted to deliver a particular Relation of the Books themſelves wherein this Law was written, with the Name of the ſeveral Authors and Compilers of them, the reſpective Times wherein they were wrote and compiled, and the beſt Commentators thereon. And, laſtly, I have herein endeavour'd to evince and ſhew, That the ancient *Canon-Law* received in this Realm, is a part of the Law of the Kingdom in all Eccleſiaſtical Caſes, if it be not repugnant to the Royal Prerogative, or the Cuſtoms, Laws, and Statutes of the Realm. This being my chief Deſign by this Introduction, I ſhall proceed, *Firſt*, to ſhew what I mean by the *Canon-Law*, in order to eſtabliſh my firſt Inquiry.

Now the *Canon-Law* is ſo called from the *Greek* Word κανων, which in *Engliſh* ſignifies a Rule, becauſe the *Canon-Law* is as a Rule of Life unto all Chriſtians in Matters relating to Church-Diſcipline; and being chiefly collected from the Decrees of Councils, is explain'd and govern'd by them in a great Meaſure, as by a * Rule: and theſe Decrees are diſtinguiſhed into Canons, and divided into Chapters. The moſt ancient Collection ſeems to be that of the Apoſtolical Canons, or Conſtitutions; which were formerly among the *Papiſts* of great Weight and Authority, tho' the *Proteſtants*, and even ſome of the more honeſt and ſincere *Papiſts* themſelves have long ſince ſhewn, That theſe Canons had not their Original from the Apoſtles, but were of a much later Date. *Franciſcus Turrianus* the Jeſuit, indeed, believes, That theſe Canons were, about the 45th Year of *Chriſt*, compoſed by the Apoſtles themſelves; and has publiſhed a Book on purpoſe to prove, (as he imagines) that the Canons, commonly called *Apoſtolical*, were made by thoſe Holy Men; and being committed to Writing ſince by *Clemens Romanus*, a Diſciple of the Apoſtles, were by him reduced into the Form we now have them. And as *Sixtus Senenſis*, in his ſecond Book of his *Bibliotheca*, under the Name of *Clemens*, concurs with *Turrianus* in this Opinion; ſo another † Perſon ſays, That theſe Canons were made by the Authority of the Apoſtles, and were wrote by *Clemens Romanus*, a Diſciple of *Peter*, according to the Tradition of the Apoſtles, in the *Greek* Tongue, as now delivered to us; and that the Abbot *Dionyſius Exiguus*, being well skill'd in that Language, and an eminent Writer in the Time of *Juſtin* the Emperor, tranſlated them into *Latin*, with all the Accuracy and Fidelity he was Maſter of. But *Bellarmine*, in his Book touching *Eccleſiaſtical Writers*, thinks, That only fifty of theſe Canons are genuine, and of lawful Authority, rejecting the other thirty five, as not ſerving the crafty Purpoſes of the Church of *Rome*: And *Baronius* in his ** Annals, and *Poſſevine* the Jeſuit, in his *Apparatus*, are of the like Opinion, for the very ſame Reaſon. *Binius*, in his firſt Tome of the Councils, contends for all of them, beſides the ſixty fifth and the eighty fourth of theſe Canons. *Dionyſius Exiguus*, who tranſlated them into *Latin*, makes no more than fifty of them, or (at leaſt) has tranſlated no more; nor has *Iſidore Mercator* inſerted more of them in his Collection. But yet, *John* Biſhop of *Antioch*, commonly called *Antiochenus*, who liv'd in the ſixth Century, ſays, That our Lord's Diſciples and Apoſtles did, by the Means of *Clemens*, publiſh eighty five Canons; and ſo many of them were receiv'd and confirm'd by the ſecond Canon of the ſixth General Council, vulgarly call'd the Council of *Trullo*, held in the Year 692. as may be ſeen in the firſt Tome of the General Councils, towards the beginning of the

* 33 Diſt. Cap. 1 & 2. † Fran. Long. a Coriolano. ** Ad ann. 102.

the ſecond Chapter. And theſe eighty five Canons are found in ſeveral Editions of the Councils, tho' the *Papiſts* have thought fit to omit ſome of them, that make againſt their Corruptions in Religion: And Biſhop *Beveridge* has recorded this ſame Number in his *Codex Canonum*; tho' *Gregory Haloander* has only inſerted eighty four of them in his Body of the Law.

John Dallee is of *Opinion, that theſe Canons were made by ſome certain Impoſtor or other, after the Year of our Lord 450; and *Tho. Cambensis*, who has, in a Book of his printed at *London* 1689. detected the *Roman* Forgeries committed in the Edition of the Councils of the four firſt Centuries, does alſo acknowlege theſe Canons to be ſuppoſitious. But Biſhop *Beveridge* oppoſes this Conjecture, and believes they were made either in the ſecond or third Century: So that all the Decrees of the Church, during the firſt Century, being therein digeſted, they were as a *Code* unto the Primitive Church, according to which the Diſcipline and Policy of the Church was to be adminiſtred. I do eaſily aſſent and agree with Biſhop *Beveridge*, that theſe Canons were made in the third Century, ſince they are cited, and appeal'd to by the Eccleſiaſtical Writers of the fourth Century. Nor will I deny them proper Authority, ſince they ſeem to have their Riſe from the Doctrine of the Apoſtles; and, therefore, and for no other Reaſon, they were called the Apoſtolical Canons; and were appeal'd to in the Synod of † *Nice*, the Synod of ** *Antioch*, and in other Synods; tho' I will not preſume to affirm, that they were particularly receiv'd in the Church. In the *Canon-Law* they are reckon'd as Apocryphal Books, and among the Apocryphal Canons: which ſurely they had never been, if the Church had receiv'd them by Publick Authority in the early Ages of Chriſtianity. *Gelaſius*, in a Council or Synod of ſeventy Biſhops, held at †† *Rome*, reckons them as ſuch; whoſe Decrees we have extant in the Books of the *Canon-Law*, ſaying, That the Book of Apoſtolical Canons was an Apocryphal *** Book: And, again, ſuch Things as are preach'd and written by Hereticks, or Schiſmaticks, the Catholick and Apoſtolick Church of *Rome* no wiſe receives, among which Writings are reckon'd theſe Canons. But Biſhop *Beveridge*, and Biſhop *Pearſon*, do both doubt, whether there ever was any ſuch Decree publiſh'd by *Gelaſius*, ſince no Author ever mentioned the ſame till three hundred Years after *Gelaſius* his Death. 2*dly*, Suppoſing this Decree to be ever ſo genuine; yet 'tis uncertain, whether theſe Words, *viz. Liber Canonum Apoſtolorum Apocryphus*, were truly inſerted in it or not; ſince they are not to be met with in *Juſtellus*, and other Manuſcript Copies. And this appears ſo much the more plainly, from the Words of *Hinckmare* Biſhop of *Rheims*, againſt *Hinkmare*, Biſhop of *Laudun*, who ſays, That tho' *Gelaſius*, in a Catalogue of Books receiv'd by the Catholick Church, and in other Authentick Writings, and in the Hiſtory of the Council of *Nice*, the Council of *Conſtantinople*, the Council of *Epheſus*, the Council of *Chalcedon*, is not entirely ſilent touching theſe Canons, yet he has not put them among Apocryphal Writings. Yea, if this Decree of *Gelaſius* was ever ſo genuine, yet it immediately appears from thence, that *Gelaſius* only rejected thoſe Writings as Apocryphal, which were not receiv'd by the Church.

Now from this different Account of the Number of theſe Canons, and from the Corruptions of them, I believe there have been ſeveral Matters intermix'd therein, which are entirely foreign to their firſt State and Purity,

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* vid. Pſeudep. Can. † A. D. 325. ** A. D. 341. †† A. D. 493. *** 15 Diſt. c. 3. 27 & 64.

Purity; from whence the *Papiſts* at this Day confirm their *Dogma's* and Opinions. Therefore ſince, as *Ger. a Maſtricht* has plainly ſhewn, they had not their Original from the Apoſtles themſelves: there have been ſeveral Matters interpolated and tack'd to them at different Seaſons, as Occaſion ſerv'd this or that Set of Men. Tho' Biſhop *Beveridge* plainly ſhews, that theſe Canons contain nothing in them contrary to the Manners and Rites of the Church in the third Century. *Melchior Canus* among the *Papiſts*, in the ſecond Book of his * *Loci Theologici*, thinks, That theſe Canons ought not to be deem'd Apoſtolical, nor will he have them to be reckon'd among the ſacred Book, according to the Deſire of other *Romaniſts*. And *Cabaſſutius* in his Account of the Councils, is of the ſame Opinion, and ſo likewiſe is †*Natalis Alexander*. Among the *Proteſtants* who hold theſe Canons to be leſs Apoſtolical, we may reckon Archbiſhop *Uſher* in his Diſſertation touching the Writings of *Ignatius*, *Luke Oſiander* ** in his Church-Hiſtory, *Rob. Coke* in his *Cenſura de Canonibus Apoſtolorum*, *Andrew Rivet* in his firſt Book of Criticiſm, †† *John Dallee* in his *Pſeudepigraphe Apoſtolorum*, *** and the *Centuriators* of *Magdeburg* †††.

Albaſpinæus thinks ****, that theſe Canons were not all of them made at one and the ſame Time, but that ſome of them were made in the firſt, and ſome in the ſecond Century, by the Apoſtles and their Succeſſors, and that ſome others were added in the third Century, tho' they ſtill retain the Name of *Apoſtolical* Canons: And other Authors ſay, that this *Farrago* was nothing elſe but an Abridgment or an *Epitome* of the Acts of private Councils, and of Matters enacted and eſtabliſh'd by private Biſhops, that had the Government and Adminiſtration of the *Greek* Church before the Council of *Nice*. But *Gerard a Maſtricht*, is of a contrary Opinion, believing that if this was an *Epitome* of Tranſactions eſtabliſh'd in the Church before the *Nicene* Council, they had been entirely inſerted in the *Codex Canonum* of the Univerſal Church, which yet was not then done. But I do not look upon this as a good Argument; ſince only thoſe Canons that were then receiv'd by the Church, were inſerted in this *Code*, which at length, in Proceſs of Time, happen'd alſo in Reſpect of the Apoſtolical Canons themſelves. I have dwelt the longer on this Subject of the Apoſtolical Canons, becauſe they have been the Occaſion of ſo much Diſpute among *Proteſtant* and *Papiſt*, and ſome have been ſo weak as to think them genuine, and of Apoſtolical Birth: But yet they ſeem to me to be one of the chief Pillars, on which the Policy of the Church and the *Canon-Law* itſelf is founded.

Plettenberg, in his Introduction to the *Canon-Law*, informs us, that this Law had its Riſe and Beginning even from the very Infancy of the Church itſelf: But as he was a *Popiſh* Writer, fond of Antiquity to ſupport the Power and Grandeur of the Hierarchy, we ought to have but little Regard to his Aſſertion in this Point; unleſs he would be underſtood not to mean the Papal *Canon-Law* as now eſtabliſhed in the *Roman* Church, nor any part thereof; but the Canons of particular Churches only. For 'tis certain there were ſome Rules and Canons made for the Diſcipline and Government of particular Churches in thoſe early Ages of Chriſtianity, tho' the ſame are now loſt in the Ruins of ſucceeding Times: Which were afterwards in Proceſs of Years ſupply'd by the Decrees of Provincial Synods and General Councils. For 'tis not to be ſuppos'd, that the

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* Cap. 10. † Ad ſæc. 1. Dif. 17. 18. **19. 20. lib. 3. c. 1. †† lib. 1. c. 1. *** lib. 3. c. 34. ††† Cent. 1. lib. 2. c. 7. **** 1. Ob. c. 13.

the Communion of the Church could long ſubſiſt after the Death of the Apoſtles, without ſome other Laws and Obligations, holding Men to Peace and Concord among themſelves, than thoſe contain'd in holy Writ: Conſidering the Pride and Paſſions of Men, and an overweaning Conceit of their own particular Ways in point of Divine Worſhip, and the Ceremonies of it. But whether theſe Laws were made by the Prieſthood alone, or by the whole Communion of the Church repreſented, I ſhall enquire hereafter in another Place.

Gregory of *Tholouſe*, a pretty good *Civilian* and a *Canoniſt* in the *Romiſh* Church, defines the *Canon* Law to be a poſitive Law, ordain'd and given to the Catholick Church by ſeveral Popes, or (at leaſt) approved of by them: Directing the Actions of all Chriſtian Believers immediately to the Worſhip of God, and to Chriſtian Peace and Juſtice; (which conſiſts in Purity of Faith, Integrity of Behaviour, and in obſerving the Commands of God and the Church) but ultimately directing their Actions to the ends of Eternal Happineſs. But *Gratian* himſelf * as well as *Piringhius*, confounds the *Canon* and *Papal-Law* together: The latter being only in Propriety of Speech ſtiled *Jus Pontificium*, from the Popes, who were the Authors of it, and from whom it had its Force and Authority. For this *Papal-Law* chiefly conſiſts of the *Decretum*, and the *Decretal* Epiſtles of ſeveral Popes: But the *Canon-Law*, properly and ſtrictly ſpeaking, is that Law, which conſiſts only of the Canons of General and Provincial Councils. But, ſays *Gratian*, there are ſome of the Canons which are the Popes Decrees; and ſome of them that are the Statutes and Decrees of Councils: And, therefore, the *Canon-Law*, in a large Senſe of it, is Threefold, *viz. Firſt*, That which is properly ſo called. *Secondly*, That which is in *Latin* ſtiled *Jus Pontificium*, or, in *Engliſh*, the *Papal-Law*. And, *Thirdly*, That which is term'd *Jus Eccleſiaſticum*, or the *Law of the Church*. The firſt depends on the Canons of Councils alone; and from a Collection of theſe it derives its firſt Original. The *Jus Pontificium*, or *Papal-Law*, was compiled and made up of the Decrees and Epiſtles of ſeveral Popes, and entirely depends on Papal Uſurpation and Authority; and on the Sayings of the ancient Fathers of the Church. And the *Jus Eccleſiaſticum*, or Law of the Church, contemplates and takes in the State and Government of the Church, and the Laws at this Day receiv'd from and by the Church.

Under the Appellation of a Canon, we may reckon every Eccleſiaſtical Conſtitution whatſoever: And from hence the Word *Canon*, being taken in a large Senſe, is the ſame as a Canonical, or Eccleſiaſtical Conſtitution. For tho' a Conſtitution, properly ſpeaking in the Senſe of the *Civil-Law*, is that Law which is made and ordained by ſome King or Emperor; yet, the *Canoniſts*, by adding the Word *Sacred* to it, make it to ſignify the ſame as an Eccleſiaſtical Canon. Now a Canon is ſo called, becauſe it is, or (at leaſt) ought to be a Rule unto every Man's Actions in the Affairs of the Church, and of Religion itſelf, by leading him to a right and regular way of living in Point of Practice †. But ſtrictly taken, it is uſed for a Conſtitution, or Law made and enacted in ſome General Council, as in the third Diſtinction here-under quoted †, where the Reader may ſee the Difference between a *Canon*, a *Decree*, a *Decretal Epiſtle*, a *Dogma*, a *Sanction*, an *Interdict*, and a *Mandatum*. And 'tis, moreover, to be obſerv'd; That every Canon, or Eccleſiaſtical Conſtitution may be ſtiled a Law, ſince a Law, diſtin-

* 3 Diſt. c. 2. † 3 Diſt. c. 2.

guiſh'd by the *Latin* Word (*Lex*) is nothing elſe but a Conſtitution reduced into Writing. Yea, the Canons of the Church are very rightly term'd *Eccleſiaſtical* Conſtitutions; but the Conſtitutions of the *Civil-Law* are in *Latin* properly ſtiled *Leges Seculi*, or Secular Laws: And from hence the *Civil-Law* in the general Import thereof, is, as it were, the *Jus Civium*, or a Political Law.

The Canons of General Councils, according to *Iſidore*, in the ſixth Book of his *Etymologies* *, had their Riſe and Beginning from the Time of the Emperor *Conſtantine the Great*. For in the 'foregoing Ages of Chriſtianity, thro' the great and raging Perſecution thereof, the Church in General had but little Power of inſtructing the People therein, and of governing the Community by any known Body of Laws, other than what our Saviour *Chriſt* and his Apoſtles had left behind them in the Sacred Book of the New Teſtament: And from hence it is, according to ſome, that the Chriſtians were divided into ſeveral Hereſies, during the three firſt Centuries of the Church; becauſe (ſay they) the Biſhops had not the Power of meeting together in one Place to confirm the Faith, and to eſtabliſh wholeſome Laws and Inſtitutions for the Government of the Church at large, till the Reign of the aforeſaid Emperor: For he was the firſt of all the *Roman* Emperors that was a Chriſtian, and impower'd the Chriſtians to aſſemble freely together, and to enact Laws for the Ends aforeſaid. I will not here take upon me to determine, whether this Grant of Power has done any great Service to Religion or not, ſince the Clergy in many Places have got it into their own Hands: But, ſure I am, they have much exalted and magnified themſelves hereon, and from a limited Conceſſion of meeting whenever the Emperor thought fit to call them together, (for ſo was that firſt Grant) they have ſince in ſeveral Countries, contrary to the Welfare and Peace of the Commonwealth, and the legal Eſtabliſhment of the Civil Power, erected themſelves into an Independent State, and do claim to aſſemble, whenever they think proper to diſturb the Quiet of the Community; and not when the Prince ſhall judge it reaſonable and neceſſary.

Plettenberg, in his aforeſaid Preface or Introduction, obſerves; That the *Canon* or *Eccleſiaſtical-Law* admits of various Titles and Appellations in our Law-Books. *Firſt*, ſays he, it is called the *Canon-Law* from the *Greek* Word κανων, (as already hinted) ſignifying a *Rule*; becauſe it preſcribes and chalks out to us a Rule or Method for the well-governing of our Lives and Actions in Religious Matters, or (at leaſt) ought to do ſo †. *Secondly*, It is in *Latin* ſtiled *Jus Pontificium*, from the Popes that were the Authors of it (as aforeſaid), and who are in *Latin* called *Pontifices*. *Thirdly*, 'Tis term'd *Jus Eccleſiaſticum*, from the *Greek* or *Latin* Word *Eccleſia*, denoting the Church, which is directed and govern'd by it. *Fourthly*, 'Tis alſo in *Latin* ſtiled *Jus Sacrum*, either from the Matter and Subject therein contain'd, or elſe becauſe it is directed to ſome ſacred End and Purpoſe. *Fifthly*, 'Tis call'd *Jus Divinum*, not that it did immediately proceed from God himſelf, for that is not true; but becauſe it either contains ſome Matters taken out of Holy Writ, or elſe (as the *Papiſts* would make us believe) that the Canons were dictated by the Gift and Inſpiration of the Holy Ghoſt; or elſe becauſe they are Concluſions deduced from certain Principles of the Divine Law; or, *Laſtly*, Becauſe the *Canon-Law* was made by him,

* Cap. 16. † 3 Diſt. c. 1 & 2.

him, who (according to the *Romaniſts*) has the Power of Binding immediately from *Chriſt* himſelf *: Which Power we Proteſtants entirely deny. *Emanuel Gontſalez*, in his *Apparatus* touching the Origine and Progreſs of the *Canon-Law*, thinks, that this Law ought to be called the *Divine*, as well as the *Canon-Law*; ſaying, That the Law which contains theſe Eccleſiaſtical Laws, is ſometimes called the Divine, but more frequently the *Canon-Law*: And there he gives the ſame Reaſons for it as I have now remembred. The Words *Jus Eccleſiaſticum* in a general Senſe of them, denote any Rule, according to which a Man ought to proceed, and be judged by in Church Matters; that all Things may be done Decently and in Order, as St. *Paul* adviſes.

We read, that in ſome of the firſt Ages of the Church two or three Dioceſſes met together, and did by joint Conſent, or Suffrages, make Canons and Decrees for themſelves; which, beſides the Canons of General Councils, they made uſe of for deciding of controverſial Matters among themſelves. Whereupon in the Provincial Dioceſſes of *Aſia*, *Pontus*, and the *Eaſt*, there were ſeveral Canons publiſh'd by the Council of *Ancyra*, *Neo-Ceſaria*, *Gangrena*, *Antioch*, and *Laodicea*: And theſe Canons were of Force among ſuch Biſhops, by whoſe Authority and Suffrages they were made. But afterwards all the Biſhops and Churches of the *Eaſt* were oblig'd, by the Authority of the Council of *Conſtantinople*. Soon after the Council of *Nice* theſe Canons were collected together; and became of Publick Uſe in the Church, by rejecting and throwing out ſuch as were contrary hereunto. But under the *Nicene* Canons even thoſe were included, which were eſtabliſh'd for ſome Time before this Council was held, in particular Synods and Aſſemblies; the *Nicene* Council receiving thoſe Canons †. In the Time of the fourth Century, there were ſeveral Collections of Canons made, which were of great Uſe and Authority in the Chriſtian Church. And, among thoſe, ſoon after the Council of *Nice*, the *Codex Canonum* of the Univerſal Church had its Riſe and Beginning: Which Code is alſo by another Name in *Latin* called *Corpus Canonum* **; and that in no wiſe improperly. For as the *Civil-Law* is ſtiled a *Corpus Juris*, or Body of Law, in the ſame manner as *Homer*'s Works are ſtiled *Corpus Homeri*, conſiſting of all the Books, and the ſeveral Parts thereof, belonging to that Poet: So likewiſe may this *Code* be called a *Corpus Canonum*, and the whole Body of the *Canon-Law* a *Corpus Juris*. For *Cicero* in his Letter to his Brother *Quintus* obſerves, That the Word *Corpus* is taken for any written Body, or Collection whatſoever. And as the *Corpus* of the *Civil-Law* contains the *Digeſt*, the *Code*, the *Novels*, and the *Inſtitutions*; ſo likewiſe does that of the *Canon-Law* comprehend the *Decrees*, the *Decretals*, the *Clementines*, and the *Extravagants*; and alſo the *Inſtitutions*.

Though we do not certainly know who was the Author of this *Codex Canonum*, yet, if we may believe ſome Manuſcript Copies, *Stephen* of *Epheſus* †† was the reputed Author thereof, tho' he rather ſeems to me to be the Enlarger, than the firſt Compiler of it. In the firſt Edition of this ſame *Code*, we only meet with 138 *Canons*, *viz.* 25 *Canons* of the Council of *Ancyra*, 14 *Canons* of the Council of *Neo-Ceſaria*, 59 of the Council of *Laodicea*, and 20 of the Council of *Gangrena* ***. This Collection increaſed in the Time of the

* Matt. 16. v. 19. † Jerom. Hiſt. lib. 8. cap. 26. ** Maſtricht. N. 27. Fran. Flor. par. 2. p. 253.
†† Pet. de Mar. lib. 3. cap. 3. N. 4. *** Maſtricht. N. 36.

the Council of *Chalcedon*, even to the Number of 207 *Canons*; ſo that the 25 *Canons* of the Council of *Antioch* were added thereunto, as were likewiſe the ſeven of the Council of *Conſtantinople*, the eight of *Epheſus*, and the 29 of the Council of *Chalcedon* *. And that this *Code* might have full and ample Authority in the Church, it was confirmed not only by the Fathers of the Council of *Chalcedon* †, but alſo by the Emperor *Juſtinian* himſelf **, and afterwards ratify'd by the pretended Power of divers Popes, and Councils. But in Proceſs of Time various and ſeveral *Canons* were added to this *Code*, as the 85 *Apoſtolical Canons*, the *Canons* of the Council of *Sardica*, being in Number 21, the *African Canons*, and ſome Canonical Epiſtles written by *Theophilus*, *Dionyſius*, *Petrus*, *Athanaſius*, and *Timotheus*, Biſhop of *Alexandria*, *Gregory*, Biſhop of *Neo-Cæſaria*, *Baſil* Biſhop of *Cæſaria* in *Cappadocia*, *Gregory* the *Theologiſt*, *Amphilochius*, *Iconius*, and *Gennadius*, Patriarch of *Conſtantinople*: And afterwards in Courſe of Time, ſeveral Papal Decrees were added hereunto, ſo that after the Time of the *Nicene* Council, the Church began to be govern'd by a Twofold Law, *viz.* by the Law of God, which is founded in the Holy Scriptures, and by the *Canon-Law*, properly ſo call'd, contain'd in the *Codex Canonum*. We have at this Day ſeveral Editions extant of this *Code*, one publiſh'd by *Chriſtoph. Juſtellus* at *Paris* ††, in Folio; and another by *Gerhard. Theod. Mezier* at *Helmſtadt* ***, in Quarto. And *Juſtellus*'s Son has again publiſh'd the ſame at *Paris* †††, in his *Bibliotheca Juris Canonici*; adding hereunto the *Canons* of the Councils of *Epheſus* and *Chalcedon*. The *Code* of the Oriental Church, which was confirm'd in the Council of *Trullo* at the ſixth General Council held at *Conſtantiuople*, is in ſome reſpect different from this *Code*; wherein the *Canons* of the Council of *Sardica* were omitted, partly becauſe they were firſt publiſh'd in *Latin*, and partly becauſe they contained ſome Matters which are contrary to the Doctrine of the Church of *Rome*.

Next to the *Code* of the Univerſal Church ſucceeded that of the *African* Church: For the *African* Church not only made uſe of the *Code* of the Univerſal Church, but even us'd a particular Collection of of their own ****; this Collection being made out of ſuch *Canons* as were peculiar to the *African* Church: As from the *Canons* of the Council of *Hippo*, the *Canons* of the firſt, ſecond, third, fourth, fifth and ſixth Councils of *Carthage*, and from thoſe of the ſeventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth Council of *Carthage*, and from the *Canons* of the Council of *Miletum*. This *Code*, conſiſting of 138 *Canons*, was firſt wrote in the *Latin* Tongue by an uncertain Author, and by Private Authority alone, tho' it was afterwards confirm'd by the fifteenth Council of *Carthage* ††††, either under the Name of the Council of *Carthage*, or the Council of *Africa*; and it was then tranſlated into the *Greek* Language, and inſerted not only in the *Code* of the Oriental Church, but it was alſo receiv'd by *Dionyſius Exiguus* into the *Codex Canonum* of the *Roman* Church, and publiſh'd by the care of *Juſtellus* *****.

The Church of *Rome* did alſo, according to the Example of the Eaſtern Churches, make uſe of a particular *Code* of *Eccleſiaſtical Canons*, by tranſlating the *Canons* of the Eaſtern and Univerſal Church, into

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* Pet. de Mar. de Conc. Can. cap. 2. † Can. 1. ** Nov. 131. cap. 1. †† A.D. 1610.
*** A. D. 1643. ††† A. D. 1661. **** Maſtricht. N. 96. †††† A. D. 419.
***** vid. Juſtell. Præf. ad Biblioth. Jur.

into the *Latin* Tongue. This *Code* of the *Canons* of the *Roman* or Weſtern Church contains the *Apoſtolical Canons*, the *Canons* of the Councils of *Nice*, *Ancyra*, *Neo-Cæſarea*, *Gangrena*, *Antioch*, *Laodicea*, *Conſtantinople*, *Epheſus*, *Chalcedon*, *Sardica*, *Carthage*, *Africa*, a Treatiſe of the Primacy of the *Roman* Church, the Decrees of ſeveral Popes, as *Siricius*, *Innocent*, *Zozimus*; *Boniface* the Firſt, *Celeſtine*, *Leo* the Firſt, *Hilary*, *Simplicius*, *Felix*, *Gelaſius*, *Anaſtaſius*, *Symmachus*, *Hormiſda*, and Pope *Gregory*: *Leo* the Fourth*, and other Popes appealing to this *Code*. *Creſconius*, an *African* Biſhop, who liv'd about the Year 690. has given us an Abridgment or Breviary of this *Code* in 300 Canons; omitting ſome whole Canons of Councils, and the Decrees of Popes. *Peter Pithou*, in his Hiſtorical *Synopſis*, takes Notice of the Collections of ſome uncertain Canons; yet theſe Collections ſeem to me to be the ſame with the *Codex Canonum* either of the *Roman*, or Univerſal Church. We have ſeveral Teſtimonies from the *Britiſh* Hiſtorians; That the *Britiſh* Church made uſe of the *Code* of the *Roman* Church during the Time of Popery here among us: For according to *Bede*, in the fourth Book of his Church Hiſtory †, we read of *Theodore* Archbiſhop of *Canterbury*, who wrote a Book, intituled, *Patrum Canones*, which was approv'd by the Council of *Hereford*. He, moreover, adds, That in the third Year of King *Egfrid*'s Reign**, this *Theodore* ſumon'd a Council of Biſhops to meet together with ſuch as were acquainted with the Laws; and made Choice of the Canonical Decrees of the Fathers: And, ſoon after reciting *Theodore*'s own Words themſelves, who was Preſident of this Council, he adds, *viz.* "I intreat you, my "beloved Brethren, that we all of us preſerve the Decrees and Deter-"minations of the Holy Fathers uncorrupted." *Peter de Marca*, in his Diſſertation touching the ancient Collectors of Canons, ſays, That the *Roman* Church was govern'd only by the Canons of the *Nicene* Council, as Pope *Innocent* the Firſt ſhews, in his Epiſtle to the Clergy of *Conſtantinople*.

Dionyſius Exiguus, who was a *Scythian* by Birth and Nation, being a Perſon of ſome Eminency for his Learning, did, in the ſixth Century, under *Theodorick*, King of the *Goths*, compile another *Code* of Canons: For he tranſlated the *Greek Code* of Canons into the *Latin* Tongue, chiefly at the Requeſt of *Stephen*, Biſhop of *Salona*. But this *Code* herein differs from the former of the *Roman* Church, ſince it does not number its Canons *una ſerie*, and by an uninterrupted Order, but aſſigns to each Council its proper Canons; and at the beginning of every new Council he alſo begins afreſh to number its Canons. But *Dionyſius*'s *Code* extends itſelf to the Number of 165. which is the third Canon of the firſt Council of *Conſtantinople*: And of this Council we find ſeven Canons in the *Greek Code* of the Univerſal Church; and only three in the *Roman Code* of Canons. After this *Dionyſius* begins to number or reckon Twenty ſeven Canons of the Council of *Chalcedon*; and likewiſe to number the Canons of the Council of *Sardis*, which are only publiſh'd in the *Latin* Tongue. But the *African* Canons at length bring up the Rear, being made by the *African* Councils; and by a new way of Numbring, conſiſt of 138: So that this *Code* of *Dionyſius* was partly collected and compiled from the *Greek* Synods, and partly from the Weſtern Councils. This Collection contains almoſt the ſame Canons of Councils as the *Greek Code* of the Univerſal Church

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* Diſt. 20 cap. 1. † Chap. 5. ** A. D. 673. Caſſiodor. Lect. cap. 22.

publiſh'd by *Juſtellus* in the Year 1590. Soon after this a Collection of Papal Decrees down from the Time of *Siricius* to the Papacy of *Anaſtaſius* was ſubjoin'd hereunto, to which Collection is prefix'd an Epiſtle directed to *Julian* the Presbyter, who liv'd towards the end of the ſixth Century. There are ſome Decretals added by other Perſons, being ſuch as were enacted from the Time of Pope *Hilary* to that of Pope *Gregory* the Younger. This *Code* of *Dionyſius* was receiv'd by the *Roman* Church, and offer'd by Pope *Adrian* the Firſt to *Charlemagne* then being at *Rome* for the Government of the Weſtern Churches, tho' 'tis a great Doubt, whether it be ſtill remaining, and whether it was receiv'd in *France*, according to the Opinion of *Sirmond* in his Preface to the ancient Councils of *France*. Yet *Anton. Pagus*, in his Criticiſm on **Baronius*, thinks, that the Decretal Epiſtles of the Popes were ſometimes uſed by the ancient Synods of *France*. About the ſame t me *Fulgenius Ferrandus*, a Deacon of the Church of *Carthage*, who liv'd in the Days of *Juſtinian*†, made an Abridgment of the Canons, wherein he has included all the Diſcipline of the Canons within the Compaſs of 232 Chapters, having a good Regard to ſeveral Matters therein contain'd; and has alſo plac'd theſe Canons and Decrees, as they do beſt agree unto each Chapter. *Baronius*, without any reaſonable Foundation, confounds this Perſon with *Creſconius*: But *Maſtricht* has fully ſhewn the Agreement and Diſagreement of each of them. *Peter Pithou* firſt publiſh'd this ** Agreement in *Latin* from a Manuſcript Copy belonging to the Church of *Troyes*; and afterwards the ſame was again publiſh'd at †† *Paris*, with the *Code* of the *Roman* Church by *Chiflet*, in *Octavo*.

About the ſame time alſo, wherein *Juſtinian* reign'd, *John* of *Antioch*, (commonly call'd *Scholaſticus*) Patriarch of *Conſtantinople****, likewiſe diſtributed all the Eccleſiaſtical Canons, which had any Force in the Eaſtern Church, into 50 Titles, aſſigning to each Title ſuch Canons as had been made and eſtabliſh'd either about the ſame Matter, or elſe touching Matters of the like Nature. In this Collection he has inſerted the 85 Apoſtolical Canons, the 20 Canons of the Council of *Nice*, the 25 of the Council of *Antioch*, the 59 Canons of the Council of *Laodicea*, 21 Canons of the Council of *Sardis*, the 20 Canons of the Council of *Gangrena*, the 25 Canons of the Council of *Ancyra*, 14 Canons of the Council of *Neo-Cæſarea*, ſix of the Council of *Conſtantinople*, ſeven of the Council of *Epheſus*, 27 of the Council of *Chalcedon*, and 68 Canons or Decrees of St. *Baſil*, as he is called, without obſerving any Order of Time or Series of Numbers. But he was the firſt of the *Greeks* that added the 85 Apoſtolical Canons, the 21 Canons of *Sardica* and the 68 Canons of *Baſil*; which he has tranſlated at large, and not given us in Brief. Pope *Nicholas* the Firſt ſeems to have a View to this Collection; and, by way of Reſpect, ſtiles it a *Concordia Canonum*: Becauſe all the *Concordant Canons*, as ranged and diſtributed under certain Heads and Chapters, were herein reduced to a perfect Harmony and good Agreement with each other. And tho' *Fran. Floreus* aſcribes this Work to *Theoderet* Biſhop of *Cyrus*, who liv'd 130 Years before *Scholaſticus*; yet *Chriſtoph. Juſtellus* has ſufficiently ſhewn from ancient Manuſcripts, That this was the Collection of *Johan. Scholaſticus*. There is a *Nomo-Canon* of the ſame *Scholaſticus* now extant conſiſting of fifty Titles, wherein he reports an Opinion extracted from the Canons,

* An. 527. N. 11. † Vict. Tun. Chron. p. 43. ** A. D. 1588. †† A. D. 1618.
*** Can. Lect. ant. Tom. 6. p. 413.

nons of Councils, and ſubjoins a Decree of the Emperor *Juſtinian* in his *Novels* *. But tho' this Collection was made by private Hands; yet it was heretofore of great Authority in the Church, till it was aboliſh'd by *Photius*'s *Nomo-Canon*, as being a more full and compleat Collection. This Collection of *Scholaſticus* continu'd in Manuſcript almoſt unknown to the World for many Years, till *Chriſtoph. Juſtellus* firſt publiſh'd it in his *Bibliotheca Juris*, having procur'd the ſame from his Son *Hen. Juſtellus*.

The next Collection of Canons was that which was made by *Martin Bracarenſis*, a *Spaniſh* Biſhop †, ſoon after the middle of the ſixth Century. For it being found, that the ancient Verſion was in no wiſe accurate, he, with much Pains, made a new one and adorn'd it with a great deal of Learning. This Work is divided into ten Parts. The firſt Part contains ſuch Canons as relate to Perſons, Eſtates and Church Rites and Ceremonies. The ſecond treats of ſuch Things as appertain to Laymen (as we call them). ** But tho' he tranſlated ſeveral Things from the *Greek*; yet he has made a Mixture of ſome Things by borrowing from the *African* and *Weſtern* Councils, and alſo from thoſe of *Spain*; as from the firſt Council of *Toledo*, and from the Councils of *Bracara*, where he was Biſhop. There are two Editions of this Collection; the one called the *Old* and *Vulgar* Edition, which we meet with in the Collection of Councils, and in the *Bibliotheque* of the ancient *Canon-Law*; the other called the *Modern* Edition, which (*Garſias a Loyaſa* ſays) he publiſh'd from ancient Manuſcripts in the Collection of *Spaniſh* Councils.

Then follows the Collection of *Creſconius*, an *African* Biſhop, ſtiled alſo by the Title of *Concordia Canonum*, and compil'd in the ſeventh Century; in which Collection we meet with all the Canons of Councils entire, and the Decrees of the Popes; which Collection is diſtinguiſh'd from an Abridgment of the Canons made by the ſame Author. We find this Collection in the *Bibliotheca Juris*, firſt publiſh'd from a Manuſcript Copy in the Library at *Clermont*. In the twelfth Century was publiſh'd a *Synopſis Canonum* in *Greek* and *Latin*, which is aſcrib'd to *Alexius Ariſtinus*, and was made *** by Order of *Johan. Comnenus*, Emperor of *Conſtantinople*; wherein the Order of Councils is well obſerv'd ††. But ſince *Alexius Ariſtinus* himſelf, in his *Scholia* on this *Synopſis*, criticiſes on the Author, we may conclude him not to be the**** Author: And about the middle of this Century, Maſter *Simeon*, a Lawyer, wrote an *Epitome* of the Canons, but in a Method and Order different from the former †††. For he firſt places the Apoſtolical Canons, then thoſe of the General Councils, and then next come thoſe of particular Synods, as that of *Ancyra*, *Sardica*, *Neo-Ceſarea*, *Gangrena*, *Antioch* and *Laodicea*: And, moreover, he has added the *African* and *Trullan* Canons, and the three Canonical Epiſtles of *Baſil*. At length, *Arſenius*, a Monk, and afterwards Patriarch of *Conſtantinople*, under *Theodor Laſcharis* the Younger, about the Year 1255, collected a *Synopſis Canonum* out of the Councils and Fathers approv'd of in the *Trullan* Council; in which accurate Method is contain'd the whole Knowledge of Canonical Diſcipline, under One hundred fifty one Titles; and in the end of each Title he has added ſome Heads of *Concordant-Laws*. Therefore this Work in all its Manuſcript Copies goes alſo by the Title of a *Nomo-Canon*. Theſe three *Epitomies* were

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* Nov. 131. cap. 2. † Greg. Tur. Hiſt. Fran. lib. 5. 38. **Appen. Tom. 1. f. 33. ***A. D. 1130. †† Maſtricht. N. 281. **** Bev. Prolog. SS. 26. ††† Maſtricht. N. 293.

were firſt publiſh'd from the Manuſcript Copies of the *French* King's Library, together with ſome other Collections of Canons of the ſame Kind in the *Bibliotheque* of the ancient *Canon-Law*. There are ſome other Collections of Canons, which were receiv'd in the *Greek* Church; but they are ſuch as were made by private Hands, which Biſhop *Beveridge* has recorded in his *Synodicon*, with the other Canons of Councils, wherein we have a particular Collection of Canons belonging to the *Greek* Church: And herein we meet with the *Syntagma Alphabeticum* of *Mat. Blaſtar*, containing all Things that are comprehended in the Sacred Canons of the Church. *Conſtantin. Harmenopulus*, a Judge of *Theſſalonica*, who liv'd about the middle of the Twelfth Century, has alſo given us an *Epitome* of the Sacred Canons, out of the Canonical *Code* of the *Eaſtern* Church, which *Freherus* publiſh'd.

The *Weſtern* Church had alſo their *Code* of Canons, (beſides the *Code* of the Univerſal Church) which they made uſe of; and hereupon the *Gallican* Church had their *Code* turn'd into *Latin* *. For it is ſaid in the *Bibliotheca Juris* above-mentioned, That even the *Gallican* Church made uſe of the ancient *Canon-Law*, *viz.* That of the four firſt General Councils, and all thoſe Canons, which were confirm'd by them, and receiv'd by the Catholick Church: But yet it was not according to the Tranſlation of *Dionyſius*, but according to another more ancient Verſion, *viz.* That which is contain'd in *Iſidore's* Collection of the Councils publiſh'd at *Cologn*. The Council of *Paris* mentions the *Codex Canonum* of the *Gallican* Church in a Cauſe of *Prætextatus*, Biſhop of *Rheims*; and *Gregory Turonenſis*, in his † Hiſtory, ſtiles it a Book of Canons, ſaying, "That King *Chilperick* has inſert-"ed a new Canon thereinto, which is in ſome Meaſure Apoſtolical; "and that this Canon was not in the old *Code* of Canons of the Uni-"verſal Church". But it appears, that the Apoſtolical Canons were not receiv'd by the *French* King before this Time, but were then altogether unknown to that Nation. *Sigebert*, King of *France*, in a Letter to *Deſiderius*, Biſhop of *Quercy*, profeſſedly declares his Deſign of preſerving the Canonical Decrees and Rules of the Church, as his Parents before him had obſerv'd them. And the *French* Biſhops under *Childebert*, King of the *Auſtraſii*, or of that People now called *Lorainers*, in the Council of *Metz*, remov'd *Ægidius* Biſhop of *Rheims* from his Sacerdotal Order, upon their reading the Canonical Sanctions. Nor do I in the leaſt doubt, but that the *Spaniards*, in the Beginning of Chriſtianity among them, did make uſe of the Law of the ancient Canons contain'd in the *Code* of the Univerſal Church **; having ſo great a Zeal and Affection for it, that whenever they ſubſcrib'd to their Synods, they always us'd this Form, *viz. Saving the Authority of the ancient Canons*, as we may obſerve in their Subſcriptions to the Sacred Council of *Toledo*, and others. And the Council of *Bracara*, held *A. D.* 563. expreſly mentions the *Code* of the aforeſaid Canons, in theſe Words, *viz.* "Bi-"ſhop *Lucretius* ſaid, I think it neceſſary, if it pleaſes your Brotherhood, "that the Inſtitutions of the Holy Fathers ſhould be made known to "you by being acquainted with the ancient Canons; and tho' all of "them need not be read, yet ſome few of them ought to be read for "inſtructing the Clergy in Church Diſcipline". And all the Biſhops hereunto made Anſwer, *That it was their Pleaſure that it ſhould be ſo*; and ſo onwards. To this *Spaniſh* Collection we find ſome Conſtitutions of

* Præf. Biblioth. Jur. Canon. vet. † Lib. 5. cap. 18. ** Dicta Biblioth. p. 24.

of the *Gallican* Church, and ſome Decretals of Popes added and inſerted. We meet with ſeveral ancient and modern Canons of the *Britiſh* Church, in Sir *Henry Spelman*'s Edition of the *Engliſh* Councils; from whence 'tis plain, That the *Engliſh* made uſe of the *Greek* Canons, and alſo of the *African* and *Gallican Code*, as *Maſtricht* obſerves, who out of *Bede* has given ten Canons of the *Britiſh Code*.

After the Collection of the Canons ſucceeded the *Penitentials* of the ancient * Church, from whence the *Canon-Law* has borrow'd ſeveral Things, as may be ſeen particularly in the *Decretum*, if we examine the Rubricks of the *Decrees*. Theſe *Penitentials* were introduc'd into the Chriſtian Church, the better thereby to aſcertain the Degrees of Publick Pennance receiv'd in the ancient Church †: But theſe *Penitentials* were never eſtabliſh'd by Publick and Canonical Authority. And the Council of *Paris* order'd ſuch of them to be aboliſh'd as were written contrary to the Authority of the Canons ‡. *Burchard* Biſhop of *Worms* mentions three of theſe *Penitentials* in a very particular manner; and out of theſe three he has collected his large Volume of Canons. And the firſt of theſe three was in the *Roman Penitential*, the ſecond was that of *Theodore* **, and the third was that of the Venerable *Bede*. The *Penitential* of Pope *Gregory* the Third is ſtill extant in one of the Volumes of the Councils. *Caniſius* has publiſh'd the *Penitential* of *Halithgarius* Biſhop of *Cambray*; and the *Penitential* of *Gregory* the Great is much extoll'd by the Papiſts ††. And in our Libraries we have ſtill extant the *Penitentials* of *Peter Pictavienſis*, *Peter de Flameſburgo*, and of *Alan de Inſulis*. Father *Morin* in his Book of *Publick Penannce*, has collected ſeveral of theſe *Penitential* Canons; and ſo likewiſe has *Anton. Auguſtinus*. Hereunto we may alſo add the *Penitential* Book of *Rabanus Maurus*, wherein he diſcourſes of the various and ſeveral Kinds of Eccleſiaſtical Puniſhments. But when the Rigour of Publick Pennance ceas'd in the Church, the uſe of *Penitentials* then ceas'd alſo. *Du Freſne* informs us, That the *Penitentials* or Book of Pennance, was a Book containing ſuch Matters as related to the impoſing of Pennance, and the Reconciliation of the Perſon that ſuffer'd Pennance. But to proceed,

It has been already obſerv'd, That that Part of the *Canon-Law*, which is ſtiled *Jus Pontificium*, or the Papal-Law, and of which I am next to treat, is diſtinguiſh'd and ſeparated from the *Canon-Law* properly ſo called; it being that Law, which conſiſts of the Reſcripts, Decretal Epiſtles and Conſtitutions of ſeveral Popes, which they publiſh'd from time to time on the vaſt Increaſe of the Papal Power and Authority. And this Part of the *Canon-Law* had its Riſe and Beginning from the Ruin of the *Roman* Empire, being built and founded on the Papal Power alone. For after the Seat of the Empire was tranſlated from *Rome* to *Conſtantinople*, ſeveral of the *Europeans* began to revolt and fall off from the Empire; and even before *Juſtinian*'s Time the *Gauls*, *Spaniards*, *Germans*, and ſoon after his Death the *Italians* ſhook off the Yoke of this mighty Empire. For *Gaul* was then in Subjection to the Kings of the *Franks*, *Spain* to the *Gothick* Kings, *Italy* to the Kings of *Lombardy*, and *Germany* was govern'd by ſeveral of its own Princes. For in thoſe Times we meet with no other Right of Government acquir'd, but what was purchas'd by the Sword; all manner of

* Vid. du Freſne Pænitentiale. † Edm. Martene de ant. Eccl. Diſc. cap. 17. ‡ Thomaſin. c. l. N. 11. ** Cave Script. Eccleſ. Hiſt. Lit. p. 327. †† Du Freſne. c. l.

Learning being eclips'd under the Covert of the gröſſeſt Ignorance. The Laws which then govern'd were deriv'd from thoſe People, which the *Romans* deem'd *Barbarians*, *viz.* from the *Franks*, *Goths* and *Lombards*; the *Roman* Law lying bury'd under that rude *Chaos* of Things, and Confuſion of Manners, which every where appear'd at that Time. But during this Period of Darkneſs, the Zeal and Affection, which even ſome of thoſe Men bore to the Chriſtian Religion, was ſo great, that many of them were prevail'd on to Reverence the Biſhops and Clergy to ſuch a Degree, that almoſt all the People voluntarily ſubmitted themſelves to the Commands of the Church, and to the Juriſdiction of the Biſhops of *Rome*: Giving very ample Teſtimonies of their Piety in building Churches, Sacred Colleges, and ſplendid and magnificent Monaſteries; which were erected in thoſe Times of Ignorance, and are ſtill enjoy'd by other Nations and People ſucceeding them. Princes being thus overcome by the Means of this Charity, and prevail'd on by the Artifices of the Clergy, did with great Ardour embrace and receive the Canons of the Church, and the Writings and Opinions of the Fathers; and at length the Decrees and Conſtitutions of Popes: Which proceeding from Men of Learning, made a great Figure among the rude and unpoliſh'd Laws of thoſe People, and in that Age of Darkneſs. And hence it was, that they were better affected to the Canons of the Church, than to their own Laws. Touching the Canons of Councils, *Juſtinian* order'd and eſtabliſh'd, That the Decrees of the four firſt General Councils ſhould be held and eſteem'd in the ſame Manner as the Holy Scriptures themſelves; namely, The Councils of *Nice* and *Conſtantinople*, the firſt Council of *Epheſus*, and that of *Chalcedon*; and their Canons ſhould be obſerv'd as Laws for the Chriſtian Church. By *Decrees* I here mean ſuch Ordinances as relate to Matters of Faith and Doctrine; and by *Canons* ſuch Laws as relate to the Actions and Manners of Men, and to Church-Diſcipline. After *Juſtinian*'s Time the Authority of Canons made and publiſh'd either by General or Provincial Councils increas'd apace, as did alſo the Writings of the Fathers of the Church; and after this the *Deciſions* of Eccleſiaſtical Controverſies made by ſeveral Popes, which could not be drawn from, and determin'd by the Canons of Councils, and the Writings of the Fathers. For the Popes, upon Application made to them in ſuch Caſes where theſe Decrees and Canons were ſilent, did after the manner of the *Roman* Emperors, write back their Thoughts and Determinations; and theſe Determinations were ſtiled *Reſcripts* or *Decretal Epiſtles*, having the Force of Laws: And, according to the Reſcripts, the Law was for ſome Ages govern'd and directed in the Eccleſiaſtical Courts, when the Power of the Clergy was rampant, and the Pope domineer'd over all Chriſtendom. But there was no certain Eccleſiaſtical Law reduced into Writing, till the Time of the Emperor *Lotharius*.

Among the moſt celebrated Collectors of the Papal Law we may reckon *Iſidore Mercator*, by ſome called *Piſcator*; whoſe Collection of Councils and Decretals is ſtill extant, being made in the eighth Century: Wherein we have the *Decretal Epiſtles* of the firſt Popes or Biſhops of *Rome*, from the Time of *Clemens Romanus* (as is pretended) to that of Pope *Siricius*; whereas thoſe, after the Time of Pope *Siricius*, are hardly to be met with. But tho' Pope *Nicholas* the Firſt approv'd of theſe Decretals, yet ſome of the *Papiſts* themſelves have plainly rejected them as ſpurious. *Anton. Poſſevine*, in his * *Apparatus*, ſays, That *Iſidore Hiſpalenſis*

* Vid. ver. Burchard.

lenſis was the Author of this Collection; but then again like a Jeſuit he contradicts himſelf. But *Caſpar Ziegler* has ſufficiently ſhewn, that *Hiſpalenſis* could not be the Author; becauſe in his Work he takes Notice of the * ſecond and † ſixth Councils of *Toledo*; ſo that he wrote forty Years and upwards after the Death of *Iſidor. Hiſpalenſis*, who dy'd in the Year 636. And, moreover, becauſe he has inſerted in his Collection the Letters of Pope *Gregory* the Second, Pope *Gregory* the Third, and Pope *Zachary*, who all ſat in the Apoſtolical See after the Year 700. And *Plettenberg* for the ſame Reaſon ſeems to be of the ſame Opinion. Nor is this Collection reckon'd among the Works of *Iſidor. Hiſpalenſis* by *Braulius* and *Ildephonſo*, nor by *Grialius* and *Loayſa*, who publiſh'd the ſame from ancient *Examplars*. *Luitprandus* in his ‡ *Chronicon*, touching this Author, ſays, That *Iſidor* Biſhop of *Xativa*, who was preſent at the ſixteenth Council of *Toledo*, compiled the Order of that Council and a Collection of the Councils, which in his *Chronicon* is ſtil'd the Collection of *Iſidore Piſcator* or *Mercator* (as you pleaſe) for ſuch was *Iſidore*'s Sirname. But ſome will have it, this Compiler was called *Iſidore Peccator*, becauſe formerly ſome Biſhops were wont to inſcribe themſelves in Councils by the Appellation of *Peccatores*; as appears from the third Council of *Paris*, the ſecond and third Council of *Tours*, and the firſt Council of *Maſcon*. The *Centuriators* of *Magdeburg* were the firſt among the Proteſtants that diſcover'd this grand Impoſture of the Papiſts; againſt whom the Jeſuit *Turrianus* has undertaken to defend this Collection: But *David Blondel*, a *Frenchman* of great Learning, has very fully detected this Fraud, who publiſh'd the ſuppoſitious Epiſtles which *Iſidore Mercator* aſcrib'd to ſome of the *Roman* Popes. Wherefore we may reckon *Jardanus Chryſopolitanus* to be the moſt ancient Collector of the Papal-Law, whoſe Work, bearing the Title of *Candela*, was never printed, but remains ſtill in Manuſcript. In the Beginning of the tenth Century *Regino* an Abbot of the Monaſtery of *Prumienſis* did by *Rathlode*'s Order, who was Archbiſhop of *Treves*, compile and publiſh two Books touching Church-Diſcipline from ancient Canons, and particularly from Papal Decrees **.

In the eleventh Century *Burchard* Biſhop of *Worms*, a *Heſſian* by Birth and Nation ††, at the Requeſt of *Brunicho* Provoſt of the Church of *Worms*, began to digeſt the Eccleſiaſtical Laws for the Advantage of his own Church: And this he did out of the Holy Scriptures, the Canons of the Church, the Decrees of Popes, and out of the Writings of the Fathers, and *Penitentials* of the ancient Fathers. This Collection he entitled, *Magnum Canonum Volumen*, and diſtinguiſh'd it into 20 Books or Titles. But in collecting this Work he has not ſhewn much Judgment, having inſerted ſeveral ſpurious and ſuppoſitious Matters out of the *Pſeudo-Iſidore* ‡‡. About the middle of this Century he was ſucceeded in his Undertaking by *Anſelm Lucenſis*, who wrote a Collection of Canonical Sentences, which contains alſo ſeveral Things equally *** Spurious. Tho' ſome deny *Anſelm* to be the Author of this Collection, becauſe it exhibits ſome Decrees of Pope *Urban* the Second, and ſucceeding Popes, who (notwithſtanding) liv'd after *Anſelm*'s Time. Then about the End of this Century *Ivo* Biſhop of *Chartres* †††, collected the *Decretum*, being divided into ſeventeen Parts; and the *Pannomia*, by others called the *Pannormia*, which was divided into eight Parts. In which Books he chiefly

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* A. D. 675. † A. D. 681. ‡ A. D. 719. ** Baluz. Præf. ad Ant. Auguſtin. de Emend: Grat.
†† Cave ut ſupra. p. 415. ‡‡ Maſtricht. N. 254. *** Maſtricht. 261. 262. ††† Cave ut ſupr. p. 437.

chiefly follows *Burchard*. But ſome aſcribe this *Pannomia* to *Hugo Catalaunus*. Much about the ſame Time *Deus-Dedit*, a Cardinal Presbyter of the Church of *Rome* *, made a Collection of Canons, according to *Baronius*: But he wrote before *Ivo*, tho' he liv'd in *Ivo*'s Time. Of this Author's Verſion there are two Parts. The firſt Part treats of the Privileges of the See of *Rome*; and the other Part of his Work was a Collection of *Canons*. *Blondel* ſays, That the Collection of *Canons* compil'd by *Deus-dedit*, was taken from the *Quiſquillia* of *Pſeudo-Iſidorus*. *Gregory* the Prieſt alſo made a Collection of *Canons*, which is ſtiled *Polycarpus*; and *Bernardus Papienſis* alſo made a Collection of *Canons* ſtiled *Populetum* †: But both theſe are very obſure. But I know not whether this Collection of *Gregory*'s ought to be referr'd to the eleventh or twelfth Century; which Collection is not printed as I know of, but may be found among the Manuſcripts in the *Vatican* Library.

Omnibonus is ſaid to have ſucceeded theſe Perſons in the fifth Year of *Frederick* the Emperor, who wrote a Book *De Concordantia Diſcordantium Canonum* ‡; and divided it into two Parts: The firſt is divided into ſixteen Diſtinctions; and the ſecond into thirty ſeven Cauſes by divers Queſtions. And this Book from the Author's Name is ſtiled *Omne Bonum*. And, in the Time of Pope *Alexander* the Third, formerly a Monk of *Bononia* and then a Cardinal, he was followed by *Gratian* **, who added many Things hereunto; and out of ſixteen he made them an Hundred and one Diſtinctions; and by his Means the Doctrine of the *Canon-Law* is become more Authentick: And for this Work Pope *Alexander* made him a Cardinal. *Gratian*, as *Omnibonus* had done before him, entitled this Work, as aforeſaid; becauſe he hereby endeavour'd to reconcile the Decrees of the Church, as they differ'd from the *Canons* thereof, to each other ††: And after he had compar'd the ſame, he dedicated it to Pope *Eugene* the Third ‡‡; tho' it does not equally appear that it was ever confirm'd. But this Collection was taken from *Dionyſius Exiguus*, *Iſidore*, and other Collectors of the *Canons*, and chiefly from *Burchard* and *Ivo*, but written in a different Order and Method. But I ſhall now haſten to that Part or Volume of the *Canon-Law*, vulgarly ſo called, which is in *Latin* ſtiled the *Decretum*, and in *Engliſh* the *Decrees*; being now in Uſe in the Schools.

This Work was in the firſt Place compil'd by *Ivo* Biſhop of *Chartres*, as aforeſaid; and was at length amended and compiled *de novo* by *Gratian* an *Etrurian* or *Tuſcan* Monk of the *Benedictine* Order ***, whilſt he was a Student at *Bononia* in the Monaſtery of St. *Felix*; and was afterwards confirm'd and approv'd of by Pope *Sixtus* the Third: But *Alexander*, in the Preface to his Work, ſays, That *Gratian* liv'd in the Year 1150. at *Bononia*, and compil'd this Book in the Monaſtery of St. *Proculus*; it being the Book, which Pope *Innocent* the Third read there as a Profeſſor of Divinity. And tho' *Gratian*'s Book be ſaid to be an Undertaking of a private Nature, as being compil'd by a private Man; yet becauſe it is read in the Schools, and commonly approv'd of by the People, it is binding and valid; and may be quoted and made uſe of for the Deciſion of Cauſes, where the Papal Law prevails. *Trithemius* and *Maranta* ſay, it was approv'd of by Pope *Eugene* the Third. But whoever firſt approv'd of it, it does not much import, ſince

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* Maſtricht. N. 273. † Maſtricht. N. 274. ‡ Albericus ad an. 1446. ** Pancirol de clar. legum Interp. lib. 3. cap. 2. †† Ant. Aug. de emend. Gr. lib. 1. Dial. 1. p. 3. ‡‡ Pancir. lib. 3. cap. 2. *** Car. Sigon. de Epiſc. Bonon. lib. 2. p. 156.

ſince it is at this Day undoubtedly an Authentick Book in all the Popiſh Countries: Becauſe Pope *Gregory* the Thirteenth has confirm'd it in his Bull granted to the Printers, calling it, with the *Decretals*, the *Sextus Decretalium*, and the *Clementines*, by the Name of the Body of the *Canon-Law*. Now this Volume of the *Canon-Law* called the *Decretum* is divided into three Parts, according to the Number of the ſeveral Subjects it treats of. The firſt is ſtiled the *Diſtinctions*, the ſecond is term'd the *Cauſes*, and the third is a Treatiſe concerning *Conſecration*. The firſt Part treats of the Principles and Elements of this Law, and of the ſeveral Parts and Species thereof, and of the Rights of Eccleſiaſtical Perſons; and this Part conſiſts of an Hundred and one *Diſtinctions*. In the Twenty firſt of theſe *Diſtinctions* we have the Elements and Principles of this Law laid down and deliver'd to us. Then in the Seventy three following *Diſtinctions* we have an Account of the Origin of the Clergy, the Form of their Inſtitution or Ordination, their Manner of Life, Offices, *&c.* And the eight laſt of theſe *Diſtinctions* treat of the Pope's Juriſdiction. The ſecond Part of the *Decretum* exhibits to us an Account of Judicial Matters, and ſuch as relate to the Affairs of the Church in Point of Judicature: And this it does by the Means of Thirty ſix *Cauſes*, ſo called; becauſe ſome certain Cauſe or Caſe in Law is propounded at the Head or Beginning of the Law; certain Queſtions afterwards ariſing from thence to be decided thereupon. And the third Part of the *Decretum* contains a Diſcourſe of the Juriſdiction of the Eccleſiaſtical Miniſtry; giving an Account of the Laws Rites and Ceremonies of the Church, and of Ordinations and Conſecrations; and all this it does in five *Diſtinctions*. But all theſe Things for the ſake of Memory, are ſumm'd up in theſe Verſes.

Una cum centum Diſtinctio ſit tibi primâ:
Sex ac triginta Cauſæ ſunt parta ſecundâ;
Tertia conſecrat ac finit Diſtinctio quinta.

And tho' it be doubted, whether the Treatiſe touching Pennance, and the third Part of the *Decretum* be *Gratian*'s or not, becauſe he does not ſeem very Orthodox in theſe two Parts *; yet they are for the moſt Part aſcrib'd to him, the Stile well agreeing with the other Part of his Writings; and he himſelf appeals to them as his own †. But 'tis certain, that by the Number of Chapters no Volume was thus diſtinguiſh'd before the Edition publiſh'd by *Anton. Contius*. And, again, he ſoon after ſays, That this Treatiſe touching Pennance ſeems not to be *Gratian*'s, but that of ſome other Perſon a little more ancient, and before him: For this whole Treatiſe ſeems to have been a Tranſlation, and is not to be met with in the ancient *Examplars*. In the firſt Part of the *Decretum* the Number of the *Diſtinctions* is to be quoted, and ſometimes the *Initial* Words of the *Canon* or Chapter; and theſe promiſcuouſly put together with the Number of the *Diſtinction* itſelf ‡; as may be ſeen in the Explanation of the Maginal Quotations from the Books of the *Canon-Law* prefix'd unto the Body of this Work. In the ſecond Part the Number of the *Chapter*, *Cauſe* and *Queſtion* is quoted: And the ſame alſo is obſerv'd in his Treatiſe touching *Pennance* **; only with the Word *Pen.* being added††. In the third Part the Number of the

* Maſtricht. N. 320. Fran. Flor. Tract. de Authorit. Collect. Gratian. † Ant. Aug. lib. 1. Dial. 18. p. 288. ‡ Maſtricht. N. 322. †† 63 Diſt. cap. 22. ** 12 Q. 1. cap. 13. †† Pæn. 5. Diſt. cap. 6.

Chapter and the *Diſtinction* occurs, with the Word or Syllable *Con.* added thereunto. The Numbers and Summaries of the Chapters were not added by *Gratian* himſelf; but the Numbers were firſt added by *Anton. Contius*, and the Summaries ſeem to have been added by Degrees by ſuch as publiſh'd the firſt Editions of his Works.

Altho' this Work was wrote by private Authority (as already remark'd) yet it was immediately receiv'd in all Places; ſo that the Popes themſelves did often appeal unto *Gratian:* But it no where appears, that Pope *Eugene* the Third eſtabliſh'd it by any Publick Law, tho' it was tacitly promoted by the See of *Rome* for the better advancing the Papal Authority, and for ſuppreſſing the Power of the Emperor. From hence it was that the *Decretiſts* had their Riſe and Beginning, even under the Reign of the Emperor *Frederick Barbaroſſa*; who, by endeavouring to defend the pretended Rights of the Pope, did all of them in a great Meaſure give Birth to that long conteſted Diſpute between the *Guelphs* and *Ghibelins*. But ſome of the Papiſts do even confeſs, That this Part of the Papal-Law was never otherwiſe receiv'd, than as Credit was given to the Author. For tho' this became a Work of great Authority among ſome, yet others have found ſeveral Errors of a monſtrous Size therein *; and (particularly) it has been thought worthy of Correction, becauſe it contain'd ſeveral Things not only falſe and ſpurious †, but nefarious ‡ and uncertain too **. And, among theſe Things, it muſt be own'd; That ſeveral Things were found therein contain'd, which plainly overthrow the affected Monarchy of his pretended Holineſs. Dr. *Duck* will have it, That *Gratian* compil'd this Book of Decrees under the Papacy of Pope *Eugene* the Third, about the Year 1157; extracting the ſame from the Canons of Councils, the Opinions of the Fathers, and from ſuch Papal Conſtitutions, as the Popes either made and publiſh'd of themſelves, or elſe by and with the Advice of the Cardinals; to which he added ſome of the Imperial Laws: Moreover, inſerting therein ſome of his own Sayings, and ſome Rubricks added thereunto. But the Authority of all theſe Laws (ſays he) thus compil'd, is now much diſputed, through the frequent Miſtakes of *Gratian* in quoting the Canons of Councils, the Sayings of the ancient Fathers, and the Papal Conſtitutions themſelves: For many of theſe in their Originals, from whence taken, are found quite otherwiſe than *Gratian* has reported them. And his Sayings and Rubricks meet with little or no Credit and Authority among learned Men; becauſe, as a private Man, he had not the Power of enacting Laws. And the *Canoniſts* make no other Account and Uſe of his Sayings and Rubricks than they do of the Opinions of one of their own Doctors or Maſters; herein differing from *Gratian*, and only giving him the Power of interpreting, and not of making Laws. But the *Canoniſts* ſay, That this *Code* has been approv'd of by Cuſtom and common Uſage; and ſetting aſide the Rubricks and Sentences of *Gratian* himſelf, 'tis publickly read in Foreign Univerſities, and receiv'd in the Courts of almoſt all Chriſtian Nations, eſpecially ſince the Confirmation of it by Pope *Gregory* the Thirteenth, who employ'd ſeveral Men of eminent Learning to correct and amend the ſame. Many Perſons do extol this *Code* for its great Uſe and Service to Divines and Lawyers, towards the better underſtanding both of the Law of God and Man; it abounding with

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* Fr. Flor. de Auth. Collect. Grat. p. 307. † Ziegl. Differt. Prælim. SS. 38. ‡ 34 Diſt. cap. 4. Ant. Aug. de emend. Grat.

with the Opinions of the Fathers, and the Decrees of the ancient Councils. And tho' *Gratian* has been often out in tranſcribing them, and in inſerting herein ſeveral Things from ſpurious and uncertain Authors; yet *Covarruvias*, *Contius* and *Anton. Auguſtin* Biſhop of *Lerida*, to whom the *Civil* and *Canon-Law* are much indebted for their Purity and Beauty in particular, have taken a great deal of Pains to explain and correct this Book of the Decrees, and to reſtore it to its former State. Theſe Books of Decrees written by *Burchard* and *Ivo* aforeſaid, as they never attain'd the Force of Laws; ſo after *Gratian*'s *Code* was publiſh'd were entirely neglected and out of Uſe.

Soon after the Publicatian of the *Decretum*, there aroſe ſeveral Commentators thereon, either thro' the obſcure and ambiguous Senſe of the Decrees themſelves, or elſe with a Deſire of flattering the Pope and the Clergy with a Power they do not meet with in the Decrees: For as the *Civil-Law* met with ſeveral Doctors and Interpreters thereon, ſo likewiſe has the *Canon-Law* done the ſame Thing in a Manner no wiſe inferior to the others in Number, Knowlege and Authority, but only in Point of Honeſty and fair Dealing with the Law itſelf. Among theſe Commentators on the *Decretum* we may reckon *Laurent. Cremenſis*, *Vincent. Caſtillionæus*, and *Hugo Vercellenſis* *. After theſe came *Tanredus a Corneto*, an *Etrurian* †, and *Sinabaldus Fliſcus*, otherwiſe called Pope *Innocent* the Fourth ‡, *Joh. Semega* or *Seneca*, commonly ſtiled *Teutonocus*, who reform'd the Gloſſes of ſuch as went before him, and made ſome new Gloſſes of his own **. This Gloſs was afterwards enlarg'd by *Bartholomæus Brixienſis* ††, and ſeveral others. But after Pope *Gregory* the Thirteenth had order'd an Amendment of the *Decretum*, thoſe *Roman* Correctors, who were the Pope's own Creatures, ſubjoin'd to each particular Chapter ſome certain Notes of their own, whereby they point out the ſame Canon among the more ancient Collectors of the Canons, as already remember'd, and ſhew how the ſame may be found in their Collections; all which Notes, in the *Roman* Edition of the *Decretum*, and in the Body of the *Canon-Law*, with the Gloſs, and in the two *Pithou*'s Edition, are read in the Margin; but in the other Editions they are placed at the Bottom of the Page ‡‡. Beſides the 'forementiond Commentators, the Reader has on the *Decretum*, the Commentaries of *Guido de Bajiſo* Archdeacon of *Bononia*, *Joh. de Turrecremata*, *Joh. de Sancto Georgio*, the Provoſt of *Alexandria*, *&c.*

The ſecond Part of the *Canon-Law* vulgarly ſo called is the Pope's *Decretal Epiſtles*, which are of the ſame Authority with the Decrees themſelves, being in the like Manner digeſted into the Body of the *Canon-Law*: For this Part of the Law we have in the five Books of the *Decretals* of Pope *Gregory* the Ninth, and in the ſixth of the ſame Title by *Boniface* the Eighth; which, with the *Clementines* and *Extravagants*, make up the entire Body of the *Canon-Law*. But tho' the *Decretals* are by the *Canoniſts* compar'd unto the Canons of General Councils, and are (among Papiſts) of equal Authority with them; yet a *Decretal Epiſtle* is ſometimes only *Local*, and not extended to any other Place than that unto which it was ſent, unleſs it be by way of Conſequence or Implication of Law: And 'tis the ſame Thing if it be *Perſonal*. But a General *Decretal*, which is ſent and directed to all Perſons, binds

* Pancirol. lib. cap. 3. 3. † Cap. 4. ‡ Cap. 5. ** Panc. lib. 2. cap. 6. †† Lib. 3. cap. 7. ‡‡ Maſtricht. N. 324.

binds and obliges all Men that are Subject to the Pope's Juriſdiction: And whenever a *Decretal* commands or forbids any Thing to be done, it imports a Neceſſity; but when it only permits and adviſes a Thing to be done, then every Man is freely left to himſelf either to obſerve or not obſerve it. Now a *Decretal Epiſtle* is that Law, which the Pope gives as an Anſwer unto ſuch Perſons as do conſult him about any Matter relating to the Church. And theſe *Decretals* having obtain'd their Authority in the Council of *Rome* ***, were introduc'd and receiv'd in the Church even from the Time of the eighth Century, by laying aſide almoſt all the Canons of General Councils *. And that the Popes might hereby confirm their own Power the better, they joyn'd more and more Force to theſe *Epiſtles* every Day †: So great a Havock did the Pope make with the ancient Law of the Church, in order to eſtabliſh a Spiritual Monarchy or Hierarchy on the Ruin of Chriſtianity.

After *Gratian*'s Time the firſt Collection of *Decretal Epiſtles* or *Conſtitutions*, which were then publiſh'd as diſtinct from the Canons, was that which was compil'd and made by *Bernard* Provoſt of *Pavia*, under the Papacy of *Alexander* the Third, who by his own private Induſtry collected all the *Decretals* of the ſeveral Popes, down from the Papacy of *Lucius* to the Time of Pope *Celeſtine*; and digeſted them under certain Titles, to the end that this Work might be as a Supplement to *Gratian's Code* ‡. This Collection was made from ſuch Councils and Fathers as *Gratian* had omitted: And *Anton. Auguſtinus* has publiſh'd this Book in his Collection of ancient *Decretals*, in the Beginning of this Volume **. The ſecond Collection was made by *Joh. Vallenſis*, and (as ſome ſay) by *Gilbert.* and *Alan.* but I rather think from the Compilements of theſe two laſt nam'd, about the Beginning of the thirteenth Century, in Pope *Alexander* the Fourth's Time ††. The next Collection was made under the Papacy of Pope *Innocent* the Third, by *Peter de Benevento* the Pope's Notary; and this was done by the Command and Order of the Pope himſelf; and being collected from the Rules and Regiſters of this Pope, was called the *Roman* Collection or Edition ‡‡. But as theſe Collections were only made by private Hands, the *Romaniſts* intreated Pope *Innocent* the Third, that a new Collection might be made by publick Authority, which this Pope order'd to be compil'd from the General Canons of the *Lateran* Council, and from his own Conſtitutions; and being publiſh'd A. D. 1210. was ſtiled the fourth Collection ***. A fifth Collection was alſo made in this Papacy by Order of the fourth *Lateran* Council, which Collection conſiſted of Seventy one Chapters or Conſtitutions; and the *Decretals* publiſh'd after the third Collection, were added hereunto. The ſixth or (as others ſay) the fifth Collection was made by *Tancred* of *Bononia*, about the Year 1227. wherein we meet with the *Decretals* of Pope *Honorius* the Third †††: But this laſt Collection was never publiſh'd, till *Cironius* Chancellor of the Univerſity of *Thouloufe*, lately publiſh'd it upon finding the ſame in the Library at *Montferrat*; and adding learned Commentaries thereunto, he has therein explain'd ſuch Things as relate to the Hiſtory of that Time, and the Knowledge of the Law; and which were entirely omitted in all the former Gloſſographers ‡‡. *Auguſtinus* omitted this when he publiſhed the four firſt Collections of the *Decretals*. The ſeventh

or

*** A. D. 494. * 15 Diſt. cap. 3. † Baluz. Præf. ad Ant. Aug. Dialog. SS. 2. ‡ Fr. Flor. de Meth. & Auth. Coll. Gr. SS. 4. ** Maſtricht. N. 338. †† Maſtricht. N. 346. ‡‡ Maſtricht. N. 349. *** Maſtricht. N. 350. ††† Maſtricht. N. 358. Franc. Flor. cap. 4.

or (as ſome ſay) the ſixth Collection, which is now in Uſe, was made in the Papacy of *Gregory* the Ninth, and compil'd by that Pope's Chaplain *Raymund de Penna Forti* *, out of ſuch Collections as had been formerly put together**, and from ſuch Conſtitutions as were therein omitted †. And herein *Gregory* has inſerted ſeveral of his own Conſtitutions, which he made without being conſulted by *Litigants* on the ‡Caſe; and ſome, which he borrowed from the *Civil-Law* ††, leſt Men ſhould have Recourſe to the Books of that Law, which he reſolv'd to ſuppreſs as much as lay in him ‡‡. And tho' *Gregory* declares, he has lopt off many ſuperfluous Parts of the former Collection; yet the Lawyers often complain of him, as having taken away ſeveral profitable Branches of the Law, and added ſome others more obſcure ‡‡: And, therefore, the former Collections are frequently conſulted. So that according to *Anton. Contius*, *Gregory*'s Collections are often too ſhort and obſcure and cannot be underſtood without a View of the ancient Collections. The Order of the Titles is the ſame as in the former Compilements; and are 185 in Number. The Number of the *Chapters* and *Rubricks* of the Title is wont to be quoted out of theſe, by adding the Word *extra*, or elſe the Letter (X.) becauſe they are *extra Decretum*.

There are ſeveral Perſons that have publiſh'd Gloſſes and Commentaries on this Collection of the *Decretals*, as *Ruffinus*, *Sylveſter*, *Ricardus Anglus*, *Rodoicus* ſirnam'd *Modicipaſſus*, *Pet. Corbolus* otherwiſe called *Bolinatus Hiſpanus*, *Bertrand*, *Damaſius*, *Alan. Anglicus*, *Peter* Provoſt of *Pavia*, *Pet. Galenſis* of *Volterra*, *Bernard* of *Compoſtella*, *Laurent. Vincent*, *Caſtillion* of *Millain*, *Joh. Teutonicus* and *Tancredus*, who have alſo publiſh'd Gloſſes on the *Decretum*, as aforeſaid. The Perſons ſucceeding theſe were *Guil. Naſo*, and *Jac. de Albenga* Biſhop of *Faenza*, *Goffredus*, *Innocentius*, *Phil. Hoſtienſis*, *Pet. Sampſo*, *Ægidius* of *Bononia*, *Aretinus*, *Fran. Vercellenſis*, *Boatinus* of *Mantua*, and the Archdeacon. There are alſo ſome Anonimous Authors, that have wrote a Book on theſe *Decretals*, entitled, *Suffragium Monachorum*; but as this Work is Erroneous, and imperfect in many Places, ſo it is of little Uſe. After theſe came Fryar *James* Canon of St. *John's on the Mount*: But *Bern. Botton* a *Pariſian*, about the Year 1240. collected the Gloſſes of all theſe Perſons into one Body, and enlarg'd the ſame, having taken all their Reputation for Learning on himſelf. But as theſe Writers on the *Canon-Law* have propounded ſeveral Abſurdities in their Gloſſes, and are frequently guilty of much Trifling, it has paſſed into a Proverb, *Magnus Canoniſta, magnus Aſiniſta*.

After this the compiling of *Decretals* ceas'd for ſome Time, till Pope *Boniface* the Eighth, in the third Year of his Papacy, towards the end of the thirteenth Century ***, committed the compiling of a new Body of *Decretals* to three Cardinals, *viz. William* Archbiſhop of *Ambrun*. *Berengarius Fredellus* Biſhop of *Bourges*, and *Rich. de Senis* Vice-Chancellor of the Church of *Rome*. This ſixth Book of the *Decretals* conſiſts chiefly of thoſe of Pope *Innocent* the Fourth, Pope *Alexander* the Sixth, Pope *Urban* the Fourth, Pope *Clement* the Fourth, Pope *Gregory* the Ninth and Tenth, and thoſe of Pope *Boniface* himſelf; and alſo of the Conſtitutions of the Council of *Lyons*, under Pope *Innocent* the Fourth †††, and under Pope *Gregory* the Tenth ‡‡‡. This Collection is divided into five Books, and as many Titles almoſt as the Collection of

*A.D. 1230. † Schot. Bibl. Hiſp. Tom. 2. p. 186. ‡ Mat. Par. **352. †† Ziegler. Diſcurſ. Præl. N. 513. ‡‡ Duar. Præf. Tract. de Sacr. Min. *** A.D. 1298. ††† A. D. 1245. ‡‡‡ A. D. 1272.

Pope *Gregory* the Ninth; being as it were a Supplement to thoſe Books and Titles *: And here in this ſixth Book of *Decretals*, Pope *Boniface* has explain'd ſeveral Things very doubtfully deliver'd by Pope *Gregory* the Ninth. After the compiling thereof Pope *Boniface* did, by a particular Bull command this Book to be receiv'd and admitted in all Courts of Law, and Univerſities too †. But it containing ſeveral Things contrary to the *French* King's Intereſt, and being compil'd at a Time when the Controverſy was on Foot between *Philip de Valois* and Pope *Boniface* the Eighth, it was never receiv'd in *France* ‡, as it has been in all other Parts of *Chriſtendom*, it being calculated entirely for the Power and unrighteous Gain of the *Roman* See. And, as it has been already obſerv'd, that in quoting Pope *Gregory*'s *Decretals*, we make uſe of the Word *Extra* or the Letter (X.) ſo here it is noted, that when we quote the ſixth Book of the *Decretals*, we either add the Word *ſexto* to the Initial Words of the Law, or to the Number of the Title and Chapter; and ſometimes this Figure (vi.) is made uſe of, as I have more clearly deſcrib'd it at the Beginning of this Work. *Joh. Andreas*, an eminent Doctor of the *Canon-Law*, has wrote ſome Gloſſes on this ſixth Book of the *Decretals*.

About the beginning of the fourteenth Century Pope *Clement* the Fifth caus'd the Conſtitutions of the Council of *Vienna*, as well as his own, to be collected into five Books, included almoſt under the ſame Number of Titles with the *Decretals* of Pope *Gregory* and Pope *Boniface*; and order'd the ſame to be publiſh'd on the 12*th* of the Calends of *April*, ** 1313. in a Publick Conſiſtory. And as he dy'd immediately afterwards, they were ſcarce tranſmitted to the Univerſities before his Death ††: Which was at length perform'd by his Succeſſor Pope *John* the Twenty ſecond, in the Year 1317. who, on the Publication thereof, gave them the Titles of *Clementines*. In quoting the *Clementines* we prefix the Word (*Clem.*) to the Number of the Book, Title and Chapter; as the Word (*Extrav.*) is prefix'd in quoting the *Extravagants*. For what ſucceeded the *Clementines* were twenty Conſtitutions of Pope *John* the Twenty ſecond, and ſome other Popes, which are called the *Extravagants* ‡‡; for that they being written in no Order or Method, *vagantur extra Corpus Collectionum Canonum*: Yet they are collected and digeſted into certain Titles. But theſe being collected by Private Authority alone, about the Year 1340. were never receiv'd as a Publick Law; being the Invention only of the aforeſaid Pope for aggrandizing the Power of the See of *Rome*. This ſame Pope reviv'd the Rules of *Chancery* ***, and the Right of *Annats* †††, belonging to the Biſhop of *Rome*; and on this Account, at the Time of his Death, he left behind him an immenſe Heap of Riches. At the latter end of the fifteenth Century, the *Extravagantes Communes* of divers Popes were collected, *viz.* of Pope *Eugene* the Fourth, *Calixtus* the Third, *Paul* the Second, and *Sixtus* the Fourth. But this Collection was made alſo by private Authority, according to the Order and Method of the *Decretals*; and it was in ſuch a manner, that the fourth Book is wanting: But both of theſe Collections of the *Extravagants* have been ſince receiv'd into Uſe in Foreign Countries as proceeding from ſeveral Popes; and (as it ſeems) added to the Body of the *Canon-Law* by the Doctors of this Law.

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* H. Stero Ann. ad a. 1297. † Vid. Bull Bon. 8. ‡ H. Stero. ad a. 1301. 1302. ** March 21. †† Aventin. Ann. Broir. lib. 7. cap. 15. N. 18. ‡‡ Born. Guid. vit. Joh. 22. p. 168. *** Vid. Gomeſ. ††† Gomeſ.

The Body of this Law, therefore, conſiſts of theſe Parts, *viz.* of the *Decretum*, the *Decretals* of Pope *Gregory* the Ninth, the *Sixth Book* of the *Decretals*, the *Clementines*, the *Extravagants* of Pope *John* the Twenty ſecond, and the *Extravagantes Communes*. The *Decretum* was compil'd after the manner of the *Pandects*; and the *Decretals* after the Form of the *Code*; the *Sixth Book* of the *Decretals*, the *Clementines* and the *Extravagants* were fram'd after the Faſhion of *Juſtinian*'s *Novels*. For as the *Decretum* in the *Canon-Law* anſwers the *Pandects* in the *Civil-Law*, and the *Decretals* the *Juſtinian Code*; ſo do the *Clementines* and the *Extravagants* anſwer the *Novels*: For as yet we had no ſuch Thing as *Inſtitutions* in the *Canon-Law*. But to compleat the whole, Pope *Paul* * commanded *John Lancellot* to write the *Inſtitutions* or *Elements* of the *Canon-Law*. Wherefore the ſaid *Lancellot*, taking Advice thereon, and with a Deſire of gaining ſome Reputation to himſelf, did by this Pope's Order compile a Volume of *Inſtitutions* after the Method of *Juſtinian*'s, reducing them into four Books; and theſe being printed at *Rome* under the Papacy of *Gregory* the Thirteenth, were added to the Body of the *Canon-Law*. For it took him up ſeveral Years to finiſh this Work; and tho' he had well examin'd and revis'd the ſame, yet he could by no Means obtain the Approbation of Pope *Pius* the Fourth touching the ſame: So that this was publiſh'd only in his own Name. For, on his Return to his own Country of *Perugia*, he thus publiſh'd it in his own Name †, leſt he ſhould be hinder'd by the Council of *Trent*, or be oblig'd to alter ſeveral Things therein according to the Decrees of that Council, which he refus'd to do on earneſt Intreaties to this end. In the Fourteenth Century, under Pope *Paul* the Fifth, Endeavours were us'd at the preſſing Inſtances of Cardinal *Scipio Cabellutio Galcot*, *Oddo* Bailiff of *Narnicus*, and *Lean. Galganetto*, three eminent Lawyers, to have theſe *Inſtitutions* approv'd, but they could no more prevail on Pope *Paul* the Fifth than on Pope *Pius* the Fourth: For they only obtain'd to have theſe *Inſtitutions* added to the *Canon-Law*, without any Confirmation. The Gloſſes and Annotations of two Profeſſors at *Perugia* ‡ were afterwards added to theſe *Inſtitutions*, the one a Divine, the other a Lawyer: And there have been ſeveral Comments thereon written, as by *Jo. Doviat*, *Caſper Ziegler*, and lately by *Chriſtian. Thomaſius* and others. *Anton. Cucchus* alſo, after ten Years Labour in writing *Inſtitutions* of the *Canon-Law*, publiſh'd the ſame in the Month of *September*, 1567. but without the Pope's Approbation.

But ſeveral Errors having been diſcover'd in this Body of the *Canon-Law*, *Anton. Demochares* and *Anton, Contius*, two learned *Frenchmen*, did in the ſixteenth Century by their own private Authority attempt to reduce all the Decrees of *Gratian* into ſome better Order and Method, which they did with pretty good Succeſs **: But the Work was a Matter of ſo much Toil and Difficulty, that it could not be entirely accompliſh'd by thoſe two Men. So that after the Council of *Trent* was ended, Pope *Pius* the Fifth choſe ſome Cardinals and ſeveral Doctors for reſtoring *Gratian*'s *Code* according to its Originals; and to theſe Pope *Pius* the Fifth added two others ††. And this *Code* being at length entirely perfected under Pope *Gregory* the Thirteenth, was publiſh'd by him, together with the other Parts of the Body of the *Canon-Law*, in the Year 1580 ‡‡. So that this Pope now perform'd that in the

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* A. D. 1580. † A. D. 1563. ‡ Bapt. Bartolinus & Anton. Timothevs. ** Baluz. Præf. ad Ant. Auguſt. Sect. 29. †† Ant. Aug. de emend. Gratian. ‡‡ Vid. Gregor. Bull Corp. Jur. Canon. præfix.

the Church, which *Juſtinian* had effected in the *Roman* Empire. The *Decretals* being corrected, were reſtor'd to their ancient Purity from the former Collections, and from the Regiſters of divers Popes *. Therefore we may from hence conclude, That the modern Editions do excel the ancient; and, among the modern Ones, that of *Pithou* is the beſt. Out of theſe Regiſters there were afterwards compil'd theſe ſeveral *Bullariums* †, which do exhibit to us the Papal Conſtitutions at full Length.

Towards the end of the ſixteenth Century *Pet. Matthæus*, a Lawyer at *Lyons*, did by his own private Authority collect a ſeventh Book of the *Decretals*, which he inſcrib'd and dedicated to Cardinal *Cajetan*. This Book is a Collection of the Papal Conſtitutions, that were made and publiſh'd after the *Sixth Book* of the *Decretals*, the *Clementines*, and the *Extravagants*; and it conſiſts of the ſame Number of Books and Order of Titles, as is found in the *Gregorian Decretals*. But tho' this Book or Collection was never approv'd of by any Papal Authority, it has been added to ſome of the modern Editions of the *Canon-Law*. But this ſeventh Book being publiſh'd without any publick Authority, Pope *Gregory* the Thirteenth deſign'd a new Book of *Decretals*, and committed the Task of it to *Flavio Urſini*, *Fran. Alciatti*, and *Anton. Caraffa*, three Cardinals. But on Pope *Gregory* the Thirteenth's Death, Pope *Sixtus* the Fifth, his Succeſſor, committed the finiſhing of this Work to the following Cardinals, *viz.* to *Pinelli*, *Aldobrandini* and *Colonna*; and *Aldobrandini* on the Death of *Sixtus* being choſen Pope himſelf, he took Care to have this Work brought to Perfection. And it becoming a Doubt whether the Canons of the Councils of *Florence* and *Trent*, relating to Faith, ſhould be inſerted or not, they adjudg'd them to be inſerted in this Collection. And thus this Volume, containing the Conſtitutions of ſeveral Popes, and the Decrees of ſeveral Councils for almoſt Three hundred Years, was finiſh'd on the 25th of *July*, A. D. 1598. being divided into five Books, and diſtinguiſh'd under proper Titles: But it being printed and publiſh'd under the Name of the *Seventh Book* of the *Decretals* of Pope *Clement* the Eighth, it became a Queſtion, Whether the Lawyers ſhould make Gloſſes and Comments on the Decrees of the Council of *Trent*, which were inſerted in this Book, as they had done on other Collections of the *Canon-Law*; becauſe as the Doctrine and Diſcipline of the *Romiſh* Church was eſtabliſh'd by this Council, they were unwilling to have the ſame explain'd by Lawyers, who intended no great Good to the Power of the Clergy: And Pope *Pius* the Fourth having forbidden it under the ſevereſt Cenſures of the Church, the Publication of this Volume is now entirely ſuppreſs'd **; the Clergy of the *Romiſh* Communion themſelves being almoſt aſham'd of the Exorbitant Power which this Collection gave them over Mens Purſes and Conſciences, ſince the Reformation of Religion has enlighten'd ſo great a Part of Mankind.

I next come to the Authority of the *Canon-Law*, as it has been receiv'd here in *England*, and in other Countries, which enlarg'd itſelf, as the Papal Power increas'd and got Ground in the World: And that it might proceed with the better Succeſs, ſeveral Perſons were firſt employ'd to interpret the *Civil-Law* as much as poſſible in Favour of the Clergy; and wherever that could not be done with a tollerable Gloſs or Colour,

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* Maſtricht. N. 396. Introduct. ad Jus Can. † Vid. Cherub. Bull. Rom. 1588. ‡ Maſtricht. N. 407. ** Plettenb.

Colour, the Pope and his Cardinals endeavour'd not only to corrupt and deprave the Text itſelf, by Penſions given to Tranſcribers, and their own *Amanuenſes*, but have likewiſe introduc'd ſeveral Titles into the Body of the *Canon-Law*, which are entirely of a Secular Nature, and can have no Relation to Church Matters: All which Titles in the *Canon-Law*, with the ſeveral Corruptions and falſe Expoſitions of the Text in the *Civil-Law*, and (particularly) in the *Juſtinian Code*, are ſo numerous, that it would ſwell this Introduction beyond its intended Length to relate them at large. Therefore whoever will take the Pains to compare the ſeveral Editions of the *Pandects* with that printed at *Florence* in the Year 1553. (which is the beſt Edition, as printed from the *Florentine Examplar*) will ſoon find how the Pope's Creatures have mangled this Sacred Volume, as they have done the Holy Scripture itſelf, to ſerve their wicked Purpoſes, whenever they had an Opportunity of ſo doing. I have likewiſe taken upon me, with much Labour and Pains, to examine and collate the ſeveral Editions of the *Juſtinian Code*, as I have done thoſe of the *Pandects*; and in the firſt Book of this *Code* alone, which principally treats of *Religion, and the Rites and Ceremonies thereunto belonging, of holy Church, and her Privileges, which either concern Eccleſiaſtical Men's Perſons themſelves or their Eſtates*, and the like, I find no leſs than One hundred and ſeven very manifeſt Errors, or private Interpolations of the Clergy in favour of themſelves. For tho' the firſt Chriſtian Emperors were weak enough to grant vaſt Privileges and Immunities to the Clergy, and to aſſemble themſelves together in General Councils; yet theſe Men were not ſatisfy'd with theſe Princely Conceſſions, but in after Ages of the Church, when they lock'd up all Learning from the profane Laity, and had blinded the Minds of the People with an unaccountable Zeal and Devotion for the Prieſthood, they began to enlarge their Rights and Privileges by frequent Interpolations and various Readings of the Text; and, having ſubjugated the Laity to a ſtrange Obedience of themſelves, they proceeded Step by Step to eſtabliſh an Independent Power in the Church, and to call Kings and Princes before them for a pretended Salvation of their Souls; though Pride, Avarice, and Spiritual Tyranny was at the Bottom of all their boaſted Deſigns of Piety.

The next Attempt made to eſtabliſh the Authority of the *Canon-Law*, was, That all the Pope's *Decretal* Epiſtles ſhould be reckon'd among the Canonical Books of Holy Scripture *; tho' this Place of *Gratian* has been corrupted and deprav'd by ſome of the Papiſts themſelves, who, through a Senſe of Shame for ſuch an Impiety, do acknowlege, That this muſt be underſtood of St. *Paul*'s Epiſtles, and in no wiſe of the Pope's *Decretals*: And therefore, they have wiſely, ſince the Reformation of Religion among the Proteſtants, alter'd this Text of *Gratian*'s in ſeveral Editions of his *Decretum*, and the Gloſs thereon. But whilſt the Papal Authority was by Degrees grown great in ſeveral Kingdoms of *Europe*, the *Canon-Law* was almoſt entirely receiv'd in many of thoſe Kingdoms and States †, and all Judicial Proceedings were govern'd thereby; the *Decretiſts* and the *Ghibelins*, which were the Pope's *Spahi*, every where promoting the ſame in a particular manner ‡.

But in *Germany* the *Canon-Law* did not begin to have a full Power till the thirteenth Century; and tho' it was then confirm'd by the Pub-

* 19 Diſt. cap. 6. † Duck. de Auth. Jur. Civ. lib. 1. cap. ‡ Pet. de Marc. de Concord. Sac. & Imp. lib. 3. cap. 6. N. 4.

lick Laws of the Empire, yet the Authority of this Law has very ſenſibly decreas'd in *Germany* ever ſince the Reign of *Lewis* the *Bavarian*, from the ſeveral Writers that have aſſerted the Laws and Rights of the Empire to be above the Pope; and do ſufficiently condemn the Iniquity of this Law, and the wicked tho' ingenious Precepts of its Avarice *. And hence it is, that ſeveral Princes and Cities of the Empire have made divers Laws and Statutes plainly repugnant to the *Canon-Law*. But (notwithſtanding theſe Laws and Statutes) this Law continu'd in ſome Force till the Time of the Council of *Conſtance*, when this *Theſis* or *Poſition* firſt prevail'd, *viz. That a General Council was and is above the Pope:* Which Doctrine was afterwards confirmd in the Council of *Baſil*. But the *Canon-Law* ſuffer'd its greateſt Declenſion in the *German* Empire at the Time of the aforeſaid Reformation, when *Luther* in a great Aſſembly of Doctors and Students, burnt the Books of this †Law, as in no wiſe agreeable to the Holy Scriptures, and the Word of God: And that he might the better ſuppreſs the Pope's Authority, he did in a wonderful manner extol and commend the Majeſty, Juſtice and Equity of the *Roman Civil-Law*. For through a Reſolution of entirely aboliſhing the *Canon-Law*, he held various Diſputes with the Lawyers at *Wittenburg*: But, by the Help of *Henning. Gœdenius*, *Jerome Schurf*, *Everard a Weyte*, and ſome Lawyers of other Univerſities, this Law has been ſtill preſerv'd in ſome Meaſure in the Empire. For as long as Perſons well verſed in this Law continued their Lectures thereon, they did by this Means preſerve its Authority in ſome Degree; yea, ſome Men wrote particular Apologies in its Behalf. But leſt its Authority ſhould be entirely deſtroy'd, it has been ſince approv'd of by ſome Princes, who in their reſpective Univerſities have lately founded Profeſſorſhips in the *Canon-Law*. But tho' the States of the Empire, that ſtile themſelves *Catholick*, as being devoted Bigots to Popery, do ſtill preſerve the Uſe of the *Canon-Law*, it being eſtabliſh'd and confirm'd by the Civil Laws of the Empire; yet Dioceſan Conſtitutions and Provincial Canons are in Force among them. And in thoſe Territories of the Empire belonging to Proteſtant Princes, that have freed themſelves from the Papal and Epiſcopal Yoke of Bondage by Religious Pacts and Conventions, another ſort of Law obtains; this Exemption or Freedom being confirm'd to them by Capitulations made between Proteſtants and Papiſts. So that they have obtain'd a Power of making Laws for themſelves in Church-Matters, without having any Dependency on the *Romiſh* Church. Therefore, among theſe Princes, the *Canon-Law* only ſo far prevails in their Territories, as it has been anciently receiv'd, and is not contrary to the Proteſtant Religion; and in no wiſe Derogatory to their own Eccleſiaſtical Conſtitutions, and the Stile and Uſage of their Conſiſtories. For tho' *Luther* by an over-heated Zeal burnt the Books, as aforeſaid, in Oppoſition to the See of *Rome*; yet the People of *Brunſwick*, *Saxony* and other Proteſtant Countries Abroad have continu'd the Uſe of the *Canon-Law* ever ſince that Time, without admitting any Change thereof, according to an Agreement made in the *Augsburg* Confeſſion: And the ſame is now read and taught at *Wittenberg* and in other Proteſtant Univerſities beyond Sea, with ſome Alterations made and allow'd, ſo far as they concern Articles of Faith and Doctrinal Points of Religion; which, being founded on the Holy Scriptures as a Rule of Faith and of pure Religion, we ought not to deviate from them.

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* Scard. de Auth. & Juriſd. Imp. Goldaſt. Collect. de Mon. Imp. lib. 1. cap. 7. † Dec. 10*th*, 1520.

The *Spaniards*, in the like manner as the Papiſts in *Germany*, have Recourſe to the *Canon-Law*, where the *Jus Regium* is ſilent; and by this Law Cauſes are Judicially decided in their Courts in all Eccleſiaſtical Caſes. The *Hungarians*, *Danes*, and many other Nations do acknowledge, that ſeveral of their Laws were borrow'd from the *Canon-Law*: But in *France* this Law does not entirely prevail, for the Reaſon already given, the *French* being in many reſpects govern'd by the Rules of the *Gallican* Church, which diſavows the Pope's Juriſdiction in many Particulars. It likewiſe ſufficiently appears that the *Canon-Law* was receiv'd here in *England*, tho' under certain Limitations and Reſtrictions from the Common Law of the Realm, ſince the greateſt Part of the *Decretal* Conſtitutions in the *Canon-Law* have been found to have been ſent hither by ſeveral Popes upon Controverſies here among us in Eccleſiaſtical Cauſes. And thus all Chriſtian States and Princes have admitted the *Canon-Law* more or leſs, without Diſtinction of Religion, and do ſtill retain ſome Part of it. Among the *Jews* alone, indeed, there is a Diſparity of Reaſon: For ſuch of them as live in a Chriſtian State are Subject to the Civil Law only, and in no wiſe bound by the *Canon-Law*; becauſe as they are not of the Pale of the Church, and out of all Communion with Chriſtians, the Church has not the Care of their Souls Salvation.

But before I proceed any farther in my Deſign, I ſhall conſider how the *Canon-Law* advanced itſelf after its firſt Riſe and Beginning in the Church, by the Subtlety of the *Romiſh* Clergy, ſoon after the Seat of the *Roman* Empire was remov'd to *Conſtantinople*, and *Barbariſm* had invaded the politer Nations of *Europe*; which I promis'd as my firſt principal Enquiry in this Introduction to the following Work. And then I ſhall ſhew how and by what Steps it came into *England*, ſo far as the ſame has been receiv'd here among us in ancient Times. For the Imperial Reſidence of the *Roman* Empire being remov'd to *Conſtantinople*, it ſo weaken'd the Weſtern Parts of the Empire, and expos'd it not only to the foreign Invaſions of the *Goths*, *Vandals*, *Herules*, *Lombards*, and other Flotes of People, that by Secret Inſtinct, about theſe Times were weary of their own Dwellings, but likewiſe to the Riſing Power of the Biſhop of *Rome*; who by Patience, and for his own Advancement, out-rode the Storms of Foreign Force; and, taking the Advantage of the Publick Calamities of thoſe Times, he began to inſinuate himſelf the deeper into the Conſciences of a Diſtreſſed People, that knew no other Conſolation in a plunder'd State, but from God and the Biſhop, who was the Chief amongſt them in Account at that Time. And the Beauty and Splendor of the Biſhop of *Rome* thus growing in the Weſt by the Indulgence and Supineſs of the *Roman* or Eaſtern Emperors, it made him to outreach not only his own Dioceſs and Province, but likewiſe to aim at a Kind of Eccleſiaſtical Empire, and a Title according thereunto; which at length he attain'd from an Emperor weak and well fit enough for his Purpoſe, (for he was now called the Univerſal Biſhop): And that was ſufficient to make him paſs ſo for current in the Empire.

But *Britain* was forſaken by the *Roman* Empire above One hundred fifty three Years before this Time. So that tho' the Emperor could prefer the Power and Honour of the *Roman* Beaſt his Chaplain as far as his own, which was to the *French* Shoar; yet *Britain* was reputed to be in another World under the Power of the *Saxons*, and not worth looking after, till the Havock and Plunder, which was then made, was over; and the *Saxon* Affairs well ſettled in Peace, in ſuch a manner as ſome

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Good might accrue to the Clergy. Then an Inſtrument was ſought after for this Work, and none was found ſo fitly qualified to wind up the *Saxon* to the *Roman* Bent as a Monk, that was then deem'd an humble and holy Man in the Opinion of all, but thoſe who were ſo in Truth, and knew him to be otherwiſe. Thus was *Auſtin* ſent by Pope *Gregory* to do a Work that was not then publickly owned: For it was pretended to bring in Religion to the *Saxons* in *England*, tho' the true Deſign was nothing elſe but introducing the Papal Power, and a Church-Policy, with a kind of Worſhip that render'd the *Latria* to God, and the *Dulia* to *Rome*. And, therefore, they gave *Auſtin* the Title of the *Saxon* Apoſtle. The *Saxons* were not wholly deſtitute of Religion, and that *Gregory* himſelf, in his Letter to *Brunchilda* the *French* Queen, plainly confeſſes: *Indicamus*, ſays he, *ad nos perveniſſe Eccleſiam Anglicanam velle fieri Chriſtianam*. So that there was a good Diſpoſition to Religion before ever *Auſtin* came into *England*; and ſuch an one as rang loud, and reach'd the Biſhop of *Rome*. But this is far more evident from the *Saxons* keeping of *Eaſter more Aſiatico*; which Cuſtom alſo continu'd ſore againſt *Auſtin*'s Will for fifty Years after his coming hither; as we may learn from the Diſpute between *Colman* and *Wilfred*, that witneſſes hereunto. And it had been a miraculous Ignorance or Hardneſs of Heart, had the *Saxons* (a People ordain'd for Mercy) convers'd with the Chriſtian *Picts* and *Britains* above an Hundred and fifty Years without the leaſt Senſe of their Religion. Therefore, if we take *Auſtin* in his beſt Colours, he might be ſaid to bring Religion to the South *Saxons*, but then it was after the *Roman* Garb; and his warmeſt Diſputes about *Eaſter*, the *Roman* Supremacy, his own *Legatine* Power, and his worthy Queries to the Pope, do all plainly teſtify, That he regarded the Faſhion more than the Thing itſelf, and the Faſhion of his Perſon more than the Work he pretended to. For he loved State and Grandeur, and deſired to be ſomewhat like the Legate of an Univerſal Biſhop: And, therefore, from a Monk he ſoon became a Biſhop in *Germany*, before he ever had a Dioceſs, or had ſeen *England*. And perceiving his Work was like to thrive, upon his Return he was made Archbiſhop of the *Saxons*, before any other Biſhop was amongſt them: And, after three Years, had the Pall, with the Title of Supremacy over the *Britiſh* Biſhops, that never ſubmitted to him. And thus Church-Policy firſt came into *England* by *Auſtin*'s Means; and then in Proceſs of Time the Papal *Canon-Law* ſucceeded, which did in a great Meaſure give the firſt Entrance unto all that Bondage and Miſery that has follow'd ſince.

For upon *Auſtin*'s firſt coming into *Kent*, the fartheſt Corner of all the Iſland from the *Picts* and *Britains*, and conſequently leſs prejudic'd by his Church-Policy, he ſo far inſinuated himſelf into the Affections of the South *Saxons*, that they readily ſwallow'd all that bitter Potion of the *Roman* Hierarchy from the Pope down to the Apparitor, with a *Quicquid Imponitur & imponetur*; which was of ſuch a laſting Efficacy, that it does not ceaſe to work to this Day in many Reſpects, tho' it was ſlow in its firſt Operations. For the *Saxons* having then a Government founded on the Liberty of the People, it was a Maſter-piece of Cunning for *Auſtin* and his Clergy ſo to work the Matter, as to remain Members of the Commonwealth, and yet to retain their Affections for the See of *Rome*; which was now grown to a high Pitch of Grandeur. For Reaſon muſt tell them, That the *Saxon* Principles would not ſuffer them to be in all Reſpects for *Rome*, nor the *Roman* Canon allow them to be wholly *Saxon*. And perceiving likewiſe, that the Times were too

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tender to endure a Declaration on either Part, they choſe therefore a third way, which was to preſerve the Municipal Laws in ſome Moderation towards the Canon; and to that end they endeavour'd ſuch a Temper upon the State as muſt admit the *Canon-Law* to be in ſome Reputation, ſuch as without which the Commonwealth could not well ſubſiſt, no more than a Body without a Soul. And to this Temper the *Saxons* were ſufficiently prepar'd and inclinable: For it was no new Thing for them to admit the Heathen Prieſthood into their General Meetings, and to allow them much Power therein. And then it was but changing the Perſon, and they might do as much for their Biſhops, when they became Chriſtian. The *Saxon* Kings were hereupon oblig'd to make a Virtue of Neceſſity; and, upon the Entrance of Prelacy into this Kingdom, to advance Biſhops to be common Favourites both of *Rome* and themſelves; and, to maintain a good Correſpondence between both Swords, they were to countenance the Power of the Temporal Magiſtrate in all Caſes of Diſpute between him and his Subjects. And upon this Condition the Prince was to give way to the Biſhop of *Rome*, and the Spiritual Power of the Clergy, who became Lovers of Lordſhip, and Diſturbers of States and Kingdoms; and if they ſerv'd their Country in any Thing, they ſerv'd *Rome* much more. Their Merchandize was made of the Policies and Councils of Kingdoms and States; and ſuch Returns proceeded as were ſtill ſubſervient to the *Roman* Intereſt. They at length prevail'd on the Weakneſs of Princes to live by Laws of their own making: And thus, in Courſe of Time, they did by Degrees introduce into all Chriſtian Nations firſt the Canons of the Church made by General and Provincial Councils, and then what we here call the Papal *Canon-Law*, as already obſerv'd.

In the Year 680. at the Command of *Ethelred* and three other *Saxon* Kings, *viz. Egfrid* of *Northumberland*, *Aldwulf* of the *Eaſt Angles*, and *Lothar* of *Kent*, Archbiſhop *Theodore* ſummon'd a Synod at *Hatfield* in *Hertfordſhire*, in which we received the Canons of five General Councils; as that of *Nice*, *Conſtantinople*, *Epheſus*, *Chalcedon*, and another in *Conſtantinople*, with thoſe Conſtitutions made at *Rome* by the Synod held under Pope *Martin* *, which Pope *Agatho* this Year ſent into *England*. But there are ſeveral Canonical Decrees in the Body of the *Canon-Law*, which were never receiv'd and obſerv'd here in *England* by the Church even in the Times of Popery itſelf; As that a Woman ſhould not be admitted to be a Witneſs againſt a *Presbyter* †; That no Sentence of Condemnation ſhould be pronounc'd againſt a Biſhop, unleſs it was founded on the Evidence of Seventy two Witneſſes ‡; and ſeveral Decrees of the ſame Leaven and Impreſſion **: The Repetition of which would almoſt fill a large Volume. Indeed many Attempts were made by the Clergy to eſtabliſh the whole Body of the *Canon-Law* here in *England*, but our Kings would never ſuffer it. King *Henry* the Firſt rejected ſeveral whole Titles of this Law, and inſiſted on the ancient Laws of the Realm, commanding, *Firſt*, That all Controverſies between the Laity and the Clergy ſhould be try'd in the King's Court. *Secondly*, That no Biſhop or Clerk ſhould go out of the Kingdom without the King's Licence; and at their going out ſhould ſwear to procure no Damage to the King or the Realm. *Thirdly*, That no Appeals ſhould be made to the Pope, but all Pleas in the Conſiſtory ſhall be made and remov'd, 1*ſt*, To the Archdeacon's Court. 2*dly*, From thence to the Biſhop's Court.

* A.D. 648. † 15. Q. 3. 3. ‡ 3. Q. 5. 3. ** 43. Diſt. c. 2.

3*dly*, From thence to the Archbiſhop's; and, *laſtly*, To the King's. *Fourthly*, That *Peter-Pence* be paid to the King. *Fifthly*, That Clerks guilty of Treaſon be hang'd, drawn and quarter'd; and ſuch as are guilty of Felony be hang'd. *Sixthly*, That all Perſons who are found bringing any Excommunications or Interdicts from *Rome* into *England*, be dealt with as Traitors, with many of the like Nature. But King *Henry* the Second endeavouring to eſtabliſh theſe Laws by the Name of *Avitæ Leges*, or his Grandfather's Laws, met with powerful Oppoſition from that turbulent Prelate Archbiſhop *Becket* in the ſettling of them.

In the Forty ſecond Year of King *Henry* the Third's Reign *, *Boniface* the younger Son of *Thomas* Earl of *Savoy*, and Archbiſhop of *Canterbury*, made ſeveral Canons and divers Provincial Conſtitutions, directly againſt the Laws of the Realm, which Canons begun thus. *viz. Univerſis Chriſti Fidelibus, ad quos præſens Pagina pervenerit.* Bonifacius *Miſeratione Divinâ* Cant. *Archiepiſcopus, totius* Angliæ *Primas, &c. in verbo ſalutari ſalutem*; and ending thus, *viz. Actum apud* Weſtm. *ſexto Iduum Junii, Anno Domini* 1258. *In quorum omnium Robur & Teſtimonium, &c.* which being exceeding long, I cannot here inſert. But the effect of them was to uſurp and encroach upon ſeveral Matters which did apparently belong to the Common Law. "As among many "other Things the Tryal of the Bounds and Limits of Pariſhes, and the "Right of Patronage; againſt Tryals of Tithes by *Indicavit*; againſt "Writs to the Biſhop upon a Recovery in a *Quare Impedit, &c.* in "the King's Court; that none of the Poſſeſſions or Liberties, which any "of the Clergy had in Right of their Church, ſhould be try'd before "any Secular Judge (ſo as that they would not only have Cogniſance of "Things Spiritual, but of Things Temporal alſo) and concerning Di-"ſtreſſes and Attachments within their Fees." And in effect that no *Quo Warranto* ſhould be brought againſt them, having been long in Poſſeſſion of Charters, *&c.* granted to them, with an Invective againſt the perverſe Interpretation made thereof by the Judges of the Realm, (for ſo they term'd it). And a Commandment was given to the Biſhops and their Officers to admoniſh the King, to interdict his Lands and Revenues, and to thunder out an Excommunication againſt the Judges and others, if they violated or did not obey the ſaid Canons and Conſtitutions †. And this was the principal Ground of the Controverſies between the Judges of the Realm and the Biſhops, who by their Eccleſiaſtical Judges did uſurp and incroach on the Common Law.

And ſuch was the audacious Pride and Arrogance of this Archbiſhop, that he, by a Provincial Conſtitution in *Lindwood* ‡, forbid all Prelates and others to appear in the King's Courts upon Summons or Proceſs of Law touching Cauſes meerly Spiritual: But yet he was ſo modeſt and humble, in this reſpect, that he would permit them to apply to the King either *Ore tenus*, or by Writing; and to ſignify to him, That they could not yield Obedience to his Commands in this Behalf without manifeſt Danger to their Order; and were likewiſe either by themſelves or their Com-Prelates to ſhew, that the Cauſe did not belong to him. And then if the King upon Admonition did not deſiſt from ſuch Proceſs, they were commanded to proceed againſt his Under-Sheriffs, and other Officers, according to the Eccleſiaſtical Law, and to forbid them all Church-Communion **: Such was the Power and Lordlineſs of the Clergy here in *England* in thoſe tempeſtuous Times of Government.

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* A.D. 1260. † Lib. 5. Tit. 15. cap. 1. ‡ Vid. Lindw. l. 3. Tit. 28. c. 2 & 3. ** Vid. Lind. ut ſupra.

The Laws of *England* are the Municipal Laws of the Realm, which are built on theſe three Foundations, *viz. Firſt*, On the general Cuſtoms of the whole Realm, of which ſort are theſe, among many others, *viz.* That the Goods which are bequeathed on the Teſtator's Death, are not the Goods of the Heir, according to the *Civil-Law*, but of the Executor, whom the Teſtator deputed to execute his laſt Will and Teſtament; That the Wife cannot bequeath her Dower during her Husband's Life-Time, which ſhe might do by the *Civil-Law*; That a Perſon born before Eſpouſals is a ſpurious Iſſue, and cannot be an Heir, which he might be according to the *Canon-Law*, if Marriage afterwards enſu'd; and ſeveral Matters of this Kind. *Secondly*, On the Statute Law of the Realm, which is made by King, Lords and Commons. And, *laſtly*, On ſuch Foreign Laws as have been receiv'd in the Realm, and confirm'd by uſage and length of Time. Therefore,

The ancient *Canon-Law* receiv'd in this Realm is the Law of the Kingdom in Eccleſiaſtical Caſes, if it be not repugnant to the Royal Prerogative, or to the Cuſtoms, Laws and Statutes of the Realm *: For ſays the Statute of the 25 of *Henry* the Eighth, Chap. 19. "All Ca-"nons already enacted, and hereafter to be enacted, do and ſhall ſtand "in Force, provided they be not contrary to the Laws of the Realm of "*England*, meaning, the *Statute* and *Common-Law*; nor in Damage of "the King's Prerogative." And the *Canon-Law* is one and the ſame Law throughout the whole Church of *England*, and ought to be obſerv'd as ſuch †. And it is ſaid, that the Council of *Lateran* ordaining a Conſtitution in relation to Deprivation for a Plurality of Benefices, was a general Law receiv'd here in *England*: And this Conſtitution is of equal Force with an Act of Parliament, which concludes all Parties. *Staveley*'s Caſe in the Exchequer ‡. And again, an Eccleſiaſtical Canon or Conſtitution is a general Sentence and Judgment, which binds ſtronger than the particular Sentence or Judgment of any Perſon whatſoever: And a Conſtitution made by an Archbiſhop in a Provincial Council legally aſſembled binds and obliges all Perſons of that Province.

By an Act of Parliament in the 35 of *Henry* the Eighth, Chap. 16. the King was authorized during his Life-time to name Thirty two Perſons, *viz.* Sixteen Temporal and Sixteen Spiritual Men to examine all Canons, Conſtitutions and Ordinances Principal and Synodal, and to eſtabliſh ſuch Eccleſiaſtical Laws as he and they ſhould think meet and convenient to be uſed in all Spiritual Courts. And in purſuance hereof they compiled a Body of Laws under the Stile and Title of *Reformatio legum Eccleſiaſticarum*: Which for want of a due and proper Confirmation are left to Poſterity without any Force or Authority belonging to them. But note, this Act is ſince expir'd **. In the ſecond Year of King *James* the Firſt's Reign, it was reſolv'd by all the Judges, the Lord Chancellor *Elleſmere*, the Archbiſhop of *Canterbury*, the Biſhop of *London*, and a great Number of the Nobility, then aſſembled at the King's Palace, That the King without a Parliament might make Orders and Conſtitutions for the Government of the Clergy; and might deprive them if they diſobey'd ſuch Orders: For the Supream Eccleſiaſtical Power is veſted in the King ††. But tho' all Papal Decrees, Canons, Conſtitutions not anciently receiv'd here, and ſuch as are contrary to the known Laws and Cuſtoms of the Realm were aboliſh'd in *England* by

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* Vaug. Rep. p. 132. † 10 E. 3. 1. 5. E. 3. 9. 19. E. 3. ‡ Hetl. Rep. p. 101. Paſch. 1657.
** 25 H. 8. ch. 19. SS. 7. †† Crok. Rep. p. 37.

by the 25 of *Henry* the Eighth, Chap. 19. and by that aboliſhing, the Clergy promis'd *in Verbo Sacerdotis*, not to make, ordain or execute any Canon or Eccleſiaſtical Conſtitution without the Royal Aſſent firſt had thereunto; yet the Body or Book of Canons made in a Synod begun at *London* in the Year 1603. commonly called King *James*'s Canons, are certainly in Force, tho' not particularly confirm'd by Parliament; becauſe they were made in Purſuance of the Authority given by Parliament, and confirm'd by Royal Aſſent. For tho' indeed no Canons of *England* ſtand confirm'd by Parliament, yet they are the Laws which bind and govern in Eccleſiaſtical Affairs. For the Convocation may with the King's Licenſe and Aſſent had under the Great Seal, make Canons for the Regulation of the Church, and that as well concerning *Laicks* as *Eccleſiaſticks*: And ſo is *Lyndwood*. Indeed, they cannot alter or infringe the *Common Law*, *Statute Law*, or the King's Prerogative, as aforeſaid: But they may make Alterations in Eccleſiaſtical Matters, or elſe they could not make any new Canons. All that is requir'd of them in making new Canons, is, that they do confine themſelves to Church-Matters *. For as no Human Law can be made, which is contrary to the Divine Law; (and 'tis only binding in thoſe Things which are permitted by the Divine Law:) So no Canon can be made, which is repugnant to the Law of the Land. In the Caſe of *Grove* and Dr. *Elliot* Chancellor of *Sarum* †, Juſtice *Tyrrel* was of an Opinion, That the King and Convocation without the Parliament cannot make any Canons, that ſhall bind the Laity, tho' they may the Clergy: But ſurely that Judge had never read or (at leaſt) conſider'd well the Act of Parliament ‡. Indeed, the Eccleſiaſtical Canons and Conſtitutions treated on by the two Archbiſhops of *Canterbury* and *York*, and the reſt of the Biſhops and Clergy of thoſe Provinces, and agreed upon with the King's Licenſe in their ſeveral Synods begun at *London* and *York* **, in the ſixteenth Year of King *Charles* the Firſt's Reign were complain'd of and much inſiſted on by the Houſe of Commons, as a palpable Invaſion made by the whole Body of the Clergy upon the Laws and Liberties of the People: But I ſhall give the Reader ſome Account hereof from the Words of the Earl of *Clarendon* in his Hiſtory of the late Civil War ††, who there ſays as follows, *viz.*

"That after the Diſſolution of the former ſhort Parliament, the "Convocation was continued by ſpecial Warrant from the King; and "by his Majeſty in a ſolemn Meſſage ſent to them by Sir *Harry Vane*, "then Principal Secretary, requir'd to proceed in the making of Canons, "for the better Peace and Quiet of the Church. Notwithſtanding this "Command ‡‡, the Chief of the Clergy, well knowing the Spirit of Bit-"terneſs contracted againſt them; and many obſolete Pamphlets againſt "their Juriſdiction and Power, being, ſince the Commotions in *Scotland*, "revived and publiſh'd with more Freedom; deſir'd his Majeſty, *That the* "*Opinions of the Judges might be known and declared, whether they* "*might then lawfully ſit, the Parliament being diſſolv'd, and proceed in* "*the making of Canons; as likewiſe, upon other Particulars in their* "*Juriſdiction, which had been moſt inveigh'd againſt?* All the Judges "of *England*, upon a mature Debate, in the Preſence of the King's "Coun-

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* Vent. Rep. pt. 2d. p. 44. † Vent. Rep. pt. 2d. p. 43. ‡ 25 H. 8. ch. 19. ** A. D. 1640. †† Pag. 204. & 205. 8vo. Edit. Vol. 1ſt. ‡‡ This Command was at the Inſtance of Archbiſhop *Laud*, or (as others ſay) Sir *Harry Vane*, on Purpoſe to ruin the Church.

" Council, under their Hands aſſerted the *Power of the Convocation in* " *making Canons, and thoſe other Parts of Juriſdiction, which had been* " *ſo enviouſly queſtion'd.* Hereupon they proceeded; and having com- " poſed a Body of Canons, preſented the ſame to his Majeſty, for his " Royal Approbation. They were then debated at the Council-Board, " not without notable Oppoſition: For upon ſome leſſening the Power " and Authority of their Chancellors *, and their Commiſſaries, by thoſe " Canons, the Profeſſors of that Law took themſelves to be diſoblig'd; " and Sir *Henry Martin*, (*who was not likely to overſee any Advantages*) " upon ſeveral Days of Hearing at the Council-Table, with his utmoſt " Skill objected againſt them: But in the End, by the *entire and* " *unanimous* † Advice of the Privy-Council, the Canons were confirm'd " by the King under the Great Seal of *England*; and there enjoin'd to " be obſerv'd. So that whatſoever they were, the Judges were at leaſt " as guilty of the firſt Preſumption in framing them, and the Lords " of the Council in publiſhing and executing them, as the Biſhops or " the reſt of the Clergy, in either. Yet the Storm fell wholly on the " Church; and the Matter of thoſe Canons, and the manner of making " them, was inſiſted on as a pregnant Teſtimony of a malignant Spirit in " the very Function of the Biſhops. The Truth is, the Seaſon in which " that Synod continued to ſit was in ſo ill a Conjuncture of Time (upon " the Diſſolution of a Parliament, and almoſt in an Invaſion from *Scot-* " *land*) that nothing could have been tranſacted there of a Popular and " prevailing Influence. And then ſome ſharp Canons againſt Sectaries‡; " and ſome Additionals in Point of Ceremonies **, countenancing, tho' " not enjoining what had not been long practiſed, infinitely inflamed " ſome, and troubled others: who jointly took Advantage of what was " ſtrictly amiſs, as the making an Oath ††, the Matter of which was " conceived incongruous; and enjoining it to many of the Laity, as well " as the Clergy ‡‡; and likewiſe the granting of Subſidies. So that the " Houſe of Commons (that is, the major Part) made no Scruple, in that " Heat, to declare, *That the Convocation-Houſe had no Power at all of* " *making Canons:* Notwithſtanding it was apparent by the Law, and " the uncontradicted Practice of the Church, that Canons had never " been otherwiſe: And *that thoſe Canons contain'd in them Matter of* " *Sedition and Reproach to the Regal Power; prejudicial to the Liberty* " *and Property of the Subject; and to the Privileges of Parliament.*" But as theſe Canons were then cenſur'd, and ſeem to have in them ſeveral Matters contrary to the Rights of the People, and the Laws of the Realm, they have never been in uſe ſince, tho' they contain ſome wholſome Doctrines and Inſtitutions in ſome of them, as I ſhall hereafter more largely obſerve.

We likewiſe read of a certain Book of Articles or Canons which were made, conſented and ſubſcrib'd to by a Provincial Synod begun at St. *Paul's* Church in *London* the third Day of *April*, 1571. by *Mat. Parker* Archbiſhop of *Canterbury*, and by all the reſt of the Biſhops of this Province, attending either in their own Perſons, or elſe by their Proxies: But it is not ſaid, this Book of Canons was confirm'd by the Royal Authority. But, in the 27th Year of the Reign of Queen *Elizabeth*, there were certain Articles or Canons made by the Archbiſhop of *Canterbury*, and the reſt of the Biſhops and Clergy of this Province in a

* Can. 11. 12. & 14. vid. † Theſe Words in the Text mark'd or printed in the *Italick* Letter are ſuppos'd to be an *Oxford* Interpolation. ‡ Vid. Can. 5. ** Can. 7. †† Can. 6. ‡‡ Can. 6.

Synod begun at *London*, *November* the 24th, 1584; and theſe were approv'd and confirm'd by Royal Authority. On the 25th of *October*, in the Thirty fourth Year of the ſaid Queen's Reign, another Provincial Synod was begun and held by the Archbiſhop, Biſhops, and the reſt of the Clergy of the Province of *Canterbury* at *London*, wherein divers Canons and Eccleſiaſtical Conſtitutions were treated of by the ſaid Synod, and being afterwards approv'd and confirm'd by the Queen's Majeſty, were by her Royal Authority under the Great Seal of *England* tranſmitted to the two Provinces of *Canterbury* and *York*, and publiſh'd for the due Obſervation of them.

The Council of *Melda* enjoins, That the Decrees of the Canons be obſerved by all Perſons, and that in Eccleſiaſtical Acts or Matters of Judicature; and that no one does preſume to govern himſelf by his own Senſe and Opinion of Things: But let him give Judgment (ſays that Council) according to the *Civil* and *Canon-Law*; that is to ſay, according to the *Civil-Law* in Matters of a Temporal Nature, and according to the *Canon-Law* in Spiritual Matters. But tho' the Canons of this Council were never receiv'd here in *England*, yet all Eccleſiaſtical Matters of Judicature ought to be regulated and govern'd among us according to the Rules and Practice of the *Canon-Law*, and not by the *Civil-Law*, unleſs it be in ſome particular Caſes wherein that Part of the *Canon-Law* was never admitted here. Yea, according to the *Canoniſts*, if a Diſpute ſhall happen to be about an Eccleſiaſtical Matter, tho' it before a Secular Judge, yet it ought to be *decided* according to the *Canon*, and not by the *Civil* or any *Secular* Law. Obſerve, that I ſay *decided*, and not handled or treated of, becauſe in reſpect of Matters *Preparatory* to Judgment; the Law of the Court ought always to be obſerv'd, where the Suit or Matter is Judicially try'd *. And thus even *Juſtinian* himſelf would have all Judgments made and directed by the *Canon-Law*, in all Cauſes relating to Eccleſiaſtical Matters; commanding the ſacred Canons herein to be kept and obſerv'd in their full Force and Vigour, no leſs than the *Civil-Law*. For *Juſtinian* profeſs'd himſelf to follow the firſt four General Councils in all Things that are ordain'd and confirm'd by them; enacting, That the *Dogma's* and Opinions of theſe Councils ſhould be obſerv'd as Holy Writings †. And, *laſtly*, not only the Advantage, but even the Neceſſity of the *Canon-Law* is acknowledg'd by all Chriſtian Nations.

For, *Firſt*, if you take away this Law, we have no juſt Method and Form of Proceeding in Judicial Cauſes of an Eccleſiaſtical Cogniſance; ſince this Form is only compriz'd and ſet down in the ſecond Book of the *Decretals*. And, *Secondly*, We ſhall be without the Deciſions of ſeveral important and conſiderable Controverſies; which, being taken from the Laws of Nature and of Nations, are not be met with in any other Books but in thoſe of the *Civil* and *Canon-Law*. And *Thirdly*, The Lawyers themſelves will be without the united Knowledge of both theſe Laws to their great Diſadvantage: For as the Interpreters of the *Canon-Law* are deem'd but very unskilful Inſtructers without the Knowledge of the *Roman Civil-Law*; ſo are the Interpreters of the *Civil-Law* reckon'd but mean Lawyers with a due and proper Underſtanding of the *Canon-Law*. And both theſe Laws are at this Day ſo link'd together, that no one can be ſaid to be a Lawyer beyond Sea, without underſtanding both of them: And he is entirely

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* 11 Q. 1. 1. † Nov. 131 cap. 1.

ly ignorant of both of theſe Laws, who contents himſelf with the Knowledge of one of theſe alone.

I ſhall conclude this Introduction with ſome proper Obſervations on the *Canon-Law* in general. And, *Firſt*, It is to be obſerv'd, That there is this Difference between a *Canon*, a *Decree*, a *Decretal Epiſtle*, a *Dogma*, *Sanction*, *Interdict*, and a *Mandate*, *viz.* A *Canon* is ſaid to be that Law which is made and ordained in a General Council or Provincial Synod of the Church. A *Decree* is an Ordinance, which is enacted by the Pope himſelf, by and with the Advice of his Cardinals in Council aſſembled, without being conſulted by any one thereon *. A *Decretal Epiſtle* is that which the Pope decrees either by himſelf, or elſe by the Advice of his Cardinals: And this muſt be on his being conſulted by ſome particular Perſon or Perſons thereon. A *Dogma* is that Determination, which conſiſts in and has a Relation to ſome Caſuiſtical Point of Doctrine, or ſome Doctrinal Part of the Chriſtian Faith. And a *Precept* or *Commandment*, in *Latin* called *Mandatum*, is that which conſiſts in and has a reſpect to ſome moral Point of Doctrine, *viz.* ſuch as concerns our Manners, and our inward and outward good Behaviour as Men in this Life. But ſtrictly ſpeaking, a Law made in a Provincial Synod is properly term'd a *Provincial* Conſtitution. But then,

Secondly, It is to be noted, That by the *Canon-Law* under the Name and Appellation of a *Canon* is included every Eccleſiaſtical Conſtitution; therefore if we take the Word *Canon* in a large Senſe, it is the ſame Thing as an Eccleſiaſtical Conſtitution; but, taken ſtrictly, it is a Conſtitution made in ſome General Council, as aforeſaid. Moreover, 'tis to be obſerv'd, That every Canon or Eccleſiaſtical Conſtitution may be called a Law; becauſe a Law is a written Conſtitution: And as the Conſtitutions of the *Civil-Law* are ſtiled Secular Laws, even ſo in like manner are the Canons of the Church often called *Eccleſiaſtical Laws*. And,

Thirdly, It is to be remark'd, That as the Pope's *Decrees* properly ſo called, are, according to the *Papal-Law*, of equal Authority with the Canons of General Councils; ſo the Pope's *Decretals* are of the ſame Authority with the *Decrees* themſelves, being a Part of the *Canon-Law*, as they are diſtributed among the Canons of the Church. Yet ſometimes a *Decretal Epiſtle* is only *local* (as already remember'd) and is not drawn *ad Conſequentiam*; that is to ſay, it has no Effect or Operation in any other Place than that which it expreſly concerns. And 'tis the ſame Thing if ſuch *Decretal Epiſtle* be *Perſonal*, *viz.* when it reſpects only ſome particular Perſon.

Fourthly, A Penal Canon or Conſtitution ought not to be extended by a Declaratory Sentence of Things therein not expreſs'd, tho' there be a perfect Parity and Similitude of Reaſon aſſign'd for the ſame; becauſe ſuch an Extenſion would be made by a Man, that has no ſuch Legiſlative Power veſted in him: But a looſe and unconfin'd Extenſion ought not to be made in Penal Canons and Conſtitutions; and ſuch are the Provincial Conſtitutions of Archbiſhop *Boniface* in *Lyndwood*'s *Code*; yet where there is the ſame Reaſon entirely ſubſiſting, there the ſame Law ought to be obſerv'd in a Caſe not expreſs'd therein. And, moreover, 'tis a Rule in Law, That an Eccleſiaſtical Canon or Conſtitution, ſpeaking *de Perſonâ verâ*, ought not to be extended *ad Perſonem repræſentatam*;

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* Vid. Gloſſ. & Doct. in 10 Diſt. cap. 4. verb. *Canones & Decreta*.

ſententiam; eſpecially if it be a Penal Canon or Conſtitution, as the greater Part of the Provincial Conſtitutions of Archbiſhop *Boniface* are, Penal, tho' little regarded among us.

Fifthly, 'Tis to be known, That an Eccleſiaſtical Canon or Conſtitution has only a Reſpect to Things future, and not to Things paſt*: And thus is every Law only extended to ſuch Things as ſhall happen hereafter; unleſs there be an expreſs Proviſion made therein, that it may have a Retroſpect and be extended to Things paſt. And, moreover, 'tis a general Rule in Law, That no one ſhall be puniſh'd *ſine Culpâ*: But he that is puniſh'd by a Law *ex poſt facto*, that is to ſay, without any Fault committed againſt any Law in Being, is puniſh'd without a Fault: *Ergo*. Again, if a Law or Canon ſpeaks in Words only of the *Preſent Tenſe* it ought not to be extended to Things future, leſt it ſhould afford Matter of Offence, and adminiſter much Miſchief. Thus if it be provided by a Law or Statute, That every baniſh'd Man, on the Payment of Ten Pounds, ſhould be diſcharg'd from his Baniſhment: This, I ſay, does not proceed in Favour of him, who ſhall be baniſh'd hereafter; becauſe it would encourage Offenders: But 'tis otherwiſe, if this Reaſon ſhould ceaſe; becauſe then, tho' ſuch Law or Statute does ſpeak in Words of the *Preſent* or *Præterperfect Tenſe*, yet 'tis extended to Things future; becauſe the Law ſpeaks in Special.

Sixthly, A Law or Canon according to the Eccleſiaſtical Law, does not begin to bind and oblige, till two Months after, or from the Time of its Publication. For after the lapſe of theſe two Months, a Knowledge thereof is preſum'd to reach all Perſons concern'd therein; and this Preſumption of Knowledge is not a Preſumption of *Law*, but a Preſumption by *Law*, ſince it admits of Proof to the contrary from any Man that can prove himſelf to be ignorant of the Publication of ſuch Law or Canonical Conſtitution. And thus a Law or Canon ſhall not affect Perſons truly ignorant, tho' ſome Law or Canon ſhould precede the Fact †.

Seventhly, 'Tis to be obſerv'd from the Nature and Reaſon of a Law, Canon or Conſtitution, that the ſame may be extended by the Law or Canon itſelf, or by any other Conſtitution; and this in ſeveral Cauſes. *Firſt*, When the Words of ſuch Law, Canon or Conſtitution may be drawn to a Caſe, wherein a Majority or Parity of Reaſon concludes the ſame Thing, even according to the largeſt Signification of a Word. For Example ſake: The Words of a Law or Statute do permit a Man to kill or put another to Death: Therefore, from a ſtrong Majority of Reaſon they do permit him to wound; becauſe the Perſon wounding may be ſaid to kill or put to Death, in reſpect of the Intent of the Perſon wounding‡. The like Example alſo appears in a Statute, which forbids a Daughter to ſucceed to the Inheritance, as long as any Male Heir or Iſſue is living: For by a Majority of Reaſon this Prohibition alſo is extended to a Niece or Grand-daughter **. An Extenſion by a Parity of Reaſon may be made from the ſtrict Signification of a Word to the large and extended Senſe thereof according to *John Andreas* †† on the *Canon-Law* quoted in the Margin; where he obſerves, that the Word *Election* is extended to a *Preſentation*.

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* X. 1. 2. 2. † Idem ut ſupr. X. 1. 2. 13. ‡ D. 9. 2. 32. ** D. 50. 16. 220.
†† In cap. 47. vi. 1. 6.

By the *Canon-Law* a Biſhop may make a Canon, Decree, or Statute, which ſhall oblige all Perſons, that are Subject to his Juriſdiction, and ſuch a Decree or Statute is called an Epiſcopal Canon: But 'tis to be obſerved, that a Biſhop cannot enact any Thing contrary to the General Canons or Conſtitutions of the Church.

There has been a great Doubt among ſome of the *Canoniſts* indeed, *Firſt*, Whether a Biſhop can make Laws without the Pope's Conſent and Approbation, and what Rule they ought to obſerve herein, *viz.* Whether a Biſhop may do every Thing which he is not forbidden to do, or whether he may only do that, which he is allow'd to do? Wherein it is to be conſider'd, *Firſt*, That according to the *Canon-Law*, Biſhops cannot make Laws in ſuch Matters as are ſpecially reſerved unto the Pope himſelf; if they are any wiſe repugnant to ſuch reſerv'd Caſes: And this appears from that pretended Subordination, which is due from Biſhops to the Pope *. *2dly*, They cannot make any Decrees or Statutes, which are contrary to the Common Law of the Church, becauſe they would be *eo ipſo* contrary to the Will of the pretended Sovereign Power thereof, our Lord the Pope †. *3dly*, 'Tis to be noted, That they cannot make any Statute or Decree in Matters of high Importance, and of an arduous Nature, becauſe they are by a general Rule in the Papal *Canon-Law* reſerv'd to the Apoſtolick See ‡. And thoſe Things are ſaid to be of a high Importance which concern the State of the Univerſal Church, or are repugnant to the Privileges and univerſal Cuſtoms of the Church **. Again, a Biſhop cannot ſubject one Church to another, nor can he unite two Biſhopricks, or divide one into two, or make any Law for the Alteration of the Time of Lent, and the like.

The *Second* Doubt is, Whether a Biſhop can make Statutes without the Advice or Conſent of his Chapter or Clergy? Some Perſons according to the Gloſs on the *Canon-Law* hold the Affirmative: But that Gloſs (I think) does not warrant it; for it only ſays, that Biſhops may make Conſtitutions. And hence the Abbot †† abſolutely denies this Doctrine to be true on the Authority of *Joh. Andreas*. And this is alſo inferred from thoſe two Chapters in the Law, touching thoſe Things which a Prelate may do without his Chapter's Conſent; which Laws do not ſpeak of Statutes, but only of expoſing the Goods of the Church, and the like; which ought not to be done by a Biſhop without his Chapter. But more of this hereafter, under their proper Titles.

We have ſeveral Rules laid down and quoted to ſhew, in what Cauſes the *Canon-Law* ſtill prevails, and is made uſe of in the Courts of Law, and Dominions of the Proteſtant Princes in *Germany* and other Places: And, among theſe there are three principally ſettled and agreed upon, as being moſt remarkable. The *Firſt* is, That as often as any Matter is doubtful according to the *Civil-Law*, and may be decided by the *Canon-Law*, it ought to be determin'd by the *Canon-Law*; and ſo *vice verſa*: But in *England* this Rule can have little or no Place, becauſe the *Common* Law ſo much prevails over the *Civil* and *Canon-Law*. The *Second* is, That whenever the *Civil* and *Canon* do claſh and interfere with each other, ſo often ought each of theſe Laws to be obſerved in their reſpective and proper Courts; unleſs it be in a Cauſe or Matter of Sin, Conſcience and Equity, wherein the *Canon-Law* ſhall prevail: But with us in Matters of Equity and Conſcience in all Civil Cauſes, the good

* X. 1. 7. 1. X. 3. 4. 1 &2. † X. 3. 18. 2. ‡ Gloſſ. in cap. 2. x. 1. 32. Gloſſ. in cap. 2. Diſt. 3. Sect. Porro. ** X. 1. 4. 8. Gloſſ. in v. Conſtitutus. †† X. 1. 30. 10.

Conſcience and Equitable Opinion of the Court of *Chancery* prevails. The *Third* is, When there is no Difference laid down between theſe two Laws: For then in *Germany* the *Canon-Law* prevails in all Matrimonial Cauſes, in Pacts, and in the Buſineſs of an *Emphiteuſis*, in Uſury, and in an *Anticreſis* or a *Mutual Uſe*, *viz.* When one borrows one Thing and leaves another as a Pawn for the Lender to uſe in the mean while, or Land mortgaged, which the Creditor makes uſe of till he be paid or ſatisfied in Point of his Debt; in all Matters relating to Church-Eſtates, Tithes, Pious Uſes, Teſtaments, *Fidei-Commiſſa*, Preſcriptions, Oaths and the Method of proceeding in Eccleſiaſtical Judicature. But to ſpeak Truth, theſe General Rules do ſtill admit of ſeveral Limitations and Exceptions: So that there is but very little uſe of the *Canon-Law* in ſeveral Proteſtant Countries; unleſs it be in Matters relating to Church Eſtates, Tithes, Oaths, Matrimonial Cauſes, Laſt Wills and Teſtaments, and the like; ſince all other Matters are for the moſt Part govern'd by the Civil and Municipal Laws of the Countries, and by Provincial and Eccleſiaſtical Conſtitutions therein enacted and ordained; as happens here in *England*.

Tho' ſeveral Titles of the *Canon-Law* are out of uſe with us here in *England*, by Reaſon of the groſs Idolatry they contain in them: As the Title of the Authority and Uſe of the Pall, the Title of the Maſs, the Title of Relicts, and the Worſhip of Saints, the Title of Monks and Regular Canons, the Title of keeping of the Euchariſt and Chriſm, and ſuch other of the like Quality: Yet theſe are retain'd in the general. For inſtead of them, we have ſubſtituted in their Places other holy Worſhips tending to the like end of Godlineſs, as thoſe did pretend to, but void of thoſe ſuperſtitious Means the others thought to pleaſe God by: And inſtead of the Maſs we have the Holy Communion; and in the Place of worſhipping Saints, we have a Godly Remembrance, and a Glorifying in his Saints; and ſo of the reſt which we make a uſe of in the Church. But there are ſome out of uſe as well among the *Civil* as *Criminal* Titles of the Law; becauſe the Matter therein treated of is notoriouſly known to belong to the Cognizance of the *Common Law* at this time. As the Titles of Buying and Selling, of Leaſing or Letting and Taking to Farm, of Mortgaging and Pledging, of Giving by Deed of Gift, of Detecting Colluſion and Coſenage, of Murder, Theft and Receiving of Thieves, and ſuch like.

For I make no doubt, but even theſe Matters both *Civil* and *Criminal*, or moſt of them among Clerks, were anciently handled and allow'd of in Biſhop's Courts within this Realm, in order to aggrandize the Prieſthood. And this I am induc'd to believe for three Reaſons. *Firſt*, Becauſe I find not only foreign Authors of the *Decretals*, but even our own Authors of the *Legatine* Conſtitutions to have enacted and inſerted theſe ſeveral Conſtitutions, not only in the Body of the *Canon-Law*, but alſo in the Body of the Eccleſiaſtical Laws of this Realm; and ſome learned Men, divers Years after their Ages, have wrote Comments upon the ſame, as Things expedient and profitable for the uſe of the Church, and the Government of the Clergy in thoſe Days: Neither of which, I preſume, they would have done, if in thoſe Times there had not been a free Practice of them. *Secondly*, I find in the *Juſtinian Code* by ſundry Laws, ſome of his own making and of ſome other Emperors before his Time; That Biſhops in their Epiſcopal Audience had the Practice of ſome of theſe Matters both *Civil* and *Criminal*, if we may believe theſe Laws to be Genuine, and not of the Clergies own Forging. And to this end they had their Officials or Chancellors, Men train'd up in the *Civil* and

Canon-

Canon-Law to direct them in Matters of Judgment, as well in Eccleſiaſtical *Criminal* Matters, as in Eccleſiaſtical *Civil* Cauſes, tho' at preſent thro' the Idleneſs and Corruption of the Times, and thro' the ſmall Regard that ſome of our Biſhops have ſhewn to their own Courts, we have had but few Chancellors that underſtand either the *Civil* or *Canon-Law*, tho' the Canon of our Church requires a good Proficiency in the Knowlege of both theſe Laws in Eccleſiaſtical Courts *. The *Third* Reaſon that induces me to believe, That theſe Titles were ſometimes exercis'd here among us, is, that I find *Glanvil* †, who liv'd under *Henry* the Second's Reign, and was Lord Chief Juſtice of *England*, refers to the Eccleſiaſtical Courts the Plea of Tenements, where the Suit was between two Clerks, or between a Clerk or a Layman; and the Plea was, *De liberâ Eleemoſynâ Feodi Eccleſiaſtici & non petitur indè recognitio*; whether the *Frank-Fee* was Lay or Eccleſiaſtical ‡. And he further adds, That if it be found by the Verdict of legal and ſufficient Men to be an Eccleſiaſtical Fee it ſhall not hereafter be drawn to a Lay Fee, no, tho' it be held of the Church by Services thereunto due and accuſtom'd. Again, by ancient Practice of the *Canon-Law* among us, whenever Land was demanded in Marriage by the Husband or Wife, or their Heir, and the Demand was againſt the Giver or his Heir, it was then at the Demandants Choice, whether he would ſue for the ſame in the Court Chriſtian or in the Secular Court: For, ſays *Glanvil*, it belongs to the Eccleſiaſtical Courts to hold Plea of Dowries, which he calls *Maritagia*; if the Plantiff does thus make Choice of thoſe Courts upon the Score of that mutual Affiance which is there made between a Man and his Wife. For if a Marriage be had between them, and there is a Dowry promis'd to the Man by the Woman's Friends, this Plea was not to be carry'd to the Temporal Courts, tho' the Lands were of a Lay-Fee; provided, the Suit was certainly for a Dowry: But if the Suit was againſt a Stranger, then it was otherwiſe **. *Thirdly*, The King's Prohibition forbidding the Clergy to deal in ſeveral Things which are of Lay-Fee, forbids them no one Thing that is of Eccleſiaſtical Fee; and to ſhew the Prince's meaning preciſely therein, *viz.* That it was not his Intent by that Prohibition to reſtrain the Eccleſiaſtical Judges from proceeding in Matters of this Kind, he does in expreſs Terms uſe theſe Words (*Recognizances touching Lay-Fees*) as though he would ſignify to all Men, that he would not touch upon Matters of Eccleſiaſtical Fee, which did then wholly belong to the Tryal of Court Chriſtian, as has been cited already out of *Glanvil*: Who, by the Place he then held, may be thought to have known the Laws of *England*, as they then ſtood, and the right Interpretation thereof, as well as any Man then or now living. And yet becauſe there were ſome Things of Lay-Fee, which the Clergy then had Cogniſance of, and have ſtill in ſome Meaſure; as Cauſes and Matters of Money, Chattels and Legacies ariſing out of Teſtaments, *&c.*: And becauſe he would have the Rights of the Clergy to be undiſputed, he excepts them from ſuch Things as did belong to the Common Law; and leaves them to the Direction of the Courts Chriſtian.

To what has been ſaid, we may add the Provincial Conſtitution of Archbiſhop *Boniface*, recorded in *Lindwood* ††, and made in the Days of *Henry* the Third by the Exorbitant Power of the Clergy, which plainly ſhews

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* Vid. Can. Jacob. 127. † Lib. 12. cap. 15. de Leg. Angliæ. ‡ Idem lib. 13. cap. 25.
** Ann. 24 Ewd. 1. †† 25 H. 8. chap. 19.

ſhews, That in thoſe Days all Perſonal Suits either between Clerk and Clerk, or between Laymen Plaintiffs and Clerks Defendants were try'd by the Eccleſiaſtical, and not by the Temporal Law: Which Practice becauſe it agrees with *Glanvil*, *Bracton* and *Britton*, and with the Prohibition itſelf, which there only reſtrains the calling of Laymen to make Recognizances of Matters belonging to Lay-Fees, it may be ſtrongly inferr'd, That theſe Matters were Things of Eccleſiaſtical Right in thoſe Days; from which the Eccleſiaſtical Courts are now fallen either by the Statute of *Henry* the Eighth, which (perhaps) has taken away the ſame, as being hurtful to the Royal Prerogative, and repugnant to to the Laws, Statutes and Cuſtoms of this Realm, *&c.* or elſe ſuppreſs'd by the reigning Power of the Common Law, which I ſhall not take upon me to determine, but leave it to Men of better Judgment and Experience than my ſelf. But this I find true by Experience, That where there are two different Juriſdictions in one and the ſame Kingdom, unleſs they be carefully bounded by the Prince, and an equal Regard had to both, ſo far as the neceſſary Uſe of them in the State requires, as the Advancement of the one increaſes, ſo does the Practice of the other decreaſe, eſpecially if one has got the Countenance of the State more than the other. For,

In reſpect of other Matters belonging to the Eccleſiaſtical Courts, ſome are acknowleg'd to be abſolutely in uſe, and others are excepted againſt only in ſome Meaſure. Thoſe are in abſolute Uſe, which never had any Oppoſition made againſt them, which are almoſt thoſe alone that belong to the Biſhop's Degree or Order: For all Things which come within the Compaſs of the Eccleſiaſtical Law, do either belong to his Degree, or his Juriſdiction. To the firſt belong the Ordination of Miniſters, the Confirmation of Children, the Dedication of Churches, and the like. The ſecond Sort is of ſuch Matters as do belong to the Biſhop's Juriſdiction, which is partly *Voluntary* and partly *Contentious*; of this latter there have been divers Things in ſundry Ages called into Queſtion, but reſtored again by the wiſe and grave Judges themſelves, who have found the Exception againſt them to be unjuſt. But what belongs to either of them in private, or what Cauſes do belong to the whole Juriſdiction, becauſe I have hereafter deſcribed them in particular, I will not here give the Reader a Catalogue of them, but ſend him to the enſuing Work for the Knowledge thereof, whereunto I ſhall next proceed, after a long Introduction ended.

An EXPLANATION of the Marginal Quotations from the Books of the *Civil* and *Canon-Law.*

And First of the *Civil-Law.*

THE *Inſtitutes of* Juſtinian, *Book the Firſt, Title the Second, Section, or Paragraph, the third and fourth.* I. 1. 2. 3 & 4.

Digeſt, Book the Firſt, Title the Second, Law the Third, and Paragraph, or Section, the Fourth. D. 1. 2. 3. 4.

Digeſt, Book the Firſt, Title the Second, Law the Third. Pr. *in* principio, *and* fin. *in* fine ejuſdem legis. D. 1. 2. 3. Pr. Fin.

Digeſt, Book the Firſt, Title the Second, and Laws the Third and Fourth. D. 1. 2. 3 & 4.

Meaning, Law the Firſt, Section, or Paragraph, beginning with the Word Furtum ff. *ſignifies the Digeſt, and the Words* de Furtis *denote the Title thereof.* L. 1. 33. Furtum, ff. de Furtis.

That is to ſay, Bartolus *on the firſt Law of the* Digeſts, *Book the Second, and Title the Fourth.* Bart. in l. 1. D. 2. 4.

Code, *Book the Firſt, Title the Twelfth, Law the Eighth, and Section or Paragraph the Second.* C. 1. 12. 8. 2.

That is to ſay, Baldus *on the Fourth Law of the* Code. *Book the Sixth, and Title the Tenth.* Bald. in l. 4. C. 6. 10.

The Novels, *Conſtitution the Eighty Ninth, and Chapter the Ninth.* Nov. 89. c. 9.

Authentick, *Collation the Ninth, Title the Ninth, and Novel Twenty.* Auth. 9. 9. 20.

All theſe Books of the *Civil-Law* are ſometimes quoted by the initial Words of the Law it ſelf; and by the Words of the Title: As, *Qui totam Hæreditatem,* ff. *De acquir. vel omit. Hæred.* That is to ſay, *The Firſt Law of the Digeſt, Book* 29, *and Title the Second.*

Marginal Quotations from the Books of the *Canon-Law* explain'd.

X. 1. 9. 6. 4. THAT *is to ſay, Book the Firſt, Title the Ninth, Chapter the Sixth, and Paragraph the Fourth, of the Decretals of Pope* Gregory *the Ninth. The Letter* (X) *denoting the Decretals of that Pope.*

VI. 3. 4. 23. *Book the Third, Title the Fourth, and Chapter the Twenty Third, of the Sixth Book of the Decretals, by Pope* Boniface *the Eighth.*

Cl. 2. 5. 2. *Book the Second, Title the Fifth, and Chapter the Second of the* Clementines.

Extra. 14. 3. *That is to ſay, Title the Fourteenth, and Chapter the Third of the* Extravagants *of Pope* John *the Twenty Second.*

Com. 3. 2. *That is to ſay, Book the Third, and Chapter the Second of the* Communes.

Diſt. 76. c. 2. *Diſtinction the Seventy Sixth, and Chapter the Second of the firſt Part of the* Decrees: *And if a* V *Conſonant, or this Note be added,* viz. §. *it denotes the Verſe or Paragraph of that Chapter, as* Diſt. 16. c. 2. v. 3 *or* §. 3.

16 Q. 7. 3. *That is to ſay, Cauſe the Sixteenth, Queſtion the Seventh, and Chapter the Third, of the Second Part of the Decrees.*

Con. 1. 2. *Diſtinction the Firſt, and Chapter the Second of the third Part of the Decrees.*

All theſe Books of the *Canon-Law* are likewiſe ſometimes quoted by the initial Words of the Law, or Chapter itſelf; and by the Words of the Title: As thus, *Ex ſpecialis,* extra *de Judæis.* That is to ſay. *Cap.* 17. *Tit.* 6. of the Fifth Book of *Gregories* Decretals. For the Word *Extra* imports theſe *Decretals* as well as the *Extravagants.*

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PARERGON
JURIS CANONICI ANGLICANI.

Of Abbots, Priors, Abbies, Priories, &c.

IT being the peculiar Happineſs of the *Britiſh* Nation in general, to be (in a great meaſure) govern'd by Laws of its own Growth and Production, and likewiſe to be freed from the Tyranny of *Romiſh* Superſtition and Papal Power, it may (perhaps) at firſt ſight, ſeem altogether unneceſſary to introduce or mention this Title of *Abbots*, *Priors*, &c. becauſe all Abbies, Priories, and other Religious Houſes of Monks and Fryars, are now aboliſh'd and diſſolv'd in *Great-Britain*, and their Lands and Poſſeſſions given to the Crown; and the very Order of Abbots themſelves is entirely extinguiſh'd among us. But ſince the Eccleſiaſtical Law and State of *England*, as it now ſubſiſts, may be much better known by informing the Reader how it ſtood before the Reformation of Religion here among us; I have thought it no-wiſe improper to the preſent Undertaking, to give a ſhort Hiſtory of the Riſe and Origine of this lazy and devouring Herd of People, commonly called *Abbots*, *Priors*, *Monks*, and the like; and alſo to give ſome Account of the Foundation and the Endowment of their Abbies and other Religious Houſes, and the Means whereby they afterwards acquired great Riches and Power, lording it over Mens Perſons, Eſtates, and Conſciences: and laſtly, I thought it not amiſs, by way of Incident, to treat of ſome other Matters relating to this Subject till the time of their Diſſolution. For I ſhall only, in the following Sheets, mention ſo much of the Papal *Canon-Law*, as may ſerve to illuſtrate and explain the *Canon-Law*, as receiv'd and practis'd here in *England*; ſaving ſome few Digreſſions, which I ſhall make in order to expoſe the Pride and Subtilty of the *Popiſh Clergy*, according to my Deſign already declared in the Introduction to this Work: and, there-

fore, I begin the ſame, *firſt*, with the Title of *Abbots*, *Priors*, and other Perſons, in the ſeveral Orders of the *Romiſh* Communion.

Now an Abbot is ſo called from the Word *Abba*, which in *Engliſh* ſignifies a *Father*; and, in its Original, is, according to ſome a *Hebrew*, and according to others, a *Syriack*, and not a *Hebrew* Word: for an Abbot is, or (at leaſt) ought to be the Father of his Monks, and in propriety of Speech, has the ſame Relation to the Houſe or Family over which he preſides and governs, as a natural Father has over his Children. For, according to *Albericus*, *Alciatus*, and others, and in the Senſe of all Nations and Languages, this Word imports the ſame as a Father, in reſpect of Age, Honour, and Care; and ſtrictly ſpeaking, is not a Term of Order: and for this Reaſon (ſay they) *Abbots* are ſtiled *Fathers* in the vernacular Tongue of all Nations. And, as the *Latin* Word *Abbas*, is the ſame as the *Hebrew* or *Syriack* Word *Abba*, Father; ſo, according to *Felinus*, an Abbacy is the Dignity itſelf, ſince an *Abbot* is a Term or Word of Dignity, and not of Office: and, therefore, even a ſecular Perſon, who has the Care of Souls, is ſometimes, in the *Canon-Law*, alſo ſtiled an *Abbot*. And though, among the *Greeks*, that Perſon only is called *Papas* or *Pater*, who is a Father in point of Reverence; yet an *Abbot* may in Law, even be called a *Monk*, and, in an indifferent Matter, he comes under that Appellation: for though he be made an *Abbot*, *&c.* he does not ceaſe to be a *Monk*, as 'tis ſaid of the Rector of Scholars in an Univerſity, who does not ceaſe to be a Scholar becauſe he is a Rector. Not only Biſhops, and Archbiſhops, come under the Name of *Prelates*, but even *Abbots* themſelves: and hence it is, that *Abbots* are ſtiled *dignify'd Clerks*, as having ſome Dignity in the Church; and as ſuch (it ſeems) they ought to be preferr'd unto all other private Clerks. And though an Abbot does not take place of the Canons of a Cathedral Church within the ſaid Church; yet out of the ſaid Church, he ſhall have a Precedency. 'Tis ſaid in the Books of the *Canon-Law*, that a *Conventual Prior* is in the Place of an *Abbot*: but then (I think) this ought only to be thus underſtood, when a Church has not an *Abbot*, but is wont to be governed by a *Prior*: Which leads me next to ſpeak of *Priors*.

Priors are ſaid to be ſuch Perſons, as do in ſome Churches preſide over others of the ſame Churches; and the Churches which are given to them *in Titulum*, or by way of *Title*, are called *Priories*. Some of theſe *Priors* are *Clauſtral*, others are *Conventual**, and a third Sort are *Secular*. *Clauſtral Priors* are ſuch, as preſide over Monaſteries next to the Abbot or ſome other chief Governour in ſuch Religious Houſes; and are like to a Sub-Dean in a Cathedral Church, or a Sub-Warden in one of our Colleges; performing the Office, and executing the Power of Vicars to the ſaid Abbot within the Clauſtres of the ſaid Monaſtery †. Thoſe are call'd *Conventual Priors*, that have the chief ruling Power over a Monaſtery, and wherein no Abbot or other Perſon is of greater Dignity than they themſelves are ‖: And Priories of this kind cannot be obtain'd or purchaſed by other Perſons than thoſe that are expreſly of that Order which they profeſs; and according to Law, they are elected and choſen by their own Chapters, and do receive Inſtitution from them. And theſe *Priors* are ſo *perpetual*, that ſuch Men as are ſet over theſe Priories, cannot be remov'd from thence, unleſs they waſte the Eſtate, and dilapidate the Goods of the Monaſtery, or lead lewd and incontinent Lives *, as moſt of them do; or are, laſtly, tranſlated to ſome other Monaſtery. A *Conventual Priory*, is a Dignity in the Church, but a *Clauſtral Priory* is not †. Thoſe are term'd *ſecular Priors*, that have Priories, or (at leaſt)

*Clem. 1. 2. 2.

† X. 3. 35. 6.

‖ Clem. 3. 10. 1.

*X. 3. 35. 2.

† Gloſs. in cap. 2. Clem. 1. 2. *verb. Conventualem.*

leaſt) the Benefice of a Priory, which is uſually govern'd and adminiſtred by ſecular Clerks or Clergy-men: and tho' ſometimes the Priory be *Regular*, yet the Cure thereof ought to be perform'd and manag'd by *ſecular* Clerks*; becauſe it is contrary to the Intention of the Law, for the Cure of Souls to be granted to *Regulars* †. Therefore, the Perſon that is choſen and ſet over the ſame for the ſake of good Government, ſhall either be ſtiled a *Rector* or a *Perpetual Vicar*; the Priory remaining with ſome other Perſon, or elſe in the Hands of the Monaſtery or ſome Chapter ‖: and thus he, who allows or gives him a Portion, ſhall be the Prior.

* Clem. 3. 10. 33. ff. *cæterum.*

† X. 3. 37. 1.

‖ X. 3. 5. 30. 2.

In the *Romiſh* Church, all Perſons are ſaid to be *Regulars*, that do profeſs and follow a certain Rule of Life in *Latin* ſtiled *Regula*, and do likewiſe obſerve the three ſubſtantial and approv'd Vows of Religion, *viz. Poverty*, *Chaſtity* and *Obedience**; three glorious Points of Religion to advance the Power and Riches of the Clergy: for according to *Goffredus*, *Regulars* are ſuch Perſons as do oblige themſelves to live Regularly, *viz.* under ſome certain Rule of Life, as *Monks*, *Fryars*, *Canons*, *Regulars* properly ſo called, and the like; and all Religious *Regulars* do agree in Eſſentials, tho' they differ according to a greater or a leſſer Degree of Perfection in reſpect of their ſeveral Orders. For ſome *Regulars* may, according to their reſpective Rights, become Rectors, and preſide over Parochial Churches, ſince the ſame Laws are not obſerv'd in every Reſpect of a Religious Order. For *Monks* do in ſome reſpect agree with *Regulars*, as in the ſubſtantial Vows of Religion; and hence, under the Appellation of *Monks*, we may, in this reſpect, ſometimes include all *Regulars*: but in other reſpects, *Monks* and *Regulars* differ; for that *Regulars*, in reſpect of all other Matters (Vows excepted) are not ty'd up to ſo cloſe and ſtrict a Rule of Life as *Monks* are †. A *Regular* is (it ſeems) in the Place of a *Genus*; but a *Monk*, is as a *Species* to that *Genus*: And hence 'tis, that though all *Monks* are *Regulars*; yet, on the contrary, all *Regulars* are not *Monks*. Tho' *ſecular* Clerks do promiſe ſome certain Things; yet they cannot be properly called *Monks* or *Regulars*, becauſe they are not ſaid to follow or profeſs any certain Rule of Life, but rather a certain Method of living, tho' this Method be approv'd of by the Apoſtolick See. But to return to the Subject of *Abbots* and *Priors*, and their ſeveral Foundations and Endowments; which were certainly made in the Beginning for Religious Purpoſes, and were Places where Holy Men retired from the buſy Affairs of the World, and there ſpent their Time in Solitude and Devotion: tho' they have been long ſince made the common Receptacles of Lewdneſs, Atheiſm, and all manner of Wickedneſs; Nurſeries for raiſing Factions in the State, and Councils for advancing the Power of the Prieſthood in the Church. And, at firſt, ſuch was the wonderful Eſteem, that both the Prince and People had of the Piety of thoſe Men, that it procur'd them very large Privileges and Exemptions from the one, and immoderate Charity and Riches from the other. For tho' by the antient * common-Law of *England*, a Man could not alienate Lands, which came to him by Deſcent, without the Concurrence of his Heir; yet he was allow'd to give part of them to God; that is to ſay, in the Phraſe of the Clergy, to ſuch Perſons as were ſeparated and devoted to his Service, as Abbots, and their whole Convents were in thoſe dark times held to be: And beſides, it was a ſettled and cuſtomary thing in thoſe Days, for every Man in the Pariſh, or within ſuch a Diſtrict, to give to the Church a certain Meaſure of Wheat every Year on St. *Martin*'s Day; and this in our ancient Books is called *Church-Seed*, from whence came

* X. 3. 35. 6.

† X. 3. 35. 5.

* Glanvil, lib. 7. cap. 1. fol. 44.

came the Riſe of our *Seed-Cakes*. But as theſe Abbies increaſed in Riches, ſo the State became Poor thereby; for the Lands which theſe *Regulars* poſſeſſed, were in, *Mortuâ manu*, not to be alienated, and conſequently, could never come into Lay-Hands again. They could never revert or eſcheat to the Lord who gave them. And ſuch was the Blindneſs of that Age, that they were exempted from Knights-Service, and from all other Temporal Services uſed for the Defence of the Kingdom. And,

† Mag. Charta. cap. 36. It was for this Reaſon, that † Laws were afterwards made to prohibit Gifts to theſe *Religious* Houſes, and my Lord Ch. Juſt. *Coke* tells us, that ſeveral Lords at the Creation of the Seigniory had a Clauſe inſerted in the very Grant itſelf, that the Donor might give or ſell his Lands to whom he pleaſed, *Exceptis viris Religioſis & Judæis*: ſo that theſe *Religious* Men were put under the ſame Incapacity with the *Jews*, who were then Enemies to the *Chriſtian* Religion; and well they might, for they were degenerated from that Strictneſs and Severity of Life, for which their Predeceſſors were ſo much admired. And as if the Conſequence of large Riches and ample Endowments was not ſufficient to ſupport them in a luxurious Courſe of Life they were always contriving, by the help of the moſt cunning and learned Men in the Law, to get more; and to evade thoſe Laws which ſtood in their way, as I ſhall obſerve under the Title of *Mortmain*. But I only mention theſe Things, to ſhew that thoſe Orders of Men did not ſpend their Time altogether in Devotion, and in the Service of God; but in conſulting with the moſt skilful Lawyers how to evade thoſe Laws, which were made againſt their Temporal Intereſt and Grandeur; and by this means, they got the greateſt part of the Lands of *England* into their Poſſeſſion.

And now their Houſes, which were built *in Laudem & Honorem Dei*, were converted into Nurſeries of licentious People, who, by Cheats, Impoſtures, and other miraculous Whimſies, had drawn all ſorts of unthinking People thither in Pilgrimages and the like; from whom they got all their Wealth in this World, to ſecure a ſafe and quiet Paſſage for themſelves into the next. And thus this devouring Locuſt continued for many Ages here in *England*, till the Reign of King *Henry* VIII. who (it's probable) only intended at firſt to reform theſe Abuſes, and not totally to diſſolve the Houſes themſelves: but they rather choſe to rebel, than reform, as many of the Clergy have done ſince upon very wicked Principles; for about two Years before this King appointed any Viſitation of theſe *Regulars*, there were two Rebellions; one in *Lincolnſhire*, headed by a Churchman, but diſguiſed in the Habit of a Cobler, and directed by a Monk; the other in *Yorkſhire*, where one *Ask* was their Captain, and this was called, The *Pilgrimage of Grace*: for ſome Prieſts marched before the Rebels with Croſſes in their Hands, and Crucifixes in their Banners. But theſe Rebellions being ſuppreſs'd, that King did, about the 28th Year of his Reign, appoint Viſitors to inſpect all the Abbies, and to examine every thing which related either to their Converſation, or Superſtitions, and to report the ſame to the Lord Vice-gerent *Cromwell*.

But if the King did always deſign a Diſſolution of theſe Bodies of Men, it was now to be effected with leſs Difficulty; for ſome of the Abbots had been guilty of comforting and aſſiſting the Rebels, and others were convicted of great Diſorders by the Viſitors. And thus moſt of them perceiving their time of Diſſolution drawing near, they committed great waſte on their Eſtates; ſo that by theſe Motives they were induced to reſign and ſurrender their Houſes to the King, that they might

might have a better Title to Penſions during their Lives. And it was by theſe Reſignations, that the Houſes and Lands of the Abbots became veſted in that King, which were afterwards granted by him to the People; from whence they had been by Fraud and Superſtition acquired to the Church; and under theſe Grants they are enjoy'd to this Day. Indeed ſome Writers in the late Reign of King *James* the Second, and ſome bold Praters in the four or five laſt Years of Queen *Anne*'s Reign, gave the preſent Poſſeſſors a very large Aſſurance of their Titles; inſomuch, as that they would not be in any danger of loſing their Lands, if Popery ſhould have been eſtabliſh'd here; becauſe the Pope himſelf had in King *James*'s Reign granted a Diſpenſation in this Caſe with a *Non-Obſtante* to the *Canon-Law*. However, this was not much regarded in King *James*'s Reign, tho' High-Church came into it in the Queen's Time, for the ſake of more Power and Riches; and ſo they have done ſince his Majeſty's Acceſſion to the Crown: for all honeſt *Proteſtants* know, that the Plenitude of the Pope's Favour is ſo extenſive, that it may be a Queſtion, (where that prevails) whether it can be bound by any Acts of his Predeceſſors. 'Tis true, we were then told, that what was done by any former Pope, could not well be revoked at *that Time*, which is as much as to affirm, that it might be done when Opportunity ſerved. But the preſent Poſſeſſors have a better Title to thoſe Lands than the Pope's Diſpenſation can give them; for, as I have already mentioned, moſt of them were ſurrendred to the King by the Abbots and Convents themſelves; and theſe Surrenders were all confirm'd by Act of Parliament.

The Penſions of thoſe Abbots that ſurrender'd, were proportioned to their Crimes or Innocence; but the Monks had an Allowance not exceeding eight Pounds *per Ann.* during their Lives, or till ſuch time as they ſhould be provided with Livings, which they were certain to have upon every Vacancy; becauſe thoſe, who purchaſed the Abbey-Lands of the King, were to pay theſe Penſions to the Monks out of the Rents of the ſuppreſſed Monaſteries; and to eaſe themſelves of the Charge, the Purchaſers were very induſtrious to provide Livings for them. But this was a wrong Step to the Reformation; becauſe the greateſt part of the Clergy were (by this Means) ſuch as had been formerly ignorant Monks and Fryars: which Sett of Men were not work'd out till the Reign of Queen *Elizabeth*; and then thoſe of better Education were placed in the Churches. Indeed, it has been often inſinuated as a Reproach to that Reign, in which theſe Monaſteries were ſurrender'd; That it was a robbing of God, and that it was a covetous Deſire of their Riches, which made the King ſo intent upon the Reformation. But hereunto I anſwer, That tho' it muſt be admitted, that Churchmen ought to have ſuch a Subſiſtence as may ſecure them from ſecular Cares, and from that Contempt which is always incident to Poverty; and likewiſe have ſufficient for Charitable Uſes, and to ſupport Hoſpitality, (for by theſe means they engage the Affections of the People): yet this was not the Caſe of the ſecular Clergy in thoſe Times of Popery; for, by Appropriations and other Church Robberies, the labouring Clergy ſuffered much, and *Religious* Houſes rioted on that Wealth, which ſhould have maintain'd the ſecular Prieſthood. And, therefore, when it evidently appeared, that thoſe *Religious* Drones graſped after great Riches, upon no other View, but only to ſupport their Pride, Luxury, and Power over Mens Conſciences; when by pious Cheats they had fraudulently obtain'd from an ignorant and unthinking Laity the greateſt Part of their Poſſeſſions and Eſtates; and when thoſe Riches were ſeldom or never applied to any religious Purpoſes; then it became the Intereſt of the Nation in general, and of the Government itſelf,

to re-aſſume thoſe Lands, which had ſo long continued uſeleſs to the Support of the one, and the Defence of the other.

The Hiſtories of thoſe Times, as well as the Books of the *Canon-Law* itſelf, inform us, That the Abbots became Rich, in the Senſe and Underſtanding of Perſons truly Religious, by falſe Opinions and Notions of Purgatory impos'd on the People, by Maſſes, Reliques of Saints, and other Superſtitious Solemnities; and what is worſt of all, by the Spoil of the Church itſelf, as before hinted: for both the great and ſmall Tythes, which belong'd to the ſecular Clergy, (that is, to *Parſons*) were in many Places taken from them, and by the Pope's Authority given to, and veſted in the Monaſteries, under the Name of *Appropriations*; and the Abbots allowed thoſe who ſerved the Cure but ſmall Stipends, and where they were moſt liberal, it was only to permit the poor Vicar to have the ſmall Tythes. But 'tis natural to Mankind to be always in Extremes; for when theſe Abbies were diſſolv'd, and all the old Monks dead, or provided with Livings, ſo that their Penſions ceaſed: thoſe who purchaſed their Lands of the Crown, had them charged with no other Incumbrance but with that poor Stipend which the Abbot had given to thoſe who officiated at the Altar, and which, (as Biſhop *Burnet* obſerves in his Preface to the ſecond Volume of his Hiſtory of the Reformation) is not a competent Maintenance for a Clergyman now. For it would ſcarce ſupport a ſingle Man then, without the additional Helps of Fees for *Obits*, *Exequies*, Maſſes for poor Mens Souls, (for the Abbots themſelves had the Profits from thoſe that died Rich) and ſuch other Perquiſites: all which are now gone by the Reformation of Religion, and nothing left in the room of them. So that the Clergy in many Places have a very narrow Subſiſtence, which certainly makes them ſubject to Want, and (by Conſequence) to Contempt; and this, he tells us, was the only Miſchief which happened to the Church at the Reformation, that there was not a better Proviſion then made for the inferior Clergy. 'Tis true, this was not only a great, but a very unequal Change, for Men who lived in the greateſt Eaſe and Plenty, to ſubſiſt upon a Penſion of eight Pounds *per Ann.* for none of the Monks had more, and all of them could not be provided with Livings: for Men, who to diſtinguiſh themſelves from the reſt of the Eccleſiaſticks, were called *Regulars*, becauſe they did or ſhould (at leaſt) live under certain Rules of Government in their Houſes; I ſay, for theſe Men to be blended amongſt the Prophane Laity, and to ſpend the Remainder of their Days in a poor and neglected manner; for theſe Men who had the Honour to ſee the Heads of their Houſes *Mitred*, and exempt from the Biſhops Juriſdiction by particular Grants from Kings, as *Abingdon* was by King *Kenulph*, *Battle* by *William* the Firſt, *&c.* and not only ſo, but to exerciſe Epiſcopal Authority within their own Limits, and who were Lords of Parliament themſelves; and likewiſe to ſee the very ſame Perſons ſtript of all thoſe Privileges and Preferments, and to live many Years afterwards leſs regarded than the Porters of their Abbies before the Diſſolution, was thought a very unequal Change of Fortune.

Tho' there was no fixed Number of thoſe Abbots that were Lords of Parliament, yet there were always ſome: for in the 43d Year of King *Henry* the Third's Reign, we find there were 102 Abbots and Priors ſummon'd to Parliament; in the Reigns of King *Edward* the Firſt, and King *Edward* the Second, there were 50, and ſometimes 80 and more; to the end that the Number of *Regulars* might come nearer to the Number of *Seculars*. Not that they eſteem'd it any great Honour to be ſummoned by a Layman, tho' a King, for their Obedience was only due

due to the Pope: and, therefore, we have Inſtances, when they refus'd to attend the Parliament upon the King's Summons. But it has been a Queſtion, when they did ſit there, whether it was as a Part of the Eccleſiaſtical State, or as they held their Lands of the King *per Baroniam*. In Anſwer to which, 'tis ſaid, That under all the *Engliſh Saxon* Kings, they held their Lands in *Frank-Almoigne*; and then they ſat there in their ſpiritual Capacity. But *William* the Firſt, to keep them a little cloſer to his Service, alter'd that Tenure; and appointed, that they ſhould hold of him *per Baroniam*: And my Lord *Coke* tells us *, That of thoſe *Abbies*, which were of the King's Foundation, and which were held of him *per Baroniam*, the Abbots, by virtue of that Tenure, had a Right to be ſummon'd to Parliament, and were Lords of Parliament. And this is confirm'd by the Charter of Exemption † of the Abbot of St. *Auguſtin* in *Briſtol*: for the Writ ſets forth, That the Abbot complain'd, that he was ſummon'd to Parliament, *licet ipſe non tenet per Baroniam ſeu aliquo alio modo in Capite*; not that his Houſe was of any Royal Foundation, *per quod deveniendo ad Parliamentum de Jure ſummoneri debeat*. So where the Abbot of *Fairplace* in *Hampſhire* complain'd of the like Summons, when he held all his Lands in *purâ & perpetuâ Eleemoſyna, & non per Baroniam aut aliàs in Capite, per quod ad Parliamentum ſummoneri non debeat*; that is to ſay, in *pure* and *perpetual Frank-Almoigne* (*a*), and not *per Baroniam* or any other Tenure *in Capite*: and, therefore, he ought not to be ſummon'd to Parliament. And Mr. *Selden* is of Opinion, That where it appear'd, that the Abbot *held nothing from the King*, it was a ſufficient Reaſon why he ſhould not be thus ſummon'd. 'Tis true, ſeveral Abbots, who did not hold *per Baroniam*, were ſummon'd to Parliament upon extraordinary Occaſions, in ſeveral Reigns after the Conqueror; but this was not *de Jure*, it was only for their Advice and Aſſiſtance upon preſſing Occaſions and Circumſtances: But thoſe who held *per Baroniam*, were Lords of Parliament; and had a Right to be ſummon'd, and to ſit with the reſt of the Peers. Of theſe, ſome think, there were twenty ſix; my Lord *Coke* tells us, they were twenty ſeven in Number; and Biſhop *Burnet* mentions twenty eight of them at the Time of the Diſſolution; and they were called *Mitred* Abbots. See hereafter the *Appendix* to this Work, *Numb.* 1.

* 2 Inſt. 3.

† Prynn on 4. Inſt. 335.

But before I conclude this Title, it may not be improper to ſhew what Difference the Law made, in ſome particular Matters, relating to Abbots and other religious and ſecular Perſons, before the Diſſolution of Religious Houſes, and how the Papal *Canon-Law* ſtands at this Day with reſpect to them. The Property of the Goods and Eſtate of the Abby was in the Abbot during Life, but after his Death, it was then in the Houſe: and this was the Reaſon, that, at Common-Law, if ſuch Goods were taken away in the Abbot's Life-time, his Succeſſor * could not have an Action of Treſpaſs; for by the Taking, the Property was diveſted. But this was

* 9 H. 6. 25.

(*a*) Frank-Almoigne, *is the ſame which we in* Latin *call* Libera Eleemoſyna *or Free Alms in* Engliſh: *whence that Tenure is commonly known among our* Engliſh *Lawyers by the Name of a Tenure in* Aumone *or* Frank-Almoigne; *which, according to* Britton, *is a Tenure by divine Service* †. *For it is a certain Tenure or Title of Lands at the Common-Law: as when Lands or Tenements are freely given in the way of Alms to ſome Church or Religious Houſe on this Condition or Conſideration,* viz. *That Divine Service ſhall be offer'd, and Prayers* pro bono Animæ Donantis, *or the like. So that according to the old Popiſh Law here in* England, *this* Frank-Almoigne *was no other than a Tenure or Title of Lands or Tenements beſtow'd on God, by giving them to ſuch as devoted themſelves to the Service of God, for pure and perpetual Alms: whence the* Feoffors *or* Donors *could not demand any terreſtrial Service from the* Feoffees, *ſo long as the ſaid Lands or Tenements remain'd in their Hands* ||. *With this agrees the* Grand Cuſtomary of Normandy, cap. 23. *and whereof* Bracton *writes at large. But* Britton *makes another Kind of this Land which is given in Alms, but not in free Alms*; becauſe the Tenants in this are oblig'd to certain Services to the Feoffor *. *See* Fitz-Herb. Nat. Brev. and the new Book of Entries, verb. *Frank-Almoigne.*

† Britt. fol. 164.

|| Britt. cap. 66. n. 5.

* Britt. *ubi ſupr.*

remedy'd

remedy'd by the Statute of *Marlebridge*: by which it was provided, That the Succeſſor might declare, *Quare Bona & Catalla Domûs & Eccleſiæ Tempore R. Prædeceſſoris ſui cepit*, &c. which the Succeſſor of the Biſhop, Dean, or *Secular* Eccleſiaſtick cannot; becauſe there is an Alteration made in the Church by the Death of thoſe Perſons, but there was none made by the Death of an Abbot, for the Houſe continu'd ſtill the ſame: and, therefore, the Abbot might have an *Aſſize* for a Diſſeiſſin, or an Action of Waſte, for any Waſte done in the Life-time of his Predeceſſor; which a ſucceeding Biſhop or Dean cannot now have, for the Reaſon above-mention'd. But the Abbot was only capable of taking a Feoffment: for it could not be made to him and his Convent; ſince they were reckon'd dead Perſons in Law.

The *Abbot*, or the chief Head of *Abbies*, being, together with the Monks of the Houſe, a *Convent*, made a Corporation; and was not, by the *Common-Law*, further charg'd with his Predeceſſor's Acts, than for ſuch Things as were for the Uſe of the Houſe, or ſuch Acts as were done under the Common Seal thereof*. And though a Creditor had a Specialty againſt a Monk; yet not the Abbot, but the Monks Executors were chargeable for his Debt contracted before his Entry into ſuch *Religious* Order; unleſs it were for ſome ſuch Thing as came to the Uſe of the Houſe†. Of theſe Abbots ſome were *Elective*, and others *Preſentative*: and under this Title were comprehended other ſpiritual Corporations, as a *Prior* and his *Convent*, *Fryars*, *Canons*, and ſuch like. And as there were Lord-Abbots as aforeſaid; ſo likewiſe there were Lord-Priors, who had exempt Juriſdictions, and were Lords of Parliament‖. 'Tis to be ſuppos'd, that the Abbot of St. *Auſtin's* in *Canterbury*, was the moſt antient of any in this Kingdom, as being founded by King *Ethelbert**. And next to him, in point of Antiquity, was the Abbot of *Weſtminſter*, founded by *Sebert* King of the *Saxons*†. Authors differ touching their Number in this Realm, as I have already hinted; but a very modern Writer, Mr. *Blount*, in his *Nomo-Lexicon*, gives us a Catalogue of no leſs than thirty three Abbots and Priors: whereof ſome were Priors-Aliens born in *France*, and were Governors of Religious Houſes erected for Foreigners here in *England*, with a View of keeping our Kings in ſubjection to foreign Princes. But theſe being ſuppreſs'd by King *Henry* the Fifth, after his Conqueſts in *France*, their Revenues were afterwards given by King *Henry* the Sixth, to other Monaſteries and Houſes of Learning; eſpecially for the Erecting and Endowing of *King's* College in *Cambridge*, and *Eaton* College near *Windſor*, according to *Stow*'s Annals‖, and other Authors.

In latter Ages, thro' the Favour of Princes, and rather thro' their Fear of the Power of the Clergy, than any Reſpect to the Church itſelf; Abbots have been reputed as Peers and Secular Lords, to whom they granted the Revenues of *Abbacies* in proportion to ſuch Dignity, for the Support thereof: and thus many of the Peers of *France* were antiently and frequently *Abbots*, as appears by *Paradine*, who wrote the Annals of *Burgundy* near 700 Years ago; and then affirm'd*, That he had ſeen very antient Records, wherein the Peers of *France* uſed theſe Titles and Diſtinctions, *viz.* Duke and Abbot, Earl and Abbot, *&c.* The venerable *Bede* ſpeaks of an Iſland in *Ireland*, which ever had an Abbot veſted with ſuch Power and Authority, that every Province, yea, and the Biſhops themſelves, were under his Government, and ſubject to his Juriſdiction†. *Mitred* Abbots among us, were thoſe that were exempt from the Dioceſan's Juriſdiction, as having within their own Precincts Epiſcopal Authority in themſelves; and being Lords in Parliament, were called

* Terms of Law. verb. *Abbot*.

† Ibid. ut ſupra.

‖ Coke de Jur. Eccle. fol. 28. a.

* A. D. 602.

† A. D. 604.

‖ Pag. 582.

* Lib. 2. ſub A. D. 1103.

† Lib. 3. de Geſtis, cap. 3. Spelm. de Prim. Eccleſ. Anglo-Sax. A. D. 605.

called *Abbots* Sovereign *: but thoſe, that were not *mitred*, were ſubject to the Dioceſan in all ſpiritual Government †. The Emperor *Juſtinian* has, in the firſt Book of his *Code*, and in the *Novels*, expreſly ordain'd and preſcrib'd the Manner and Form of the Election, and Confirmation of an Abbot, and what Perſons they ought to be, and how they ought to be qualify'd that would be accounted worthy of that Eccleſiaſtical Dignity ||, tho' theſe Qualifications are little regarded. What Conſecration is to a Biſhop, that Benediction is to an Abbot; but in a different way: For a Biſhop is not properly ſuch till Conſecration; but an Abbot being elected and confirm'd, is properly ſuch before Benediction*. Before the Reign of King *John* here in *England*, the King, and other Founders and Patrons of Abbies and Priories with us, were wont to preſent *Abbots* and *Priors* thereunto: but by King *John* there was a free Election granted unto them ||. An *Abbot* might be preſented to a Church; for he was capable of an Appropriation, whereby he was perpetual Parſon *Imparſonee*; and had the Cure of Souls committed to him *: But Monks, tho' they might, by the antient Canons of the Church, be ordain'd Prieſts for the Government and Cure of Pariſh-Churches, upon which they might exerciſe the Office of Preaching in the Church, and become Miniſters therein †; yet now they cannot be admitted to be Rectors of ſuch Churches not belonging to them *pleno Jure*, but a Chaplain ought to be appointed by the Biſhop, on the Advice and Conſent of the Monks, for the Government of ſuch Churches, where Monks do dwell and inhabit. So that the Ordination and Appointment of ſuch Chaplain, ſhall ſolely depend upon the Biſhop's good Will and Pleaſure, as his Depoſition and Removal from thence ſhall likewiſe ||.

* 9 Rich. 2. chap. 4.
† 18 Q. 2. 17, 18, 28, 29, 30, 31.
|| C. 1. 3, 4, & 47. Nov. 5. cap. 9. Nov. 123. cap. 34.
* X. 1. 10. 1. Clem. 1. 10. 1. 2.
|| 11 H. 4. 68. b.
* 34 H. 6. 15.
† X. 3. 35. 5.
|| X 3. 37. 1.

The whole Power of the Monaſtery is lodged in the Hands and Poſſeſſion of the Abbot, who may demand and recover his Monk, that is commorant and reſiding in another Monaſtery: for a Monk ought not to have a Place in divers Monaſteries *; nor ought a Monk to deſert and forſake his Houſe without the leave of his Abbot, and go to another Monaſtery †. An Abbot has a coercive Power over his Monks, and ſo has a Prior too for their Diſobedience ||, and are not obliged to require the Advice and Conſent of their Chapter herein; and if they are incorrigible, they ought to be expell'd the Fraternity. But an *Abbot* cannot, without the Knowlege and Advice of his Convent, ſubject an exempt Monaſtery to any Perſon, from whoſe Juriſdiction ſuch Monaſtery was exempted: nor can he, with the Conſent of his Chapter or Convent, unite a Church which is ſubject to himſelf *pleno Jure*, becauſe Union being a *Species* of Alienation, the Biſhop's Authority, and all other due Solemnities, are neceſſary hereunto; ſince, according to *Calderinus*, ſuch an Union gives a Title *ad Præſcribendum*, unto a Preſcription. Nor can an *Abbot* ſubject his Monaſtery to the Ordinary, it being not ſubject, without the leave of the Ordinary; becauſe this is a *Species* of Alienation. And as in alienating the Goods and Eſtate of the Church, according to the *Canon-Law*, the Biſhop's Conſent is neceſſary; ſo likewiſe is the Abbot's Conſent required in alienating the Eſtate and Goods of a Church, which is ſubject to his Juriſdiction.

* X. 3. 36. 9.
† X. 3. 31. 7.
|| X. 1. 33. 10.

An *Abbot* ought not to intermeddle in the Execution of ſuch things as are matters of Epiſcopal Dignity, as the Cognizance of Matrimonial Cauſes; the Enjoining of publick Penance; the Granting of Letters of Indulgence and the like; unleſs he has a ſpecial Right and Privilege granted him to meddle herein *: nor ought an Abbot, that is in immediate Subjection to the Pope, to ſurrender or reſign his *Abbacy* without his leave †: nor can he be admitted into another Abbacy, nor enter into any other

* X. 5. 31. 12.
† X. 1. 9. 15.

* X. 1. 4. 7. other Religious Order without the Pope's Licence or Diſpenſation *; nor
† 18 Q. 2. 8. can an *Abbot* do this, that is ſubject to a Biſhop †. *Ciſtertian* Abbots ought to yield all due Reverence and Obedience to their Biſhop according to the Form in the *Canon-Law*, that is to ſay, according to the Rule of
‖ X. 5. 3. 43. the *Benedictine* Order ‖: but an *Abbot* is not oblig'd to ſuch Obedience to his Biſhop, contrary to the Liberty and Privilege granted to his *Reli-*
* X. 5. 31. 5. *gious* Order *. An *Abbot* is not put in by the Biſhop of the Dioceſs, tho' generally ſpeaking, he is under the Juriſdiction and Power of the Biſhop in point of Correction for Exceſſes committed; but he is elected by a Congregation of Monks belonging to the *Abby*, over which he preſides. And a Hermit may be choſen to be an *Abbot*, provided he be qualify'd in reſpect of Morals, and other Acts relating to a Monaſtick Diſcipline, as every *Abbot* ought to be; that is to ſay, he ought to be cautious in his Government, chaſte, humble, diſcreet, ſober in his Converſation, and
† 18. Q. 23. 8, 9, 10, & 15. merciful in his Dealings; which ſeldom happens in theſe lordly Men †. And thus I have done with *Abbots* and *Priors* for the preſent, till I come to ſpeak of *Monks* under the Title of *Monaſteries* hereafter, in the Sequel of this Work.

Of Abjuration.

ABjuration, is where a Man had committed Felony, and, for the Safety of his Life, did fly to ſome Church or Church-yard; and there, before the Coroner, within forty Days, did confeſs the Fact; and take an Oath to be baniſh'd perpetually from his Native Country, but not to a Country of Infidels. It was founded upon the Privilege of Sanctuary; for whoever was not capable of this Sanctuary, could not have the Benefit of Abjuration: and, therefore, he that committed Sacrilege, could not Abjure; becauſe he could not take the Privilege of
‖ Edw. 2. cor. 420. Sanctuary ‖. For the Church-men in thoſe Days had ſo little regard to the Properties of Men, that if Goods were ſtolen, *& Reus ad Eccleſiam confugiſſet, vitam habeat.* But tho' this was the Doctrine of thoſe Times, when Abjuration obtain'd in *England*, yet the Clergy were very careful of their own Goods: for if a Man had committed Sacrilege (and every Violence offered either to their Perſons or Goods, was deem'd ſuch) he could not have any Privilege of Sanctuary; and, therefore, cou'd not abjure, but was hang'd.

But this Abjuration, founded upon the Privilege of Sanctuary, is now wholly abrogated and taken away by a Statute made in the firſt Year of
* 1 Jac. 1. cap. 25. ſſ. 34. King *James* the Firſt *; whereby it was enacted, That no Sanctuary, or Privilege of Sanctuary, ſhould be admitted or allow'd in any Caſe. But here it is to be noted, that this kind of Abjuration has no Relation to that of *Recuſants* by Force of the Statute of the 35th of Queen *Elizabeth*, cap. 1. for not coming to Church within three Months after Conviction, which Act was lately in Force till the Penalty was likewiſe
† 1 W. & M. cap. 1. taken off by a late Act of Parliament in King *William*'s Reign †, upon taking the new Oaths, and ſubſcribing the Declaration therein mention'd; becauſe ſuch Abjuration had no Dependency upon any Sanctuary. But to the other Abjuration in relation to Felony, Sacrilege excepted (no Abjuration or Sanctuary being allow'd in Caſes of Treaſon or Petit-Treaſon) the Law was ſo favourable for the Preſervation of Sanctuary in the Church or Church-yard, that if a Priſoner for Felony had, before his Attainder or Conviction,

viction, eſcaped and taken Sanctuary ; and, being purſu'd by his Keepers or others, was brought back again to the Priſon, he might upon his Arraignment have pleaded the ſame ; and ſhould have been reſtor'd again to the Sanctuary of the Church, or Church yard. See *the Book of Entries**, and *Atwel*'s Caſe. *Coke*'s *Inſt.* Part 3. Cap. 101. And here it is to be further obſerv'd ; That an Abjuration, which is a Deportation for ever into a foreign Land, was antiently, with us, a civil Death : and, therefore, the Wife might then bring an Action, or might be impleaded during the natural Life of her Husband ; and in the 8th of *Edward* II. an Abjuration is a Divorce between Husband and Wife †.

* 532. b. Sanc. 2. Hil. 43 E. 3. Rot. 115.

† Coke on Lit. fol. 133. a.

But there are ſome other Abjurations ſtill in Force among us here in *England* ; and thoſe which relate to Clergymen : as, by the Statute of the 25th of King *Charles* II. all Perſons that are admitted into any Office, *Civil* or *Military*, muſt take the Teſt ; which is an Abjuration of ſome Doctrines of the Church of *Rome*. But Eccleſiaſtical Offices are diſtinguiſh'd from the Civil ; and as ſuch, cannot properly be call'd *Military* : and, therefore, Parſons and Vicars are not within that Act ; and, by conſequence, not bound to take that Oath. But the Caſe is not the ſame with Biſhops and dignify'd Clergymen : for they are within that Act, becauſe they have a civil Juriſdiction and Authority annex'd to their Offices, by keeping Temporal Courts, by licenſing Phyſicians, and Probates of Wills. There is likewiſe another Oath of Abjuration, which Laymen and Clergymen are both oblig'd to take ; and that is, to abjure the Pretender, commonly call'd, amongſt *Jacobites*, by the Title and Name of King *James* the Third ; and this is to be done within three Months after they are inſtituted or inducted to any Eccleſiaſtical Benefice, or promoted to any Dignity in the Church : and this may be done either in the Courts at *Weſtminſter*, or elſe at the Quarter Seſſions, where they reſide.

Of Abſence and Preſence.

A Perſon is ſaid to be abſent or preſent, according to the common way of Speech, who is abſent from the uſual Place of his Dwelling ; and ſometimes he is ſaid to be abſent, though he has a Dwelling in the Place : for, according to *Caſtrenſis* ||, Abſence is ſometimes ſaid to be in reſpect of a Man's Perſon, and ſometimes in reſpect of his Dwelling. And thus Perſons are ſaid to be abſent from a Corporation, who are in the City or Corporation, and who do not live in the Place, where they ought to give their Attendance and Service* : and he is ſaid to be abſent, who is in another Territory or Juriſdiction, according to *Bartolus* † and *Baldus* ‖ : and ſo likewiſe is that Perſon ſaid to be abſent, who is abſent with his Family, though he does ſometimes in his own Perſon return to the City ; becauſe as he is not ſaid to be reſident in a Place, who comes thither with a Purpoſe of retiring immediately from thence, ſo alſo he is ſaid to be abſent, who is abſent in ſuch a Caſe with his Family*. But a Perſon, that has left his Family and Children in the City or any other Place, is not ſaid to be abſent from thence in reſpect of his Dwelling. As a Perſon is ſaid to be abſent from Court, when he has been cited thereunto ; ſo a Perſon

|| Conſ. 94. lib. 1.

* C. 10. 63. 6.

† In l. 3. ff. l. d. 45. 2.

‖ In L. 33. l. 46. 1.

* Ang. 270.

Perſon may be ſaid to be abſent, who is in a Place, but cannot eaſily be convened. A Perſon that is out of the Kingdom, or not in his own proper Dioceſs or Province, is ſaid to be abſent: and ſo likewiſe is a Perſon, that cannot be found in his own Houſe upon a Summons; for he that abſconds and conceals himſelf from the Beadle or Apparitor, ſo that he cannot be ſummon'd, may be ſaid to be abſent, tho' preſent in ſome reſpects.

Now Abſence is of a fourfold Kind or Species. The firſt is called a *neceſſary* Abſence, as in baniſh'd Perſons; and this is *entirely neceſſary*. A ſecond Kind of Abſence is ſaid to be *neceſſary* and *voluntary*; as upon the Account of the State or Common-wealth †, or in the Service of the Church, and the like, according to the *Canon-Law*. The third Kind is what the *Civilians* call a *probable* Abſence, as that of Students on the Score of Study. And the fourth, is an Abſence *entirely voluntary*; as on the Account of Buying and Selling, Trade, Merchandize, and the like ||. And ſome add a fifth Kind of Abſence, which is committed *cum dolo & culpâ*, by a Man's Non-appearance on a Citation; as in a contumacious Perſon, who, in hatred to his Contumacy, is by the Law, in ſome reſpects, reputed as a Perſon preſent *. A *neceſſary* Abſence is always prejudicial to baniſh'd or outlaw'd Perſons, and never helps them; becauſe a baniſh'd Perſon, that is abſent out of Neceſſity, according to *Romanus* † and others, retains all Things onerous to himſelf, as a Puniſhment for his Crime: and, therefore, in Matters of Damage, he is accounted as a Perſon preſent to diſcharge and pay Incumbrances, and other Duties ||; but in other Matters of Damage he is deemed as a Pilgrim and an abſent Perſon, according to *Alexander* *, in Hatred and Deteſtation of him. *Neceſſary* and *voluntary* Abſence, which is ſaid to be on the Score of the State or Common-wealth, ought not to prejudice the abſent Perſon, or any other by his Means, but in all favourable Caſes he ought to be reckon'd as a Perſon preſent: And, according to the *Canon-Law*, he is ſaid to be abſent on a neceſſary Account, that is, abſent on the Score of Religion, or (as *Caſtrenſis* † words it) in Favour of Religion. Abſence *entirely voluntary* is ſometimes prejudicial, and induces a Puniſhment: for thus a Scholar, that is abſent from the Univerſity for five Years together, is ſtruck or raſed out of the *Matriculation* Book; and upon his coming *de novo* to the Univerſity, ought to be again matriculated ||: But this is not practis'd with us here in *England*. And a Perſon who goes out of his own Country, in order to travel abroad after he has contracted a Dwelling, or gain'd a Settlement in ſuch a Place, is preſum'd to have left his Dwelling-Place of Settlement in his own Country, according to the *Civil-Law* *, if, on his departure from thence, he is abſent for five Years together; and ſo he is ſaid to have left ſuch Place of Settlement in a foreign Country upon his return home again. Sometimes Abſence is an Excuſe to a Perſon in ſuch a manner, that a Perſon *voluntarily* abſent, is ſaid to have a juſt Plea of Ignorance: And, therefore, in Matters of Damage, he is excuſed, according to *Oldradus* †.

† D. 4. 6. 35.

|| Felin. in cap. 10. X. 1. 29.

* Gloſs. in l. 13. C. 3. 1.

† Conſ. 74. n. 3. 5.

|| Bald. conſ. 54. lib. 5.

* Conſ. 75. n. 10. lib. 1.

† In l. 8. D. 3. 3.

|| Alex. conſ. 54. n. 5. l. 4.

* Alex. conſ. ut ſupra.

† Conſ. 3. 313. n. 7.

According to the *Canon-Law*, abſent Perſons ought to be ſummon'd in four particular Caſes; *viz.* *Firſt*, in Elections. *Secondly*, in collating to Prebends and the like, when ſuch Collation belongs to the Chapter. *Thirdly*, in the Admiſſion of Canons. And *Fourthly*, in all Ceſſations from divine Service. But in the three firſt Caſes, that is not null and void which is done without citing theſe Perſons; but it may be appeal'd, and an Action likewiſe lies for the Contempt: But, in the fourth Caſe, when a Law or Canon is made againſt ſuch Perſons as refrain or keep from divine Service, all Perſons ought to be cited; otherwiſe, according to

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Oldradus ||, ſuch Abſence makes it a Nullity. For in thoſe Things which are done out of Neceſſity, as Elections and the like, a Nullity does not ariſe thro' want of citing the abſent Perſons, becauſe they may appeal and proſecute the Contempt: But in ſuch Matters as are done out of Will and Choice, and wherein an Action lies for thoſe Things which concern every one, a Nullity ariſes from not citing the abſent Perſons*, as aforeſaid, becauſe abſent Perſons are not of Neceſſity to be ſummon'd but in the foregoing Caſes; and, eſpecially, if two Parts in three of the Canons or Chapter are preſent: but if theſe two Parts in three of the Canons or Chapter are not preſent, then, according to *Calderinus* †, the abſent Perſons ought to be cited.

|| Conſ. 259. n. 8.

* D. conſ. n. 9.

† Conſ. 3. *an duæ Partes.*

Abſence is always preſum'd to be Malicious and Blameable, when a Man that is obliged to perform or do a Thing, does abſent himſelf thereupon. Thus when a Perſon is obliged to pay a Debt or Legacy in ſome certain Place and Time, if he then abſents himſelf, he ſeems to be maliciouſly or fraudulently abſent; becauſe he is obliged to be preſent to pay the ſaid Debt or Legacy, and, according to the *Civil-Law*, ſuch a Perſon abſent, may be proceeded againſt even to a Sequeſtration. A Clergyman is obliged to reſide at his Church, and a Husband to live with his Wife: and, therefore, if either of theſe Perſons abſent themſelves, their Abſence is preſum'd to be *Blameable* and *Malicious*; and if they are abſent without a juſt Cauſe, they may be proceeded againſt by a Citation made *ad Domum*. But this ought to be only in a particular Caſe, as when a Wife impleads or ſues her Husband upon the Account of his Abſence, or to render her due Benevolence; or the Church impleads a Non-Reſident Clerk. But 'tis otherwiſe, if another Perſon will bring either a *Real* or *Perſonal* Action againſt them, or will proceed againſt them by way of Accuſation or Inquiſition: for then a Citation made *ad Domum*, is not ſufficient in a Proceſs, where the Party may be greatly prejudiced thereby, if it does not otherwiſe appear, that his Abſence was either *Blameable* or *Malicious*. Abſence is alſo ſaid to be *Blameable* and *Malicious*, when a Man goes away and leaves his Juriſdiction on the Receipt of a Citation, with a Purpoſe of avoiding Juſtice, and ſuch a Perſon ſhall be puniſh'd for his Contumacy; and in ſome Caſes, according to the *Canon-Law*, it may be proceeded even to a definitive Sentence. For though an abſent Perſon cannot be puniſh'd according to the *Civil-Law*, unleſs he evidently flies from Juſtice: yet 'tis otherwiſe by the *Canon-Law*; becauſe, according to *Oldradus* ||, 'tis well enough, if there be a ſufficient *Liquet* of the Cauſe, and Suit has been conteſted thereupon. For a Biſhop may, in order to extirpate Vice out of his Dioceſs, and when the Proceſs is *de periculo Animæ*, proceed againſt an abſent Perſon according to that Law: and ſo he may do in every Caſe relating to Benefices; and in a Cauſe that is ſummary of its own Nature, wherein Conteſtation of Suit is not neceſſary.

|| Conſ. 65.

Of Abſolution.

THE Word *Abſolution*, is a Term made uſe of both in the *Civil* and *Canon-Law*, and likewiſe by Divines, tho' to different Ends and Purpoſes in each of theſe Laws: for in the *Civil-Law*, it not only im-

ports a full and entire Acquittal of a Perſon by ſome final Sentence of Law, upon hearing the Merits of a Cauſe, and alſo a temporary Diſcharge of his farther Attendance on the Court, upon a Meſne Proceſs, through a failure or defect of Pleading, as it does likewiſe in the *Canon-Law*; but it has alſo many other Significations, as the Reader may meet with in the Books of the *Civil-Law*. But, in the *Canon-Law*, and among Divines, it is not only uſed to denote an Acquittal or Diſcharge of a Man, as aforeſaid; but it likewiſe ſignifies a Relaxation of him from the Obligation of ſome Sentence pronounced either in a Court of Law, or elſe in *Foro Pœnitentiali*. And thus there is in this Law one kind of Abſolution, which is term'd *Judicial*; and another, which is ſtiled a *Declaratory* or *Extra-judicial* Abſolution.

A *Judicial* Abſolution is that, which reſpects the Concern and Advantage of a Perſon, that has been already condemn'd in a Court of Law; and it commonly ariſes from an Excommunication pronounced in ſuch Court, which in the like manner, requires an Abſolution. A *Declaratory* or *Extra-judicial* Abſolution is that, which is conferr'd in *Foro Pœnitentiali*, and does not reſpect the Concern or Advantage of a third Perſon that has been already condemn'd in a Court of Law*. And as every *Judicial* Abſolution is not valid, tho' it be in a Court of Judicature, if it be made by an incompetent Judge: ſo 'tis the ſame thing of a *Penitential* or *Extra-judicial* Abſolution, according to the *Papiſts*, if it be made by a Perſon that has not Authority or Juriſdiction to adminiſter the ſame; nor is a Cuſtom contrary hereunto valid in Law. I ſhall, under this Title, firſt treat of a *Judicial*; and then of an *Extra-judicial* Abſolution. In reſpect of the firſt, it is a known Rule in Law, That he may abſolve a Perſon from a Sentence, who may condemn him thereby; becauſe, in Matters of a Criminal Nature, the Power of Binding and Looſing is the ſame †: and, therefore, in this Caſe, the *Negative* as well as the *Affirmative* Argument is good and valid, *viz.* that he, who cannot condemn a Man, cannot, generally ſpeaking, abſolve him from a Sentence ||; becauſe, according to the *Canon-Law*, he, who cannot bind a Man, cannot abſolve or looſe him, tho' the Perſon being of an exempt Juriſdiction, ſhould ſubject himſelf to the Power of him, who would abſolve him: provided the Perſon, who would abſolve him, be entirely a foreign and incompetent Judge: but it is otherwiſe if he be not a foreign and incompetent Judge. But yet this Rule (notwithſtanding the Premiſes) admits of a Limitation in Law. For it only proceeds and takes place, when a Perſon cannot of *common Right* condemn or bind another by his Sentence; for then (I ſay) he cannot abſolve him. But it is otherwiſe by a Specialty of Law, in virtue of ſome Privilege or particular Cuſtom; becauſe, tho' Biſhops cannot bind by an Excommunication ſuch Perſons as are exempt from their Juriſdiction, yet they may by Specialty of Law abſolve them upon their Requeſt in ſuch Caſes, wherein they might of *common Right*, and by the general Law of the Church abſolve other Subjects*. And thus we read, that the *Prior* of an Hoſpital may abſolve his Prelate or Governor, whom yet he cannot bind †.

Secondly, It is alſo a Rule in Law, That a Biſhop or Prelate ought to be more prone and ready to Abſolution, than to Excommunication and the like ||; which they very ſeldom are in *Popiſh* Countries, where the Power of the Clergy runs higher than it does here in *England*, and where Excommunication is more formidable to the poor Laity than among us: but a Biſhop or Prelate that is under an Excommunication himſelf, can neither bind nor looſe in the Phraſe of the Church*. An Archbiſhop may, in virtue of an Appeal, abſolve a Perſon from a Sentence

* vi. 5. 10. 2.

† Pœn. 1. Diſt. 5. X. 1. 33. 16.

|| D. 50. 17. D. 42. 1. 3.

* Fed. de ſen. conſ. 14. n. 4.

† X. 5. 39. 50.

|| 26 Q. 7. 12.

* 24 Q. 1. 1.

tence of Excommunication or Suſpenſion, that has been excommunicated or ſuſpended by a Biſhop †; becauſe an Archbiſhop, as ſuperior to a Biſhop, has the cognizance of the Cauſe by an Appeal after him But a Biſhop may abſolve Perſons from any Excommunication inflicted on them by Law, unleſs the Caſe and Matter thereof be reſerv'd to the Pope alone: but as the Papal Power does not prevail in *England*, many of thoſe Caſes, which were reſerv'd to the Pope by the *Papal* Law, are now given to the Archbiſhop, by an Act of Parliament in *Henry* the Eighth's Time *. And, in the Vacancy of an Epiſcopal See, the Chapter, or him to whom Epiſcopal Juriſdiction is known to belong for that Time, may abſolve all thoſe Perſons from a Sentence of Excommunication (whether it be a Sentence of Law or Man) which the Biſhop might have abſolv'd, in Caſe he had been alive ‖. By the Papal *Canon-Law*, a Perſon that dies under a Sentence of Excommunication, ought not to be abſolv'd from thence after his Death, if he did not repent in his Life-time: but in *Proteſtant* Countries, Abſolution after Death is not practis'd, as being an idle and vain Thing.

† 2 Q. 1. 11.

* 25 H. 8. chap. 21.

‖ vi. 1. 17. cap. un.

Thirdly, As to the Bond of an Eccleſiaſtical Cenſure, (which was only at firſt invented as a Medicine for Sin and Diſobedience to the Laws of the Church, and not as a mortal Puniſhment,) as it ought to be publickly notify'd to the World; ſo in the like manner ought the Benefit of Abſolution, which is conferr'd on a Perſon under this heavy Bond, to be equally known unto all Men, leſt that a Perſon who ought not to be avoided after he is looſed from this Bond of Excommunication, ſhould be ſhunn'd by ſome Men as a Contumely or Scandal to himſelf. And, therefore, whenever it ſhall happen, that any one is releas'd or abſolv'd from any Sentence of Excommunication, Interdict, or Suſpenſion, it is provided by a *Legatine* Conſtitution *, that ſome one ſhall publiſh ſuch Abſolution at all proper Times, and in all convenient Places, *viz.* Such Perſon was publickly denounc'd as an excommunicated Perſon and the like. But as Excommunication is not greatly regarded here in *England* as now fulminated, ſo this Conſtitution is out of uſe among us in a great meaſure, Perſons excommunicated being frequently abſolv'd in the private Houſe of the Judge, and ſometimes in open Court. And thus I have done with a Judicial Abſolution of Criminals and Offenders, according to the Laws of Holy Church.

* Othobon. Tit. 28.

And, therefore, I come in the next Place, to conſider what we call an *Extra-judicial* or a *Declaratory* Abſolution. For 'tis certain, that our Saviour left a Power in his Church to abſolve Men from their Sins; but this was not an abſolute and unconditional Power veſted in any of his Miniſters, but it was founded upon Repentance, and on the Penitent's Belief in him alone. And theſe are the Conditions of Abſolution, which is not a Pardon as proceeding from the Lips of the Prieſt: for what is done by him, is only Declaratory of a Pardon from God, to him who truly repents and believes; and where God does not abſolve, the Prieſt cannot. Therefore, 'tis a ſenſeleſs Inſinuation, which ſome Men make againſt the Clergy in a *Proteſtant* Country, as if they were ſo vain and fooliſh, as to think they had Power in themſelves to abſolve Men from their Sins, when they have no manner of Power in ſuch a Caſe, but what proceeds from Faith and Repentance.

'Tis true, the Words, by which this is done, are Words of Authority, *viz. I abſolve thee, &c.* but this Form of Abſolution in the *Indicative* Way, and in the Firſt Perſon, is not of more than 500 Years ſtanding, as Biſhop *Fell* has very juſtly obſerv'd in his Notes on St. *Cyprian*'s Works: And this is directly prov'd in the ſecond † and third ‖ Chapters of the *Pe-*

† Sect. 3.
‖ Sect. 4.

Penitential Diſcipline, Part the firſt. The ordinary Method of abſolving, during the firſt 1000 Years, and upwards, after Chriſt, was, for the Biſhop and Church to intercede with God in Prayer for the Penitent's Pardon, after he had gone through the courſe aſſign'd him for *Penitential* Mortifications. And becauſe leſt the natural Import of ſuch a poſitive Sentence, introduc'd, according to the new Method, under thoſe Authoritative Words, ſhould lead Men into an Opinion, That the Clergy aſſumed a Power of pardoning Sins; it was therefore always temper'd with ſome ſofter Expreſſions, as, *I abſolve thee*, ſo *far as it is granted to me*, and the like. Though if Abſolution be conſider'd as a *Judicial* Act, reſtoring a Man only to the Peace of the Church, and ſuppoſing him already pardon'd by God, the *Indicative* or *Authoritative* Way may then (perhaps) be thought not improper. And *Tertullian* (as Biſhop *Fell* has remark'd) ſeems to have alluded to ſomewhat like it, where he repreſents Pope *Zepherinus*, ſaying, *I remit the Sins of Adultery and Fornication to thoſe, who have done Penance for them.* Tho', by the way, this ſhould rather be conſider'd as *Tertullian*'s Improvement of *Zepherinus*'s Management, than as a Conſequence drawn by him, to ridicule a Practice, which he did not like in the Church, than as a ſet Form of Words uſed by *Zepherinus* upon that Occaſion. Biſhop *Fell* likewiſe takes further Notice of St. *Paul*'s Manner of releaſing the Inceſtuous *Corinthian* from his Eccleſiaſtical Bond, that it ſeem'd to proceed in the *Authoritative* Way, *viz. To whom you forgive any Thing, I forgive alſo.* But then, with Submiſſion, it does not from hence appear, that this was the very Form wherein the Apoſtle abſolv'd him, ſince the Words next following ſhew, that the Offender had really been abſolv'd before, the Apoſtle immediately ſubjoining, *viz.* For if *I forgave any Thing, to whom I forgave it, I forgave it for your ſakes, in the Perſon of Chriſt* *. So that, I ſay, he had forgiven him before; and it does not from hence appear, in what Form this was done. The Confeſſors indeed ſay, in a very different Strain to St. *Cyprian*, in his 33d Epiſtle, *Know that we have given Peace to the Perſons, in whoſe Behaviour, ſince their Crime, you are ſatisfy'd.* But be this ever ſo peremptory, it was not preciſely the Abſolution of thoſe Perſons which was thus given, but only a Recommendation of them to the Biſhop for it; or at moſt, a Notification to the Biſhop of their paſt Action on the behalf of the Lapſed: yet ſtill he was the Perſon to abſolve them, in whoſe Power alone it was to relax the Diſcipline they had deſerv'd to lie under. And beſides; *Confeſſors*, we know, were very apt to overſtrain their Privileges, in which St. *Cyprian* made a notable Stand againſt them.

* 2 Cor. 2. v. 10.

About the beginning of the 12th Century, the Pope alone aſſumed this Power of Abſolving, *&c.* which *Wickliffe* afterwards oppos'd here in *England*, by alledging, that it was in every Prieſt; and one of the Articles which the Pope ſent to our King *Richard* the Second, complaining againſt that good Man, was, That he had aſſerted, *Hoc debet credi Catholicè, quod quilibet Sacerdos ritè ordinatus habet poteſtatem ſufficientem quemlibet* Contritum *à peccato quolibet abſolvendi*: where the Word *Contritum* ſeems to be the Foundation of Abſolution; for without Repentance there can be no Pardon. And therefore, thoſe Miniſters, who in *April* 1696, abſolv'd Sir *John Friend*, and Sir *William Perkins*, at the Place of Execution, were juſtly cenſured by the Governours of the Church, to be both inſolent and irregular in that Act; becauſe the dying Perſons were not moved by them to make any Confeſſion of their Sins, or (at leaſt) of that Sin of High-Treaſon, for which they were to ſuffer. For they were ſo far from believing it to be a Sin, that they expreſs'd a Satiſ-

Satisfaction to die for it: and, therefore, they could not repent or desire Absolution in such a Case. So that Absolving them was not only a Justification of that Crime, for which they were condemn'd; but an impudent Affront both to the Laws of the Church and State.

Absolution ought not to be deny'd to any one at the Point of Death upon his Repentance *; and it may be perform'd by any one that has the Power and Exercise of the Keys †, and according to some of the *Canonists*, even by a Layman *in articulo Mortis*: and this is true *in Foro Contentioso*, but not in *Foro Pœnitentiæ*; since in this last Case it only belongs to the Priest to absolve Excommunicated Persons ||.

* X. 5. 39. 26.
† X. 1. 31. 11.
|| Bern. in D. cap. 11. X. v. *Mortis articulo.*

Of Accessory and Principal.

AN *Accessory* is said to be that, which does accede unto some *Principal* Fact or Thing in Law; and as such, generally speaking, it follows the Reason and Nature of its *Principal* †: for in *Accessories*, those Things ought to be perform'd, which ought to be perform'd in their *Principals*. And, therefore, when one Thing draws a Consequence from another, if the first thing be valid or ought to be done, that which ensues from thence is likewise valid, and ought to be done. And according hereunto, a Church, which is united unto another, follows the Nature of that Church, unto which such Union is made ||: and that, which is ordain'd and decreed in relation to the *Principal*, seems also to be ordain'd and decreed in respect of its *Accessory*; and the same Determination, generally speaking, ought to affect them both *. Thus if a Man sells a Cow big with a Calf, he also seems to have sold the Calf, which follows the Cow as an *Accessory*. And if a Man sells a House, the Glass-Windows thereunto belonging are said to be sold as an *Accessory* †: for an *Accessory* (as aforesaid) follows the Essence and Nature of the Thing unto which it is an *Accessory*. But an *Accessory* does not follow its *Principal*, when there is not the same Reason or Nature in the *Accessory* as in its *Principal*.

† vi. de Reg. Jur. Reg. 42.
|| Oldr. cons. 257. n. 16.
* D. 3. 5. 3. 1. Bart. & Jas. in l. 84. D. 30. 1. 10. in fin.
† Bart. in l. 13. D. 19. 1. 31.

An *Accessory* is said to be threefold: for there are some *Accessories* which are so by *Necessity*; some, which are so by way of *Equity*; and some which are so by way of *Inheritance*; according to *Baldus* ||. A *Principal* Obligation extinguishes an *Accessory* Obligation, if they do both concur in one and the same Person; as when a Man makes his Debtor his universal Heir or Legatary, and the like: But it is otherwise, if it be in two Obligations of equal Power. A Quality is said to be an *Accessory* unto a Fact or Crime, which is the *Principal*; and if the Fact or Crime be taken away and extinguish'd, the Quality is also thereby taken away and extinguish'd, as being an *Accessory*, according to this Rule in Law, *viz. That if the Principal be extinguish'd and taken away, the Accessory is also extinguish'd and taken away* *. And a Man, that gives Aid, Counsel, or Assistance unto any Crime, is said to be liable, and oblig'd as an *Accessory* thereunto; because *Factum accedit facto*. When an *Accessory* comes as a necessary Consequence of the *Principal*, then if the *Principal* be granted and allow'd of, the *Accessory*, and all

|| In cap. 1. X. 2. 28.
* D. 50. 17. 178.

other things, without which it cannot ſubſiſt, are deem'd to be granted and allow'd of *, according to *Federicus de Senis* †. Thus when a Privilege or Exemption is granted to poor and indigent Perſons, that they ſhould not be oblig'd to pay Tithes for the Rents of the Houſes they live in, all thoſe Things are alſo included, which they expend upon other neceſſary Things, without which they cannot ſubſiſt: and if they make Proof of the *Principal*, the *Acceſſory* is alſo (according to *Maſcard*) ſaid to be prov'd ‖. But *Acceſſories* are not deem'd to be granted and allow'd of, upon Granting and Allowing of the *Principal*, when that which is called an *Acceſſory*, is of an arduous and difficult Nature, and probably was not thought of by the Perſon, that makes ſuch Grant of the *Principal*, according to the ſaid *Federicus* *: nor is it, when there is a different Reaſon militant in the *Acceſſory*, than in the *Principal*, according to *Alexander* in his *Conſilia Juris* †.

* D. 2. 1. 2.
† Conſ. 163. & 186.
‖ Conel. 14. & 15.
* Conſ. 191. n. 3.
† Conſ. 4. n. 5. lib. 1.

Of Accuſation, and the Courſe of it.

SINCE the Good of Mother Church, as well as that of Civil Society, renders a Judicial Practice in criminal Caſes entirely neceſſary, leſt Crimes ſhould go unpuniſh'd; and this Judicial Proceeding being commenc'd and form'd either by way of *Accuſation*, *Denunciation* or *Inquiſition*; I will here, in the following Work, beg leave to ſpeak of theſe three ſeveral Ways of proceeding againſt Criminals, which the Eccleſiaſtical ‖, as well as the *Civil* Law has introduc'd in Courts of Judicature. And firſt of *Accuſation* in point of Order.

‖ X. 5. 39. 35. X. 5. 1. 24.

Now *Accuſation*, according to *Hoſtienſis*, is a Complaint or Declaration of ſome Crime committed by a Man, and preferr'd before a competent Judge, by the Intervention of an Inſcription lawfully made, in order to inflict ſome publick Puniſhment or Cenſure on the guilty Perſon: And from hence, to accuſe a Man, is nothing elſe but to detect or impeach a Perſon guilty of ſome Crime by way of Libel or Articles, in order to have a publick Puniſhment or Cenſure inflicted on him * as aforeſaid; for 'tis neceſſary, that ſuch *Accuſation* ſhould be made by way of Libel or Articles. For by the *Common Law*, or of *Common Right*, there are five things neceſſary to *Accuſation*. *Firſt*, that it be made in Writing, or even by Words of Mouth; provided, that the Notary does immediately reduce it into Writing. The *Second* thing neceſſary, is, that the Name of the Accuſer, and the Party accuſed, be expreſly mention'd in the Libel or *Accuſation*. *Thirdly*, 'Tis neceſſary, that the *Species* of the Crime or Offence be well deſcrib'd and ſet forth in the Libel or Articles, which our *Engliſh* Lawyers call an *Indictment* or *Information*. *Fourthly*, The Time and Place, that is to ſay, the Year and Month, when and where the Crime was done, ought to be mention'd therein. And the *Fifth* Thing neceſſary, is, that it be made before a competent Judge.

* X. 5. 1. 16.

The efficient Cauſe of an *Accuſation* is ſome publick Law, which permits and allows of an *Accuſation* to be made on the Account of ſome publick Crime committed; and it ought to be preferr'd before ſome ordinary or competent Judge, againſt him, who is not by a Prohibition exempted from an *Accuſation*: and hereunto is added the Will of him who has

has the Right and Power of accuſing*. The Matter of an *Accuſation* is every enormous Crime committed either againſt Religion and the publick Laws of the Church, or elſe againſt the Peace and Tranquillity of the State: in Defence of which, publick Laws are enacted, and for the Breach of theſe Laws publick Puniſhments are enjoined and inflicted. And every Perſon within the Church or Commonwealth may prefer an *Accuſation*, to the end that the Delinquent may ſuffer condign Puniſhment; provided, ſuch Accuſer does obſerve the Order and Method preſcribed him by Law; and provided ſuch Crime be not manifeſt, becauſe Crimes that are manifeſt, do not ſtand in need of an *Accuſation*†: and of theſe Things publick Judicature conſiſts.

* D. 47. 15. 3 & 4. D. 48. 1. 1.

† 2 Q. 1. 1. 2 & 3.

According to *Paulus*, in his 15th Book *ad Edictum Prætoris*, there are ſome judicial Pleas of a criminal Nature, which are *Capital*; and others which are not *Capital*. Thoſe are *Capital*, wherein the Puniſhment of Natural or Civil Death is inflicted on the Offender; and thoſe are *Non-capital*, which are puniſh'd with ſome pecuniary Mulct or Fine, or elſe with ſome corporal Puniſhment ||: but I have nothing to do with either of theſe in this Work; and, therefore, I ſhall here more properly proceed to ſpeak of ſuch judicial Proceedings as are ſtiled *Ordinary* and *Extra-ordinary*. Thoſe are ſtiled *Ordinary*, when the Puniſhments of Offences therein proſecuted are ſpecially and expreſly declar'd in Law by name, which the Judge cannot increaſe or diminiſh without Cognizance, when the Queſtion is a Matter of Fact: as in the Caſe of Treaſon, Parricide, Murder, Adultery, Forgery, Rape, Publick Force, Plagiary, and the like, which are reckon'd up in the 48th Book of the *Digeſts*. And thoſe are called *Extra-ordinary*, touching the Puniſhment of which, there is no ſpecial Proviſion made either by the *Civil* or *Canon-Law*, but the ſame is left to the Diſcretion and Will of the Judge to decree and appoint a Puniſhment according to the Nature and Quality of the Offence, and the Condition of the Perſon delinquent*: as Concuſſion, Burning of Houſes, Prevarication, the Crime of *Stellionatus*, and the like; touching which, the Reader may conſult the whole Title in the *Digeſts* quoted here in the Margin †.

|| D. 48. 1. 2.

* X. 5. 1. 16. X. 1. 29. 4. 4.

† D. 47. 11.

The Form of commencing and founding an *Accuſation*, according to the *Canon-Law*, is deliver'd by Pope *Eutychianus*, in his ſecond Epiſtle to the Biſhops of *Sicily*, in theſe Words; *viz. Whoever deſigns to bring a Crime into Judgment, let him come thither and notify the Defendant's Name, and take a Bond of Inſcription, and ſuffer the like Puniſhment (yet with a Regard had to his Dignity); and let him know the liberty he takes in Falſifying, ſhall not go unpuniſh'd, ſince a ſimilitude of Puniſhment ought to be inflicted on Perſons guilty of Calumny, by way of Vengeance* ||. And as Pope *Calixtus* commanded, let the *Accuſer* offer his *Accuſation* to the Judge in Writing, in the Preſence of the Perſon whom he accuſes, and let him read his Letters of *Accuſation propriâ voce*, in his own proper Perſon*. And the Lawyer *Paulus* ſhews us, in the 48th Book of the *Digeſts* †, what the Form of an *Accuſation* is, and what is the Method of drawing a Libel or Articles thereon: ſaying, That we ought to inſcribe the Name of the Conſul, and alſo the Day whereon ſuch Libel is exhibited, and before what Judge it is done, *viz.* LUCIUS TITIUS, *profeſſus* SEIAM *lege* JULIA *de* ADULTERIIS *ream deferre: quòd dicat eam cum* CAIO *et* SEMPRONIO *in civitate illâ, in domo illius, in menſe illo, conſulibus illis commiſſiſſe Adulterium.* For as the Place ought to be pointed out where the Adultery was committed, ſo ought alſo the Perſon with whom it was committed, and likewiſe the Month when There are ſeveral Things both according to the *Civil* and *Canon-Law* to be

|| 2 Q. 8. 3.

* 2 Q. 8. 5.

† Tit. 2. l. 3.

|| D. 48. 2. 3. 2 Q. 8. 5. 2.

be conſider'd as neceſſary in an *Accuſation*. *Firſt*, The Accuſer ought to be ſuch a Perſon as has the Right of Accuſing. *Secondly*, The Perſon accuſed, ought to be ſuch as may be accuſed. *Thirdly*, There ought to be an Inſcription ſolemnly made. *Fourthly*, There ought to be Caution or Security given by the Accuſer for the Proſecution of the Suit. And *Fifthly*, a due Proceſs of Law ought to be ſtrictly obſerv'd. And, *Firſt*, We may eaſily underſtand who may be Accuſers, if we know who may not be ſuch: And, therefore, I ſhall here obſerve, that there are ſome Perſons forbidden to be Accuſers on the Score of their Sex, as Women; others on the Score of their Age, as Pupils and Infants; others upon the Account of ſome Crimes committed by them; and others on the Score of ſome filthy Lucre they propoſe to gain thereby, or if the Perſon has already receiv'd Money to that End and Purpoſe; others on the Score of
* D. 48. 2. 8. their Conditions, as *Libertines* againſt their Patrons*; and others thro'
† D. 48. 2. 9. a ſuſpicion of Calumny †, as having once already, by the Means of Subornation, given falſe Evidence; and, laſtly, others on the Account of
‖ D. 48. 2. 10. their Poverty, as not being worth more than 50 *Aurei* ‖. Yet all theſe Perſons, if they proſecute either an Injury done to themſelves, or elſe impeach the Death of their near Relation, are not excluded from *Accuſa-*
* 2 Q. 1. 14. *tion* *. And moreover it is to be obſerved, that both the *Canon* and *Civil-Law* do each of them agree in this Prohibition of *Accuſation*. So that whatever Perſons the *Civil-Law* forbids to be Accuſers,
† 3 Q. 5. 6. 7. & 8. the *Canon-Law* does the ſelf-ſame †; as Homicides, Thieves, Robbers, Sacrilegious and Inceſtuous Perſons, Adulterers, Raviſhers of Virgins,
‖ 2 Q. 8. 3. Perſons guilty of Perjury ‖, and all other criminous Perſons ſuſpected of
* 3 Q. 5. 6. evil Converſation *, Aliens and Perſons unknown; and ſuch as do publickly keep Concubines. And by the Papal *Canon-Law*, for the Good of the Church, or rather to conceal the Shame of the Clergy, a Layman cannot
† 2 Q. 7. 2. in a criminal Cauſe accuſe a Clerk or Clergyman †, nor can a Heretick,
‖ 2 Q. 7. 25. Infidel, Jew, or Schiſmatick do this ‖: But this Part of the *Canon-Law* was never receiv'd here in *England*.

No one can be accuſed, who cannot otherwiſe be ſummon'd into a Court of Judicature, as a ſuperior Magiſtrate, the Preſident or Lieute-
* D. 48. 2. 12. nant of a Province *; nor can the Emperor or Pope be accuſed in the proper Senſe of *Accuſation*, becauſe they are free and exempt from all
† X. 3. 8. 4. coercive Laws †: but, according to the *Canon-Law*, the Emperor may be accuſed of Hereſy, Perjury, or Sacrilege; and the Pope may for the
‖ 40 Diſt. cap. 6. ſame Reaſon be accuſed of Hereſy only ‖, and may be judg'd by a Synod
* 23 Q. 5. 20. or by the Emperor *. Nor can a Bondman or Servant be accuſed of a Canonical or Eccleſiaſtical Crime, for which a Pecuniary Puniſhment is in-
† 2 Q. 8. 3. flicted; becauſe he has no Property of his own †.
2 Q. 3. 3. X. 1. 38. 5. *Inſcription* is an Obligation made in Writing, whereby the Accuſer binds himſelf to undergo the ſame Puniſhment, if he ſhall not prove the Crime which he objects to the Party accuſed in his accuſatory Libel, (and as he pretends) was committed by him, as the Defendant himſelf ought to ſuffer, if the ſame be prov'd. But tho' ſuch Libel ought to contain the Name of the Judge, before whom ſuch *Accuſation* or Information is brought, the Name of the Accuſer and of the Accuſed, the Time and Place when and where ſuch Crime was committed, and likewiſe the Quality of the Crime, and the Perſon with whom it was commited: yet it is not neceſſary that the Day or Hour ſhould be inſerted. It muſt contain the Subſcription of him who exhibits the Articles, or elſe of ſome other Perſon in his Behalf, if the Accuſer cannot write; whereby the Accuſer binds himſelf to proſecute the Suit, and profeſſes withal, that if he does not prove the Crime which he lays againſt the Party accuſed, he will then endure

dure the ſame Puniſhment, that ſuch Crime deſerves, when it is in truth committed: And if ſuch Articles are not legally inſcrib'd, as aforeſaid, then the Name of the Defendant ſhall be raſed out, and the Defendant ſhall be reſtor'd to his former ſtate of Innocence *. But tho' Criminal Pleas are uſually commenced in *Accuſation* by ſuch previous ſolemn Inſcription; yet this Inſcription is not neceſſary in all Caſes, as in the Crime of Apoſtacy and ſome others, wherein Apparitors do lay Complaints before the Judges.

* D. 48. 2. 3.

He that objects any Crime by way of *Accuſation*, ought to give Caution by the Means of Sureties, that he will perſevere in the Proſecution of ſuch Crime even till Sentence pronounced in the Cauſe. And if he ſhall not, after ſuch Caution given, appear in Court to follow the Suit, he ought firſt to be cited to exhibit his Preſence, and plead his own Cauſe; and if he ſhall not then appear, he ſhall not only be puniſh'd according to the Diſcretion of the Judge *pœnâ extraordinariâ*, but ſhall likewiſe be compelled to pay all the Expences that the Court has been at in citing him †. The ſame Proceſs is obſerv'd in a criminal Cauſe by way of *Accuſation*, as in all Cauſes: for there is a Conteſtation of Suit enjoyn'd, and Exceptions, Replications, *&c.* are admitted; a Term Probatory, and a Concluſion in the Cauſe neceſſary, and the like.

† C. 9. 1. 3. D. 48. 2. 7.

We read of an *internal* and an *external* Accuſation. An *internal* Accuſation is that of a Man's own Conſcience; as the Accuſation mention'd by *Solomon*. *He that is firſt in his own Cauſe, is juſt* ||; or, as the vulgar Tranſlation renders it, *The juſt Man is the firſt Accuſer of himſelf*. *External* Accuſation is either *Private* or *Publick*. *Private* is that which is betwixt Enemies or Friends: And that *Private* Accuſation, which is among Enemies, is of three Sorts, *viz.* *Firſt*, That which is Spiteful and Upbraiding, and by the *Grecians* called by the general Name of Κατηγορία *, a Word alſo fitting every Accuſation: 2*dly*, That which we term *Reproach* or *Reviling*: and 3*dly*, That which we call *Calumniation*, and is a Malicious and Falſe Repreſentation of an Enemy's Words or Actions to an offenſive Purpoſe. *Private Accuſation* of one Friend touching another, is nothing elſe but a *friendly Expoſtulation* with him, that is ſuppos'd not to have dealt *ſingly* or *conſiderately* in the Courſe of good Friendſhip; by the *Grecians* call'd Ἔγκλημα. That Accuſation which is call'd *Publick*, is either *Civilly* commenc'd for the private Satisfaction of the Party injur'd; or elſe *Criminally*, that is to ſay, for ſome publick Puniſhment: And it is this laſt kind of *Accuſation* which I here particularly treat of. But ſome (perhaps) will wonder how this Proſecution of Crimes, by way of *Accuſation*, could be ſo uſual as it was (in former Times) in the Commonwealths of *Athens*, *Rome*, and the like, inſomuch that it became (there) to be the moſt ordinary Way of Proceeding of all others, in order to bring Crimes and Offences into Judgment: eſpecially conſidering the Trouble and Danger that did, by Law, often attend the Accuſers on the account of Retaliation, if they did not prove the Crime objected. To this I anſwer, That few or no Accuſers would deal ſo raſhly as to undertake an *Accuſation*, till they thought themſelves furniſh'd with Witneſſes, and other Proofs, enabling them to convict the Perſons whom they accuſed. Beſides, it muſt be remembred, that the Uſe of *Accuſation* was the greateſt in Popular Governments, where the quickeſt Step unto high Offices and Dignities in the State (next unto Service in the Wars) was an Ability of ſpeaking and delivering their Minds before the whole People †, who were the Sovereign Judges (in moſt of thoſe Cauſes) either by way of *Accuſation*, or elſe in Defence of ſuch, as were, by *Accuſation*, called in queſtion for their Lives, Limbs,

|| Prov. c. 18. v. 17.

* *Plutarch* in vitâ *Publicol.*

† Quintil lib. 12. c. 7.

Honour, Liberty, Country, and the like. *Thirdly*, That when *Accuſation* was in moſt frequent Uſe, the People were Heathens, and not inſtructed in the true Knowlege of God; ſo that they thought, the putting up of an Injury done either to themſelves, or their Friends, was a great Act of Puſillanimity, and a Token of a baſe-minded Man; and was (according to *Ariſtotle*'s Morality *) a Vice very diſcommendable, even as the contrary Vice thereunto is, *viz.* the doing an Injury. In which Reſpect, all Danger to themſelves was the leſs regarded by them. *Laſtly*, They thought themſelves bound in ſtrict Terms of Duty, no leſs to perſecute and plague their Enemies by all Means, than they were to do Good, and ſhew Kindneſs to their Friends. Wherefore the ſame Philoſopher makes this to be a good conſequential Argument †, *We muſt do good to our Friends: therefore we muſt hurt and annoy our Enemies.* But *Chriſt* refutes this Heatheniſh Opinion in the Goſpel of St. *Matthew* ||.

* Lib. 5. Ethic.

† Ariſt. Topic. lib. 2.

||Ch. 5. v. 43. & 44.

For the Evidence of what I have here aſſerted, we are furniſh'd with many Proofs out of the graveſt Writers among the *Greeks* and *Latins*. *Plutarch*, in the Life of *Lucullus*, obſerves, That *publick Accuſations were antiently ordain'd, to the end, that young Men might be bred up in the ſtudy of Eloquence, and be thereby excited to the Valour of a brave Mind; for they delighted to ſee young Men as eagerly purſuing evil Members in the State by Accuſations, as good Dogs do wild Beaſts by natural Inſtinct.* And *Tully* aſſigns three ſeveral Motives, whereby, without any Diſcommendation in thoſe Times, a Man might be drawn to become an Accuſer of others *. *A Man may be well induced* (ſays he) *to be an Accuſer, either out of a dutiful Care, or elſe out of Neceſſity; or, laſtly, by reaſon of his Years. If he willingly enters into it, I attribute it to his Piety: if he be commanded, then I impute it to Neceſſity: if in hopes of attaining Glory and Renown, then I aſcribe it to his Youth. But to do it upon any other Occaſion, rather deſerves Reſiſtance than Pardon.* And in another Place he tells us, for what End we may enter into the Accuſation of others: Of *accuſing* (ſays he) † *we are not to make it an uſual Trade and Profeſſion; neither are we at any time to do it, unleſs it be either in the Behalf of the Commonwealth, as the two* Luculli; *or elſe for our neareſt Friends and Relations under Tyranny and Oppreſſion, having receiv'd them into our Patronage, as* Cneius Domitius, *and others did; or elſe but once only, as in our Youth for attaining Honour thereby.* But it ſeems the chiefeſt End was the procuring of a Reputation for Eloquence among the People unto themſelves. But this Cuſtom, which was heretofore permitted to young Beginners, to ſhew the forwardneſs and ſharpneſs of their Wits, has been long ſince grown into Diſuſe*, and is, in moſt Places, forbidden at this day.

* Cicer. pro Cæl.

† Lib. 2. Off.

* Jul. Clar. lib. 5. Sect. fin. Q. 11.

For how uſual ſoever this ſolemn Manner of *Accuſation*, mention'd in the *Roman* Civil-Law, was in thoſe Popular States of *Rome* and *Athens* heretofore; yet 'tis certain, it has not been exerciſed for a long time; nor is it now practis'd in moſt Civil Governments or Kingdoms, as I read of, not only thro' the Danger and Trouble thereof, but becauſe it is and has been ſo odious and abhor'd of Men in all Ages. But in the place thereof, we may either reckon a Proceeding of *meer Office*, or elſe ſome other *mix'd* way; as partly of that proceeding of a Proſecution at the Inſtance of a Party, who is not properly term'd an Accuſer. In *Flanders* all *Accuſation* is entirely inhibited: And, in the Kingdom of *Naples*, it is only permitted to ſuch, as will in this Manner proſecute ſome Injury or Enormity done to them or theirs. In the *Venetian* Commonwealth, 'tis wholly forbidden to private Perſons †: ſo that the Care of proſecuting Offences and Crimes, by way of ſolemn Impeachment (there) at this Day,

† Decianus.

Day, is entirely left to the publick Magiſtrate. In *France* none but the King's *General Attorneys* (whereof there are three) may take upon them to be Accuſers: And yet theſe are not properly ſo call'd. And a learned Writer * on the Law of that Nation, aſſigns a good Reaſon for this Prohibition, *viz. Leſt too great an opportunity of Calumniating and Oppreſſing the Weak by the Power of the Mighty ſhould be thereby given, and for preſerving publick Tranquillity in the Kingdom.* In *England* we rarely find *Appeals*, which neareſt reſemble the *Accuſation* practis'd by the old *Romans*, brought and proſecuted againſt any ſuppos'd Offenders, except in Murders. I remember but one *Appeal* of Robbery brought for theſe 200 Years paſt; which was that by *Bennet Smith* againſt *Giles Rufford*, in the beginning of Queen *Mary*'s Reign, as appears by the Preamble of a Statute quoted in the Margin †.

* Gul. Bened. in c. *Ranutius.* n. 200. de Teſtam.

† 2 & 3 Phil. & Mar. chap. 17.

If an Accuſer be found to Calumniate, he ſhall, according to the *Canon-Law*, receive the Puniſhment due to the Crime imputed ‖: and he that does not prove his Accuſation, ſhall ſuffer the ſame Puniſhment, in Danger of which he would have brought another Man. And to the very ſame effect did *Sixtus* *, an antient Biſhop of *Rome*, write to the Biſhops of the *Eaſtern* Parts. Yea, beſides the like Penalty, it was decreed in the ſecond Council of *Bracara* †, That the *Accuſer failing in his Proof, ſhould be excommunicated* ‖: and by the antient Canons, ſuch an Accuſer was (moreover) pronounc'd an *Infamous* Perſon *. So that even by the *Canon-Law*, this odious Way of proceeding againſt Offenders by *Accuſation* was allow'd and permitted; and ſometimes encouraged by the Biſhops of thoſe Times againſt Laymen, if they were rich enough to *commute* and *redeem* their Sins by the means of Money. But this way of proceeding by *Accuſation* being now grown much out of Faſhion in our Eccleſiaſtical Courts, I will here take leave of this Subject, and paſs to another Title.

‖ 2 Q. 3. 3.

* *Sixtus*, c. 4. in 1 vol. concil.

† A. D. 610.

‖ Can. 8.

* *Gelaſius*, ibid. cap. Siquis.

Of Acts Judicial and Extra-judicial.

JUDICIAL Acts, are ſaid to be all thoſe Writings and Matters, which relate to *Judicial* Proceedings, and are ſped in open Court at the Inſtance of one or both of the Parties *Litigant*; and, being reduced into Writing by a Publick Notary aſſumed and deputed for that end, are recorded by the Authority of the Judge, at the Motion of one or both of the aforeſaid Parties †. For *Judicial* Acts ought to be reduced into Writing as well in an *ordinary* as an *extraordinary* Cauſe, or *Judicial* Proceeding, unleſs the Cauſe be of a very light Nature and Importance ‖: For then no Writing is required, either in reſpect of the Sentence, or of the Proceſs itſelf; but entire Credit is given to the ſimple and naked Information of the Judge. And 'tis a Rule laid down in Law, That credit ought to be given to the Writings and Records of *Judicial* Acts, tho' ſuch Writings and Records have not the Subſcription and Atteſtation of Witneſſes. Becauſe more credit ought to be given to a *Judicial* Act, than to the Inſtrument of a Notary Publick; for that theſe Acts are not only written by ſuch a Notary hereunto

† Bald. in Auth. *Quæ ſupplicatio.*

‖ Bart. in c. 1. 2. 10. n. 1.

hereunto eſpecially ſworn and deputed; but they have alſo afterwards, the Approbation and Confirmation of the Judge added to them: who likewiſe gives an Authority either by ſigning the ſame under his Hand-writing, or elſe by affixing the Seal of his Office, and without whoſe Order and Directions, ſuch Acts cannot be made. And, therefore, ſurely a Notary Publick, together with the Judge, ought to have more credit given him than another Notary, who ſtands ſingle by himſelf.

I have juſt now ſaid, that *Judicial* Acts are publick written Acts of Court, being reduced into Writing by a Notary Publick, through the Order and Direction of the Judge: and they are call'd publick Acts on a threefold Account. *Firſt*, Becauſe they are reduced into Writing by a Notary Publick, who is a publick Perſon deriving his Power from publick Authority, and deputed hereunto by the Judge*. *Secondly*, Becauſe they are executed before ſome Judge or other. And, *Thirdly*, Becauſe they are ſped and executed in ſome publick Place, as in a Court of Judicature. *Judicial* Acts, which do neceſſarily require Writing, are a Libel, Conteſtation of Suit, Exceptions, Depoſitions of Witneſſes and the like†: And, moreover, 'tis to be noted, That the Aſſignation or giving of a *Term in Law* is a *Judicial* Act. Acts and other *Judicial* Proceedings, if they are recent and freſh in Memory, may be prov'd by Writing or *vivâ voce*: but if they are not, then they ought to be prov'd by other legal Evidence‖. *Judicial* Acts may alſo be prov'd by the Confeſſion of the Party: and Acts made and had in a *civil* Cauſe, ſhall be good Evidence in a *criminal* Proceeding. But *Judicial* Acts are never preſum'd, but ought to be prov'd; and, therefore, what is not found written in the Acts of Court, is not preſum'd to be done. Tho' *Judicial* Acts written by a Notary Publick in open Court, do not require the Preſence and Evidenceof Witneſſes, unleſs it be in definitive and interlocutory Sentences*; yet ſuch Acts may be proved by Witneſſes, if the Writings made thereon be loſt and deſtroy'd: but if ſuch Acts have never been reduced into Writing, they do not admit of Proof, tho' proved by Witneſſes then preſent at the making of them†. *Judicial* Acts may be proved by the ſpecial Depoſitions of Witneſſes depoſing in a particular Manner, *viz. That it was thus acted and thus written* (and the like) *in their Preſence, and to their Knowledge.* If a Judge ſhall omit or neglect to have ſuch Matters inſerted in the Acts of Court as the Party *litigant* ſhall afterwards be neceſſarily oblig'd to prove, and the Party is herein put to Expences; then the Judge thus wilfully omitting or neglecting the ſame, ſhall be liable, and oblig'd to refund ſuch Expences to the ſaid Party.

* Roman. Conſ. 281.

† Felin. in cap. 11. X. 2. 19.

‖ Cyn. in l. 11. c. 4. 21.

* Lap. Alleg. 82. n. 3.

† Tuſch. concl. 772. n. 5. &c.

But Acts of Judicature may be cancelled and circumducted by the Will and Direction of the Judge, and alſo by the Conſent of the Parties *litigant*, before the Judge has pronounced and given Sentence; but afterwards they cannot, tho' the Judge and Parties ſhould entirely conſent thereunto, becauſe the Suit or Matter is entirely ended and determin'd: and Acts made and done in the Preſence of the Judge, may be ſaid to be done by the Judge himſelf by Reaſon of his Authority. Whatever Acts of Court or *Judicial* Proceedings have been once publiſh'd, do perpetuate an Evidence; and all manner of credit is to be given them, even tho' the Judge that took Cognizance thereof, or that publiſh'd them, ſhould be dead; or if he ſhould be remov'd from his Office. The Words of all *Judicial* Acts are written *Narratively*, unleſs it be in Sentences wherein *diſpoſitive* and *enacting* Terms are made Uſe of: And, therefore, credit ought to be gi.en to theſe Acts, tho' the Words in them be *Narrative*.

As a *Preparatory* Act is ſaid to be that Act, which is previous to the *Principal* Act in Judgment; ſo an *Acceſſory* Act is ſaid to be that, which is ſubſequent to the *Principal* Act: And all Acts done in Judgment from the Date of the Citation to the time of Conteſtation of Suit, are ſaid to be done in *Principio Judicii.* Publick Acts both in *Civil* and *Criminal* Cauſes ought to be given by the Judge, Notary, or ſome other publick Officer, that has the Cuſtody thereof, unto every one that deſires the ſame: but he, againſt whom they are made in a *criminal* Cauſe, cannot demand the ſame to be given him, tho' they may rightly be given in a *civil* Cauſe. Suppoſe the Judge ſhould ſay, That he would have the keeping of the Acts of Court remain with him, and the Notary will have the Cuſtody of them with himſelf. Certainly in this Caſe the Actuary or Writer of them ought to be preferr'd; becauſe if he ſhould doubt of his own Acts, he may be under ſome imminent Danger of Falſhood: And, therefore, 'tis his Intereſt and Buſineſs to keep the Acts.

The Aſſertion of the Judge alone does not prove the Exiſtence of *Judicial* Acts, unleſs there be ſome other *Conſtat* of their Being*: But if two Judges do give Evidence or Teſtimony touching thoſe Acts, which are done in Judgment, they do then (according to the Opinion of ſome Men) make full Proof, *ſed Quære:* becauſe they may be both concern'd as Parties; as in a Cauſe of Appeal and the like. And the Reaſon, why the Aſſertion of a ſingle Judge does not prove the Exiſtence of *Judicial* Acts, is, becauſe his Office is to pronounce Judgment, and not to become an Evidence or Witneſs†. But (I pray) why may not the ſame be ſaid of two Judges? Therefore, in this Reſpect the *Gloſſators* Opinion muſt be falſe and erroneous in Point of Law. *Probatory* Acts made in a ſummary Cauſe, or judicial Proceeding, are no Evidence in a plenary Cauſe or judicial Proceeding. But Acts *principally* deduced in any Cauſe, are of more efficacious Proof, than ſuch Acts, as are deduced by way of *Incident:* and if an Act be *incidently* deduced in judicial Proceedings, leſſer Proofs are ſufficient, which otherwiſe would not be ſufficient, if they were deduced *principally*||. An Act done in the Judges Preſence, is preſum'd to be done *Sponte Purâ:* And as *Judicial* Acts make a Preſumption againſt a third Perſon*; ſo do they ſpeak and make a Notoriety of themſelves. Tho' the Inſtruments themſelves produced in Judgment are not reckon'd among the *Judicial* Acts; yet the Production of thoſe Inſtruments ought to be reckon'd among the Acts of Court. *Judicial* Acts, that do not require *Strepitum Judicii*, may well enough be ſped and done by a ſecular Judge in the Church: and the Party *litigant*, ſeems to conſent to all ſuch Acts as are done by any Judge; unleſs he contradicts and oppoſes the ſame.

* Gram. conſ. 130. n. 1.

† Anch. conſ. 451. n. 2.

|| D. 42. 1. 15.

* Gloſſ. & Dd. in lib. 13. D. 12. 2.

It has been already obſerved, That the Aſſertion of the Judge does not prove the Exiſtence of *Judicial* Acts without ſome other *Conſtat* of their Being: But this can only be underſtood in Cauſes of Weight and great Importance. For in Cauſes, where the Judge has the Power of proceeding *ſine ſcriptis*, credit is given to the Report and Information of the Judge in reſpect of the Acts of ſuch a Proceeding: for credit is given to the relation of a Meſſenger or an Apparitor; and thus *à fortiori*, it ought to be given to the ſimple Aſſertion and Report of the Judge, eſpecially in ſuch light Cauſes as theſe. In foreign Countries it is not uſual to have Witneſſes to Definitive or Interlocutory Sentences as it is with us, but the Acts of Court are ſufficient to prove the ſame: and whereſoever there is a Judge, the Acts of Court are not only ſuppos'd to be of publick credit by reaſon of his Authority, but becauſe they are made in a publick Manner, as aforeſaid. For that Rule of Law is true in this Reſpect,

viz. That all *judicial* Acts ought to be diſpatched in publick Court of their own Nature, and in the Judge's Preſence.

Extra-judicial Acts, are ſaid to be thoſe which are made and done *extra judicium*, or out of Court, without any Oppoſition given thereunto, and may rather be called *Facts* than *Acts* in Propriety of Speech; becauſe they are ſuch Matters, as are done out of a Court of Judicature without any diſpute or controverſy ariſing from thence *. Thus the Confirmation of an Election, though it be done by a previous Citation or Proclamation of all Perſons concerned therein, may (notwithſtanding) be ſaid to be done *Extra-judicially*, when no Contradiction or Oppoſition intervenes or enſues thereupon †. And the Union of Church-Benefices is an *Extra-judicial* Act for the like Reaſon; becauſe all *Extra-judicial* Acts, are ſaid to be done *ex Officio*, and not in a contentious Manner; ſince they may be done in the Abſence of the Party. And thus in this Senſe, an Appeal is not a *Judicial* Act, becauſe it may be interpoſed in any Place, and at every Seaſon, out of Court, according to *Joh. de Anan* ||.

* Guid. Pap. Dec. 616. n. 3.

† Gemin. conſ. 87. col. 1.

|| Conſ. 93.

Of Adminiſtration, and the Poſſeſſion of Inteſtate Goods.

AN *Adminiſtrator*, in the *Civil* and *Canon-Law* ſtiled *Hæres ab inteſtato* *, is ſo called in the common Law of *England*, *ab Adminiſtrando*; becauſe he is the Perſon to whom the Ordinary commits the Adminiſtration of the Goods of a Perſon that dies Inteſtate for default of an Executor, and an Action ſhall lie for and againſt him, as for an Executor. And he ſhall be accountable for ſuch Goods, and be obliged to anſwer all Debts and Legacies, as Executors are, to the Value of the Goods of the Party deceaſed, and no further; unleſs it be by his own falſe Plea, or by waſting the Goods of the deceaſed: and if ſuch Adminiſtrator dies, his Executors are not Adminiſtrators, it behoves the Ordinary to commit a new Adminiſtration. And if no Perſon will adminiſter, the Ordinary may grant Letters *ad colligendum bona defuncti*, and thereby take the Goods of the Inteſtate into his own Hands: wherewith he is to pay all Debts and Legacies ſo far as the Goods will extend; and thereby he becomes liable, in Law, as Executors or Adminiſtrators are. But he that has Letters from the Ordinary *ad colligendum bona defuncti*, is not Adminiſtrator, but the Action lies againſt the Ordinary equally as if he had taken the Goods into his own Hands.

* J. 3. 1. 1.

This Title of the *Poſſeſſion* and *Adminiſtration of Goods* was not of the Growth of the *civil* Law, ſtrictly ſo called, (which only eſtabliſhes Heirs, and gives a Right of Succeſſion) but it aroſe out of the *Prætorian* Law, which in Equity, calls ſundry Perſons to the Succeſſion of other Mens Goods by Adminiſtration, where there is no Will; and in ſome Caſes, where there is a Will, as where the Will is conceal'd, or the Executor renounces the Probate of the Will: but if the Will once appears, then the Adminiſtration forthwith ceaſes. In Caſes where Adminiſtrations are to be granted, the Children of the deceas'd (according to the *Civil* Law) have liberty to take it within a Year after the Death of the

the Party deceaſed, and if they be of more remote Kindred, then they have only a hundred Days to take it in, unleſs thoſe which are to take it are Infants, Madmen, Deaf, Dumb, or Blind; in which Caſes a longer time is aſſign'd: But this part of the *Civil* Law, in reſpect of the Time of obtaining Letters of Adminiſtration, is not regarded with us here in *England*, and is grown into diſuſe in ſeveral Countries. A Perſon, who is not yet conceiv'd in the Womb of his Mother at the Death of that Perſon to whoſe Eſtate the Succeſſion is in Controverſy, ought not to be an Adminiſtrator or an Heir *ab Inteſtato* to him; nor can he, either by the *Civil* or *Prætorian* Law, come to the Succeſſion of ſuch a Perſon's Eſtate*; for he that is not conceiv'd in the Womb till after the Death of the Perſon deceas'd, can never, according to the *Civil* Law, be ſaid to be related or of kin to him.

* D. 28. 2. 6.

The granting of Adminiſtrations, was originally a temporal Act, for above 300 Years after Chriſtianity came into the World; and came to the Church by the Indulgence of Princes: and, therefore, it muſt, in ſome meaſure, be govern'd by the Temporal Laws. Among the *Romans*, the Judge or *Prætor* granted Adminiſtration, not only according to the Tables of the Teſtament, but many times, even contrary to thoſe Tables †: as where a Child was not diſinherited by his Father's Will in plain Terms, but only paſs'd over with Silence as not remember'd; or that the Child was not born at the time of his Death, and ſo not known whether any ſuch Child was living, or to be hoped for or not: in which Caſe, if it does afterwards appear, the Mother is then put in Poſſeſſion of that which is the Child's Part. An Adminiſtrator has the Office and Quality of an Executor ‖, and may diſtrain for Rent in Arrear in the Life-time of the Party Inteſtate, or bring an Action of Debt for the ſame: and as an Adminiſtrator may ſue, ſo likewiſe he may be charged by any Creditor in an Action of Debt on the Inteſtate's account; and an Adminiſtrator is chargeable, though not named in an Obligation, becauſe he repreſents the Perſon of the Inteſtate *. Though an Adminiſtrator is not liable to a Debt upon a ſimple Contract of the Inteſtate's: yet if an Adminiſtrator, after the Inteſtate's Demiſe, promiſes to pay ſuch a Debt, if there be a Conſideration to ground the Action on, ſuch Promiſe is binding. As thus: The Husband was indebted to another Man upon a Contract for Beer, and dy'd Inteſtate; the Wife took Adminiſtration, and afterwards aſſum'd upon herſelf to the Creditor, That if he would deliver her ſix Barrels of Beer, ſhe would not only pay for them, but for her Husband's Debt alſo. In this Caſe it was adjudg'd, That Judgment ſhould be entered *de Bonis propriis* generally: for it became a Charge by her own Act; and by her Promiſe, as Adminiſtratrix, ſhe has made it her own Debt. *Wheeler* and *Collier*'s Caſe ‖.

† J. 3. 1. 13.

‖ Cok. Rep. 5. fol. 83.

* Dyer Rep. 23. Pl. 142.

‖ Crok. Rep. pt. 1.

There is a wide Difference between an Adminiſtration that was once Lawful, and an Adminiſtration that was never Lawful. And there is likewiſe a great Difference between a Sentence declaratory, by which Letters of Adminiſtration are declared to be void; and a Sentence of Repeal, which allows them to be good till they are repealed, according to my Lord, Ch. *J. Coke* *. If an Inferior Ordinary grants Letters of Adminiſtration, whilſt the Prerogative Adminiſtration granted by the Archbiſhop is in force, ſuch Adminiſtration is Null and Void; for two Adminiſtrations cannot conſiſt and ſtand together, according to Sir *John Needham*'s Caſe in *Coke*'s Reports †. If Adminiſtration be unduly granted by the Ordinary of an Inferior Dioceſs, the Party griev'd cannot have a Prohibition at the Common Law; but he muſt appeal to the Metropolitan or Arch-biſhop of the Province, and from thence to the Court of Delegates.

* 8 Rep. 145.

† 8 Rep. 135.

By

By the *Civil* Law, a Man may be ſaid to die Inteſtate four ways, as I ſhall hereafter more largely obſerve under the Title of *Inteſtates*. *Firſt*, When a Man has made no Will at all. 2*dly*, If he has not made it according to due Form of Law; for then tho' he has made a Will, yet it is the ſame thing as if he had made none. 3*dly*, When the Will which he has made, is rupted and made void by the Birth of a Poſthumous Iſſue, which he has paſſed by in ſilence and not remembred therein, or elſe by the Adoption of a Child. And 4*thly*, When no Heir is named and appointed therein, or no one will take the Heirſhip on himſelf*. If no Will appears, the *Adminiſtration* or what the *Civil* Law calls the *Inteſtate Succeſſion*, is committed according to that Law in this Order. *Firſt*, The *Children* of the Deceaſed are admitted. 2*dly*, Thoſe that are *next of Kin in the Male Line*. 3*dly*, Thoſe that are *next of Kin in the Female Line:* but this Difference (notwithſtanding) between *Male* and *Female*, is, at this day, taken away, and they that are next of Kin are equally admitted to this Succeſſion. *Laſtly*, We may reckon thoſe which have a Right thereunto, either in that they are Man or Wife.

* J. 3. 1. 1.

Now touching the Succeſſion of Husbands and Wives, there are various Laws and Cuſtoms, according to the diverſities of Countries and Nations. By the ancient Law of *Romulus*, the Wife was by *Confarreation* ſo cloſely join'd to the Husband in Wedlock, that the Marriage could never be diſſolv'd. And as the Woman was to be modeſt and obedient to her Husband, ſo ſhe was not only to have an equal ſhare of Government in the Houſe with him, but was likewiſe, upon his Deceaſe, to ſucceed as Heir to his Goods and Eſtate, in the ſame manner as a Daughter ſucceeded to the Goods and Eſtate of her *Inteſtate* Parent: and ſhe ſucceeded to the whole Eſtate if the Husband dy'd *Inteſtate* and without Children; but if he had Iſſue, ſhe ſucceeded *ex æquo* with the Children, as we may read in the *Roman* Antiquities of *Dionyſius Halicarnaſſus* †. But in Proceſs of Time, this Law became antiquated at *Rome*; and as the Husband was barr'd from ſucceeding to the Goods and Eſtate of the Wife dying *Inteſtate*, ſo was the Wife excluded and ſet aſide from ſucceeding to the Goods and Eſtate of her *Inteſtate* Husband. But afterwards, by a Decree of the Judge or *Prætor*, upon failure of Deſcendants, Aſcendants and Collaterals even to the tenth Degree and further, in *Feudal* Eſtates, the Succeſſion to an *Inteſtate*'s Eſtate was given to the Husband and Wife, if they ſurvived each other ‖; *viz.* when their Marriage was Juſt and Lawful, and was not diſſolved till the Time of their Death: And this Decree was afterwards approv'd, and confirm'd by the *Imperial* Civil Law *; and (I think) the ſame is true even at this Day according to the *Canon-Law*, if the Marriage be not ſeparated on the Score of Fornication or Adultery †. And as the Wife forfeits her Dower or Jointure (by the *Civilians* called *Donatio propter Nuptias*) upon this Account, as a Puniſhment for her Adultery, and the ſame falls to the Behoof of her innocent Husband ‖; ſo ſhall ſhe ſurely *à fortiori* ſtand depriv'd of the Advantage of ſucceeding to the Eſtate of her *Inteſtate* Husband, from whoſe Bed ſhe has thus ſeparated herſelf by her own Crime and Lewdneſs. But if this Separation *à Thoro*, happens by the Conſent of Parties, as on the Score of going into a Religious Houſe *, or the like; I think this ſhall not prejudice her in the Point of *Inteſtate Succeſſion*, provided ſhe does not, within the Year of Mourning for her Husband deceas'd, betake herſelf to a ſecond Marriage. By the Statute-Law of *England*, it was firſt enacted, That the Ordinary ſhould commit the Adminiſtration of the *Inteſtate's* Goods to the next of Kin, and ſuch Perſon might ſue and be ſued; and was accountable to the Ordinary,

† Lib. 2.

‖ D. 38. 15. 1.

* D. 38. 11. 1. C. 6. 18. 1.

† X. 4. 19. 4 & 5. C. 5. 17. 8.

‖ X. 4. 20. 4. D. 24. 3. 39.

* X. 3. 32. 4 & 7.

as

no Executors were*. But afterwards by a Statute, in the Reign of *Henry* VIII. the ſaid Adminiſtration was order'd to be granted to the Inteſtate's Widow, or next of his Blood, or to both at the Diſcretion of the Ordinary. But where divers Perſons, that are next of Blood, and are in an equality of Degree with the Inteſtate, do claim Adminiſtration; or where only one claims it as next of the Blood, (when in truth divers are of equal Kindred) the Ordinary ſhall have his choice to accept of one or more at their Requeſt. And where but one or more, and not all (being in an equality of Kindred) do make Requeſt, the Ordinary ſhall, in ſuch a Caſe, be at Liberty to admit the Widow, and him, or thoſe only making Requeſt, or any one of them, at his Pleaſure. And, according to this Statute, and the Rule aforeſaid, the Ordinary muſt commit Adminiſtration under the Pain of ten Pounds forfeiture †. But we have another Statute in the 23d Year of King *Charles* II. chap. 10. directing whom the Ordinary ſhall appoint to be Adminiſtrators, and who ſhall have the Benefit thereof, and be accountable as Executors, and take Bond for performance thereof, and order Diſtribution of the Goods: which ſee at large ||. But this Act of *Charles* II. does not ſo extend to Feme-coverts Eſtates, as that their Husbands may not have the Adminiſtration of their Perſonal Eſtates *: ſo that the Husband may have the Adminiſtration of the Perſonal Eſtate of the Wife dying Inteſtate by the *Statute-Law*, as well as by the *Civil-Law*.

* 31 E. 3. ch. 11.

† 21 H. 8. chap. 5.

|| 23 Car. 2. chap. 10.

* 29 Car. 2. chap. 3.

But by a Law in the *Juſtinian* Code, as the next of Blood did bar and exclude a Wife from ſucceeding to the Inteſtate's Eſtate †; ſo did the Wife exclude and bar the Exchequer from ſuch a Succeſſion ||: and, moreover, tho' the Lawyer *Azo* has made it a Doubt, whether a Corporation or Body Politick, of which the Husband was a Member in his Lifetime, ſhall not be preferr'd in point of ſuch Succeſſion to the Wife; yet he thinks the better Opinion to be, that ſuch Corporation or Body ſhall not be preferr'd to the Wife, unleſs it be in ſuch Goods and Eſtate as the deceas'd had acquired, through the Means and Occaſion of ſuch Corporation or Body Politick. But there is a Law in the *Novels* *, which introduces another Reaſon or Conſideration for the Wife to ſucceed to the Eſtate of her Inteſtate Husband, *viz.* That if the Husband ſhall die in wealthy Circumſtances with Children, and leave behind him a ſurviving Wife, who had no Dower or Jointure, ſhe ſhall have out of his Goods and Eſtate a fourth Part, if there are not more than three Children left behind him; but if there are more than three, ſhe ſhall then ſucceed with them *pro virili* in the Uſufruct, and leave the Property of ſuch Eſtate to the Children: which ſeems the more equitable Doctrine.

† C. 8. 2. 3.

|| C. 6. 18. 1.

* Nov. 117. cap. 5.

Among Deſcendants, which are firſt entitled unto the Benefit of *Inteſtate Succeſſion*; we may reckon natural and lawful Children to be in the firſt Degree, as well by the Law of God, as by the *Civil-Law*: For it is therein written, *A Son, and therefore an Heir* †. Now for the clearer underſtanding of this Matter, I ſhall here Hiſtorically conſider the *Series* and order of *Filial* Succeſſion, and the ſeveral Changes made thereof according to the antient, middle, and lateſt Law of the *Romans*; and hereunto I ſhall ſubjoin the Laws of ſome other Nations touching this Subject. By the Law of the twelve Tables, only thoſe were called unto the *Legal* or *Inteſtate Succeſſion* of their Parents, that were in the Parent's power at the time of his Death, excluding all emancipated Children, who were only call'd thereunto *ſecundo ordine*. They did not ſtand in need of the Help of Man to give them the Adminiſtration of their Father's Eſtate, but were, by the Law itſelf, immediately made Heirs and Adminiſtrators thereof, and became *neceſſary* Heirs or Ad-

† Gal. c. 4. v. 7.

miniſtrators whether they would or not: But what I here mention, only obtain'd in reſpect of the Father's Goods and Eſtate, and not in regard of the Mother's, becauſe they had not their Children in their Power; and by the Law of the twelve Tables, Children did not ſucceed unto their
* J. 3. 3. 1. Mothers *. But afterwards by a Decree of the Senate called *Senatus-conſultum Orficianum*, made under the Emperor *M. Antoninus* the Philoſopher, and his Son *Commodus*, A. D. 181. Lawful Children were admitted to ſucceed unto their Mother's Eſtate; and the Son or the Daughter, were preferr'd unto all other Kindred of the Mother deceas'd, even to the Father or Mother of the Mother deceas'd, who did not ſucceed if
† J. 3. 4. 1. there were any Grandchildren living †. And thus the Sons, if there were ſeveral at the Time of the Mother's Death, ſucceeded the Mother
‖ C. 6. 57. 4. *in partes viriles* ‖. And if they died before they were admitted to the Adminiſtration, they tranſmitted their Right of Adminiſtration to
* C. 6. 52. 1. theirs, if they had not repudiated and ſet them aſide *.

It was, generally ſpeaking, the common Cuſtom of all Nations, That Sons and Daughters ſhould equally ſucceed their Parents, dying Inteſtate, without any diſtinction of Sex: which thing was afterwards eſtabliſh'd by the Laws of the *Viſigoths*; among whom, Children of the firſt Degree or Order were firſt call'd to this Succeſſion, as it happened among the *Romans:* After theſe came the Grandchildren, and then the Great
† Lib. 4. Tit. 2. L. 1. & 5. Granchildren; for which, ſee the Laws of the *Viſigoths* †; and then came the next in Degree of Kindred: for the Law of their Tables made
‖ C. 6. 28. 4. no diſtinction of Sex in this *Inteſtate Succeſſion* ‖. The *Voconian* Law admitted only Daughters, and other Women, to a certain Part of the Eſtate. And the *Lombard* Law, by a Conſtitution of *Luitprandus*,
* Leg. Long. Tit. 45. only admitted them to a third Part *: But the more noble Provinces, which conſider'd each Sex, and the Nature thereof with greater accuraty, preferr'd the Males. And God, the wiſeſt Lawgiver of all, has enacted a Law in the following Words, *viz. If a Man dies and has no Son, ye ſhall then cauſe his Inheritance to paſs unto his Daughter. And if he has no Daughter, ye ſhall then give his Inheritance unto his Brethren. And if he has no Brethren, ye ſhall then give his Inheritance unto his Father's Brethren. And if his Father has no Brethren, ye ſhall then give his Inheritance unto his Kinſman or next of Blood, and he ſhall poſſeſs it; and it ſhall be unto the Children of* Iſrael
† Num. c. 27. v. 8. 9. 10. 11. *a perpetual Statute of Judgment* †. By an antient Law of the *Armenians*, Women did not ſucceed their Parents, nor their Brethren, till ſuch time as the Emperor *Juſtinian* corrected this Law by a Novel Conſti-
‖ Nov. 21. tution ‖. By the Laws of *Burgundy*, if any one dies Inteſtate without a Son, the Daughter ſhall ſucceed to the Father's and Mother's Eſtate in the Place of a Son; and if he ſhall happen to die without leaving Son or
* Leg. Burg. Tit 14. Daughter, the Eſtate ſhall come to the Siſters, or next of Kin *. And the like Law is among the *Saxons* and the *Engliſh*.

The Eſtate and Inheritance of a Perſon dying Inteſtate, is, by Right of Devolution, according to the *Civil Law*, given to ſuch as are ally'd to him *ex Latere*, commonly ſtiled *Collaterals*, if there be no Aſcendants or Deſcendants ſurviving at the time of his Death. But the Order of this Succeſſion is various and different, as the Order of Aſcendants and Deſcendants was: And, according to that Order, this Succeſſion of *Collaterals* obtains and takes place. For by the Law of the twelve Tables (as already hinted) it was given firſt to the Inteſtate's Children, then to his Kindred by Conſanguinity on the Father's ſide; and, laſtly, to ſuch as
† D. 38. 16. 1. & 2. were neareſt of Kin to him on the Mother's ſide †. And according to this Law, Brothers and Siſters were admitted to the Succeſſion of a Brother

ther deceas'd in an equal manner, tho' they were not all deſcended from the ſame Father or Mother ‖. But, by a more modern Law among the *Romans*, touching the Succeſſion of *Collaterals*, Brothers of the whole Blood are preferr'd to Brothers of the half Blood only: And thus the Brother and Siſter of a Brother already dead, did not come in for the Eſtate with the Children ſurviving and deſcending from the other Brother already dead; nor did Nephews come in with their Uncles on the Father's ſide for the Eſtate of their ſaid Uncle *. Nor is it any Objection to ſay, That Brothers *ex uno latere* are ally'd to the Perſon deceas'd even in the ſecond Degree; and, therefore, are *in pari gradu*: becauſe Perſons ally'd by the whole Blood do not only depend on the ſame Degree, but are knit together by a twofold Right or Bond of Alliance, *viz.* by that of the ſame Father and Mother: and thus as two Bonds bind ſtronger than one, ſo do two Reaſons avail more than one. And this is true in Succeſſion to *Allodial* Eſtates; but 'tis otherwiſe in Succeſſion to *Feudal* Inheritances; for then the Brother of the whole Blood ſhall not, by any means, exclude the Brother by the half Blood; becauſe, in *Feudal* Eſtates, the Bond is not conſider'd on the Mother's ſide.

‖ C. 6. 58. 1.

* C. 6. 57. 3.

According to the Common Law of *England* in Adminiſtrations, the whole Blood ought to be preferr'd to the half Blood: for next of Kin ſhall be intended to be meant, according to the Statute, of ſuch as the Common-Law adjudges to be ſo; and ſo it was held in *Brown*'s Caſe, before the Delegates, in the 8th of King *Charles* I. But according to *Stiles*'s Report †, one of the half Blood is in as equal a Degree of Kindred to have the Letters of Adminiſtration committed to him, as one of the whole Blood is. A Man dying, left Iſſue by two ſeveral Venters, *viz.* by the firſt three Sons, and by the ſecond two Daughters: one of the Sons, and the older of the two ſurviving Brothers, takes out Letters of Adminiſtration. And Sir *Lyonel Jenkins*, Judge of the Prerogative Court, would compel the Adminiſtrator to make Diſtribution to the Siſters of the half Blood. Whereupon a Prohibition was pray'd, but upon Advice by all the Judges, it was deny'd; for that the Siſters of the half Blood, being of Kin to the Inteſtate, and not in a remoter Degree than the Brother of the whole Blood, they muſt be accounted in equal Degree ‖: and this is true as to the Diſtribution of the Eſtate, but not as to granting of Letters of Adminiſtration, according to the Statute. *Smith*'s Caſe.

† Fol. 74. & 75.

‖ Mod. Rep. 209.

Adminiſtration was granted to the Siſter of the half Blood of the Inteſtate, and her Husband by the Prerogative Court, and the Brother of the whole Blood ſued to have the Letters of Adminiſtration repeal'd: And upon a Motion made for a Prohibition on this Suggeſtion, it was agreed by the Court, That the Siſter of the half Blood, is in equal Degree of Kindred with the Brother of the whole Blood, according to the Statute. And ſo it was reſolv'd in the firſt of K. *Charles* I. between *Glaſcock* and *Wingate*, known by the Name of *Yelverton*'s Man's Caſe. And if the Ordinary has once executed his Power according to the Statute, he cannot repeal the Letters upon a Citation without Cauſe ſhewn. But it was reſolv'd, That the Statute was not obſerv'd in granting Letters in this Caſe; becauſe the Husband who is not of Kin to the Inteſtate, is join'd with the Wife: and if ſhe ſhould die before him, he would continue Adminiſtrator againſt the meaning of the Statute. And for this Cauſe, a Prohibition was deny'd. But it was ſaid, That if it had been granted to them during Coverture alone, perhaps it might have been good; becauſe the Husband might have adminiſtred during the Coverture, though it had been granted to the Wife only *. *Brown* verſ. *Wood*.

* Select Caſ. p. 36.

Letters

Letters of Adminiſtration of the Goods of Sir *John Lamb* Inteſtate, were granted by the Prerogative-Court, to the Wife of one *Hill*, being near of Kin to the Inteſtate: and, upon a Suggeſtion of Suit there by others of equal Degree, for a Diſtribution of the Inteſtate's Goods, according to an Agreement made by the Adminiſtrator (as pretended) a Prohibition was pray'd and granted. For the Statute requires, That Adminiſtration be granted to the next of Kin for their Advantage; and when the Ordinary has once executed his Power (as aforeſaid) according to the Statute, he cannot alter it, nor has he any Power to compel the Adminiſtrator to make Diſtribution according to the Agreement: And 'twas ſaid, That the Court threatned to repeal the Letters granted, unleſs ſhe would exhibit a true Inventory, and paſs an Account: But if it appears, that they go about to repeal the Letters for not doing it, a Prohibition will lie; which was not deny'd by the Court *. *Hill & Uxor*, verſ. *Bird*, and others.

* Select. caſ. p. 56.

In *Goddard* and *Brier*'s Caſe, the Court was of Opinion, That this kind of Adminiſtration, during the Minority of an Executor, was not within the Statute of 21 *H.* 8. to be granted of Neceſſity to the Teſtator's Widow, becauſe there is an Executor all the while: But it had been otherwiſe (perhaps) if the Executor had been made from a Time to come †. And where one of the Executors is an Infant, and may not prove the Will, Adminiſtration *during his Minority* may be granted to the other, who may bring an Action *ſole*. And it is not inconſiſtent, that he ſhall have the Adminiſtration in ſuch a Caſe: for it is not granted as upon one dying Inteſtate, but only to enable him to ſue alone; becauſe the other is not capable of proving the Teſtament, and ſo cannot join with him, and he may not ſue alone ‖.

† Hob. Rep. p. 250.

‖ Levin. Rep. Part 2. p. 240.

By the Common Law of *England*, an Adminiſtration, granted *durante minori Ætate*, ceaſes to have any Effect in Law, as ſoon as the Perſon arrives at the Age of ſeventeen Years: And, therefore, if a Perſon brings an Action as Adminiſtrator *durante minori Ætate*, he ought to aver the Perſon, for whoſe Intereſt he brings the Action, to be a Minor within the Age of Seventeen; otherwiſe he ſhall be barr'd of his Action. See *Piggot*'s Caſe in *Coke's Rep.** Thus if an Infant be made Executor (as aforeſaid) Adminiſtration may be granted to the Mother or any other Friend of ſuch Infant *durante minori Ætate*, which ſhall ceaſe and be void, when the Infant comes to ſeventeen Years of Age: And ſuch an Adminiſtrator may not ſell any Goods of the Perſon deceaſed, unleſs it be for the Neceſſity of Payment of Debts and the like; for he has his Adminiſtrator *pro bono & commodo Minoris*, and not for his Prejudice. Nor can he aſſent to pay Legacies, unleſs there be Aſſets to pay Debts, *&c.* And if ſuch Minor be a Woman under the Age of Seventeen Years, and marries a Husband being of full Age, the Adminiſtration then ſhall ceaſe and determine. Where an Executor dies Inteſtate, the Reſiduary Legatee ſhall have the Adminiſtration granted to him, and not the next of Kin; becauſe that is more ſuitable to the Intereſt of the Teſtator's Meaning †.

* Lib. 5. Fol. 29.

† Dyer's Rep. p. 372.

It has been often reſolv'd againſt 5 *Ed.* 6. That the Father or Mother are next of Kin, to whom Adminiſtration ought to be granted in reſpect of Children dying Inteſtate ‖. By the *Civil* Law, if a Son dies Inteſtate without a Will, and leaves behind him neither Mother nor Brothers to inherit his Eſtate, the Father ſhall ſucceed as Heir thereunto *: and this Aſſertion is ſo well eſtabliſh'd by that Law, that it would be almoſt a Crime to diſpute the ſame. But if a Son dies Inteſtate, and leaves a Father and Mother behind him, they are both at this Day, by a novel Con-

‖ Coke's 3. Rep. 37.

* Nov. 118. cap. 1. & 2.

Conſtitution, equally admitted to the Succeſſion of the Inteſtate's Eſtate, tho' by a Law in the *Digeſts* and *Code**, the Father is preferr'd unto the Mother in Point of Succeſſion to his Inteſtate Son. But touching this Law in the *Novels*, there has been a great Diſpute among the Doctors, *viz.* Whether only thoſe Goods ſhall be given to the Father, which came to the Son from the Father, or by the Father's means; and thoſe to the Mother, which came from the Mother, or by her means. *Bartolus* thinks, that the Aſcendant by the Father's Line, ought to have the Goods of an Inteſtate Son, which the deceas'd had from the Father, or by his means; and likewiſe the Aſcendant by the Mother's Line, ſhould have thoſe Goods, which the Son deceas'd acquired from his Mother, or by her means: and for this Opinion, he quotes two Laws in the Margin much to this Purpoſe; and hereunto *Imola*, *Romanus* and *Jaſon*, have ſubſcribed themſelves in their Comment on the firſt of theſe Laws †. But this Opinion of *Bartolus*, and others, does in no wiſe pleaſe ſome Perſons; becauſe, ſay they, the Father and Mother ſhall equally ſucceed to their Inteſtate Son: But the Opinion of *Bartolus* is chiefly follow'd where the *Civil* Law is practis'd.

* C. 6. 56. 2. J. 3. 3. 3.

† Alex. conſ. 150. vol. 2.

Although, according to *Rolls* ‖, the Archbiſhop ſhall grant Letters of Adminiſtration of the Goods of one dying Inteſtate beyond Sea; yet if a Man dies Inteſtate, having Goods in *England* and *Ireland*, ſeveral Adminiſtrations ought to be granted. And 'tis the ſame thing if he dies Inteſtate, having Goods, in the ſeveral Provinces of *York* and *Canterbury*. *Dyer's Rep.* 305. *Pl.* 58.* Where Adminiſtration is granted by the Inferior Dioceſan, where there are *Bona notabilia*, and afterwards it is granted by the Archbiſhop; or *è contra*, how they ſhall operate together. See *Needham*'s Caſe in *Coke's Rep.* †. It was held by *Twiſden* and *Wyndham*, Juſtices, that where a Man dies Inteſtate, having Goods in ſeveral *Peculiars*, the granting of Adminiſtration does belong to the Metropolitan of the Province, and not to the Ordinary of the Dioceſs, for they are exempt from the ordinary Juriſdiction ‖, upon an Exception taken to a Declaration, that it was not Good, becauſe he declared as Adminiſtrator upon Letters granted by the Archdeacon, and did not ſay by the Ordinary of that Place, nor *cui de Jure* it did belong to grant it. The Court held, that it was good in Caſe of the Archdeacon, as well as in Caſe of the Biſhop, for the Archdeacon is *Oculus Epiſcopi*; and by *Twiſden*, the Declaration was good without ſaying *per loci illius Ordinarium*, becauſe he produc'd his Letters of Adminiſtration *.

‖ Pag. 908.

* Levin. Rep. Part 2. p. 86.

† Rep. 8. 135.

‖ Levin. Rep. Pt. 1. p. 78.

* Levin. Rep. Pt. 1. p. 163.

It was agreed by all the four Judges in the *King's-Bench*, That where the Ordinary has once granted Letters of Adminiſtration according to the Statute, he may not revoke or repeal the ſame without Cauſe ſhewn; becauſe the Grantee has an Intereſt in the Goods by the Statute, which the Ordinary cannot take from him without good Cauſe ſhewn: But for a good Cauſe, they all thought that he might; as when the Adminiſtrator becomes a Lunatick, and the like. And it was ſaid, That the granting of Adminiſtration, whilſt a *Caveat* was depending, was a ſufficient Cauſe to revoke the ſame. And they ſaid, that the Judges delegated are the proper Judges of what validity the *Caveat* ſhall be according to their Law: And it ſeem'd to them, that it was a *Superſedeas* at the Common Law, and that as Judgment given after it, according to the Common Law is erroneous, ſo it is according to the *Civil* Law after a *Caveat*. But be it ſo or not, it is to be judged by the Delegates, who are the proper Judges of this manner of Proceeding in their Courts touching a Matter Eccleſiaſtical, which belongs to their Courts, and not to the Common Law, which is not acquainted with their manner of Proceeding †.

† Levin. Rep. p. 186.

If an Ordinary grants Letters of Adminiſtration where there is a Will and Executors named therein, though it be conceal'd; yet the ſame is void, and not made good by the ſubſequent Renunciation of the Executors ||.

|| Levin. Rep. Pt. 2. 173.

Where an Appeal is made, and the firſt Adminiſtration is confirm'd, it is uſual then to ſend back the Cauſe to the Court from whence it came by Appeal: But when the firſt Sentence is revers'd, then the firſt Court is veſted of its Juriſdiction; and the Court that reverſes it, ſhall commit the Adminiſtration *de novo*; becauſe according to this Maxim in the *Civil* Law, a *Judge that has once aggriev'd a Man, is always preſum'd to be willing to aggrieve him* *. Letters of Adminiſtration obtain'd by Fraud and Colluſion are void, and ſhall not repeal a former Adminiſtration †. If an Adminiſtrator dies, his Executors are not Adminiſtrators, but it behoves the Ordinary to commit a new Adminiſtration. And if a Stranger, that is not Adminiſtrator or Executor, takes the Goods of the Perſon deceas'd, and adminiſters of his own wrong, he ſhall be charg'd and ſu'd as an Executor in his own wrong in any Action brought againſt him ||. If the Metropolitan, pretending the Party deceas'd had *Bona notabilia* in divers Dioceſſes, grants Letters of Adminiſtration, ſuch Adminiſtration is not void, but voidable, by a Sentence. But if the Ordinary of a Dioceſs commits the Adminiſtration of Goods, when the Party deceas'd has *Bona notabilia* in divers Dioceſſes, ſuch Adminiſtration is meerly void, as well in reſpect to the Goods in his own Dioceſs, as to all others *. If the Ordinary takes any Reward or Fee for preferring of any one Perſon before another to the Adminiſtration, it is Bribery in the Ordinary, and he may be puniſh'd with Fine and Impriſonment at the King's Pleaſure, and frequently with the Loſs of his Place †. As the Probate of every Biſhop's Laſt Will and Teſtament belongs to the Archbiſhop of the Province, though he has no Goods but within his own Dioceſs; ſo does the granting of Letters of Adminiſtration, touching his Goods, belong to the ſaid Archbiſhop.

* Bald. in l. 16. C. 7. 62.

† Coke Rep. 3. fol. 78.

|| Term. del. ley.

* Coke 5 Rep. fol. 29, 30.

† Coke 3 Inſt. p. 148.

Tho' the Ordinary may call the Adminiſtrator to an Account, yet he cannot force him to make a Diſpoſition of the Surpluſage of the Inteſtate's Goods after Debts paid, by the true meaning of the 21 *H.* 8. c. 5. But what remains ſhall go to the Adminiſtrator, in caſe there be any more Debts to pay, which as yet are not come to his Knowledge; and if the Ordinary will meddle in cauſing a Diſpoſition to be made, a Prohibition will be granted againſt him, if the Adminiſtrator requeſts it. *Levan*'s Caſe ||. An Adminiſtrator accounted before the Ordinary, and prov'd Payment by one Witneſs; and becauſe the Ordinary would not allow of Proof by one Witneſs, but excommunicated the Party for want of Proof, a Prohibition was thereupon granted: and the Book ſays there, That the Juriſdiction of the ſpiritual Court is not taken away by the Prohibition, but their Proceedings only regulated *.

|| Crok. Rep. Pt. 3.

* Latch. Rep. fol. 117.

In the South part of *Holland*, in reſpect of Succeſſion to an Inteſtate's Eſtate, the *Dutch* do not make uſe of the *Roman* Civil-Law, but have a particular Ordinance of their own, publiſh'd *April* the firſt, 1580. And in North *Holland*, commonly called *Weſt-Friezeland*, they have alſo, ſince that Time, receiv'd a ſpecial Law from their States Provincial, which governs them in this reſpect: Nor are we here in *England* directed by the *Civil* Law in this Point of Adminiſtration or Inteſtate Succeſſion, but are in a great Meaſure govern'd by the Municipal Laws of the Realm.

Of

Of Admiſſion to Eccleſiaſtical Benefices: And of the Cauſes of Refuſal.

ADmiſſion is, when the Patron preſents a Clerk to a Church that is vacant, and the Biſhop upon Examination admits and allows of ſuch Clerk to be fitly qualify'd, by ſaying, *Admitto te habilem, &c.* * And the Writ *de admittendo Clerico*, is a Writ granted to him, that has recover'd his Right of Preſentation againſt the Biſhop in the Common-Pleas. See the Form of this Writ in *Fitzherb. Natur. Brevium* †. A Perſon that deſires Admiſſion to a vacant Benefice in the Church, ought, in his Preſentation, according to the *Canon-Law*, to expreſs the Way and Manner how it became void ‖: for, according to that Law, it is of great moment to conſider, whether it became vacant *de Jure & de Facto*, or *de Jure* only. For an Eccleſiaſtical Benefice is ſometimes void *de Jure & Facto*, and then it ought to be conferr'd on an Idoneous Perſon *; and ſometimes *de Facto* and not *de Jure*, as when a Man ſuffers a Spoliation by his own Act †. And ſometimes it is vacant neither *de Facto* nor *de Jure*; and in this Caſe, and in that immediately foregoing, it ought not to be conferr'd on any one. So that he who is admitted unto ſuch a Benefice, ſtands depriv'd thereof *ipſo Jure* ‖.

* Coke on Lit. fol. 344. a.

† Fol. 38. & Reg. Orig. fol. 33. a.

‖ Dd. in cap. 6. vi. 1. 3.

* X. 3. 5. 29. 30 & 35.

† X. 40. 2 & 4.

‖ X. 3. 8. 1. 2. & 13.

By the *Canon-Law*, Admiſſion and Inſtitution unto Eccleſiaſtical Benefices, does not only belong to the Biſhop of the Dioceſs, but even to any other Eccleſiaſtical Perſon, provided this Perſon has ſuch Right firſt derived to him from the Biſhop, and can by ſuch precedent and original Title legally preſcribe unto ſuch a Right of Admiſſion and Inſtitution *. And 'tis likewiſe ſaid in our Law-Books, That Perſons may have the Right of Admiſſion to Eccleſiaſtical Benefices *Jure proprio*, if they have this Right and Power by ſpecial Privilege: So that the Chapter of a Cathedral Church, may do this *Jure proprio*, when the Epiſcopal See is vacant; but a Vicar-General, in the Biſhop's Life, only acts herein *Jure alieno*.

* X. 3. 7. 6.

A Biſhop, in the Buſineſs of Admiſſion or Inſtitution, is not to be look'd upon as a mere Miniſter or Inſtrument, but as a Judge †: And, therefore, in many Caſes, he may refuſe to admit the Clerk preſented to him; and juſtify his Refuſal. And the Cauſes of a Refuſal, may ariſe either from the Perſon of the Clerk, the Preſentation he brings with him; or, *thirdly*, from the Condition of the Church, to which he is preſented, *&c.* *Firſt*, They may ariſe from his Perſon. For every one, that is preſented to a Church, ought to be duly qualify'd to perform the Duties of the Incumbent thereof; and this the Law of Reaſon renders ſufficiently evident: and, therefore, he ought to be ordain'd or made a Miniſter, according to the Direction of the Laws ‖. For whatever the Law has been heretofore as to Laymen in reſpect of Deaneries, Prebends, and other Eccleſiaſtical Benefices without Cure of Souls, and to Deacons in reſpect of Benefices with Cure; yet as the Law now ſtands by a Statute in King *Charles* the Second's Reign, neither Laymen nor Deacons, but only a Prieſt according to the Form and Manner preſcrib'd by the Book of Common-Prayer, can have an Eccleſiaſtical Benefice or Dignity, upon Pain to forfeit for every Offence one hundred Pounds, except the King's Profeſſor of the *Civil* Law within the Univerſity of *Oxford*, who may hold

† 15 H. 7. 8. a.

‖ Dyer. Rep. P. 292.

hold the Prebend of *Shipton* in the Cathedral Church of *Salisbury*, * 14 Car. 2. ch. 4. though he be a Layman *. But tho' no other than a Prieſt duly ordain'd is capable of being admitted to an Eccleſiaſtical Preferment ; yet if a Clerk goes to the Biſhop with a Preſentation for an Admiſſion and Inſtitution, not having with him Letters of Orders to teſtify that he is a Prieſt duly ordain'd, nor making any Proof thereof; and the Biſhop, at the Clerk's Requeſt, gives him a Week's time to bring them, and the Clerk does not return till the Patron's ſix Months are elapſed : In this Caſe it was held, That the Cauſe of the Biſhop's refuſal to admit was not ſufficient, and that he ſhould not have the Turn by Lapſe, becauſe the Clerk is not bound to ſhew his Letters of Orders. But it was urged, That the Clerk, who is preſented, ought to prove to the Biſhop that he is a Deacon, and that he has Orders, otherwiſe by the Statute of the 13th of *Eliz.* the Biſhop is not bound to admit him : for as the Law then ſtood, a Deacon was admittable. To which it was ſaid, That the Statute does not compel the Clerk to ſhew his Orders ; for (perhaps) he has loſt them. But then it was a Queſtion, how the Clerk ſhould prove himſelf to be in Orders, becauſe it ſeems to be granted that he ought to do this: To which it was ſaid, That the Biſhop might examine him upon Oath touching his Orders. However Judgment was given againſt † Leon. Rep. pt. 1. 230. Crok. Rep. 241. the Biſhop †: which ſeems to be a hard Caſe, unleſs the Biſhop has not only Authority to examine him upon Oath, but be alſo bound to do it *ex Officio*, on the Clerk's refuſal to ſhew his Orders. And in this Caſe it was alſo ſaid, that though a Clerk does not exhibit to the Biſhop Letters Miſſive or Teſtimonial, teſtifying his Ability and good Behaviour ; yet the Biſhop ought not to refuſe the Clerk, or defer the Admiſſion of him ; becauſe the Biſhop is, by Examination, to try the Clerk's Ability, and may alſo make enquiry touching his Behaviour, ſince the Law allows him time convenient. But though a Clerk does bring to the Biſhop Letters Teſtimonial reporting his Sufficiency to ſerve the Cure, yet the Biſhop may proceed to the Examination of him in reſpect of his Ability, and may take Time to make enquiry touching his Behaviour: And *Rolls* || Rolls Abr. 354 & 355. ſays||, 28 Days are allow'd by the Law for that Purpoſe. And ſhould the Biſhop be ſatisfy'd as to the Clerk's Ability and good Behaviour; yet he is not bound inſtantly to admit him : And if a Clerk, coming to the Biſhop for Admiſſion, be order'd to come to him again afterwards to be examin'd, becauſe he has other Buſineſs, this is no Refuſal of the Clerk. So that if the Clerk returns not again for the Admiſſion, and the ſix Months expire, and the Biſhop do thereupon collate by Lapſe, this will be a good Plea for the Biſhop upon a *Quare Impedit* *.

* 14 H. 7. 21. Dyer's Rep. Leon Rep. pt. 3. 46. † Stat. de Arc. Cler. cap. 13. If the Biſhop, upon Examination, finds the Clerk preſented inſufficient to ſerve the Cure that is committed to him by the Patron, he may then refuſe to admit him †. And tho' the Clerk be otherwiſe learned, yet if he be preſented to a Church in *Wales*, where the Pariſhioners are to have divine Service in the *Welch* Tongue (for that they underſtand not *Engliſh*) and the Clerk is not able to ſpeak *Welch*, the Ordinary may refuſe him as uncapable of the Cure. And the Reaſon why the want of *Welch*, in ſuch Caſe, is, at this day, a juſtifiable Cauſe of Refuſal, is becauſe of a private Act of Parliament made in the 5th of *Eliz.* entitled, **An Act made for the Tranſlating of the Bible, and of the Divine Service, into the Welch Tongue.** And now it may be further ſaid, I conceive, by Reaſon of a Clauſe in the Statute of the 14th of *Charles* II. by which it is enacted, That the now Common-Prayers ſhall be tranſlated into the *Welch* Tongue ; and, being ſo tranſlated, ſhall be uſed by all Miniſters and Curates in *Wales*. For at the Common Law, before it was thus enacted, Ignorance of

of the *Welch* Tongue was not a Cauſe of Refuſal of any Perſon preſented to ſuch Church in *Wales*. And becauſe the Act of the 5th of *Eliz.* that makes this Alteration in the Common-Prayer, was but a private Act; according to *Anderſon*, the ſaid Act not being pleaded by the Biſhop, they could not take notice of it, but would adjudge according to the Common-Law; and therefore, it concerns the Biſhop in the like Caſe to plead it ſpecially *. Or if a Perſon be preſented to a Church in *England*, who does not underſtand the *Engliſh* Tongue, the Biſhop may refuſe to admit him for ſuch Incapacity †: But if he underſtands our Language, though he be an *Alien* born, yet he is not to be refuſed. See Statute the 7*th H.* 4. Chap. 12. and the 14*th H.* 6. Chap. 6. Tho' by the Statute of the 13*th* of *Rich.* 2. and the firſt of *Henry* the 5*th*, Chap. 7. *Frenchmen* be diſabled to have Benefices in *England*. But it is thought that theſe Statutes are not in force at this Day ||; yet *Coke* ſaid, that if the King will preſent a *Frenchman* or *Spaniard*, they ſhall not hold the Benefice within this Realm *. And *Coke* ſays alſo generally, That if an *Alien* or Stranger be preſented to a Benefice, the Biſhop ought not to admit him, but may lawfully refuſe ſo to do. And this Opinion of *Coke*'s is given on Conſideration had of all the Statutes.

* Leon. Rep. pt. 1. p. 31.
† Hob. Rep. p. 147.
|| Rolls Abr. 2. p. 348.
* Godb. Rep.

When a Biſhop refuſes a Clerk for Inſufficiency, and the Patron thereupon preſents another, ſuch Biſhop ſhall be deemed a Diſturber, if he afterwards within the ſix Months admits the firſt Clerk preſented to him; becauſe, having once refuſed to admit him on the account of Inſufficiency, he cannot afterwards accept him. See the Biſhop of *Hereford*'s Caſe in *Croke*'s Reports ||. But there are other good Cauſes for the Biſhop to deny Admiſſion to a Clerk preſented to him, beſides that of Inſufficiency in point of Learning: for whatever are held to be good Cauſes of Deprivation, are likewiſe ſaid to be ſufficient Cauſes to deny Admiſſion to a Benefice, as Incontinency, Perjury *, Hereſy †, Baſtardy || not diſpenſed with, Drunkenneſs, Simony, Outlawry, Irreligion, and the like: All which the Reader may ſee more at large under the Title of *Deprivation*. As a Clerk preſented may be refuſed Admiſſion, if he has been guilty of Perjury before a lawful Judge in a Court of Judicature *; ſo he may likewiſe be refuſed Admiſſion, if it appears by his own Confeſſion that he is guilty thereof, tho' there be no Conviction of it † For it is ſaid, that the Ordinary may refuſe a Clerk upon his own Knowledge of an Offence committed by him (provided ſuch Offence be a good Cauſe of Refuſal) tho' he be not convicted thereof by the Law; and this ſhall be try'd by Iſſue, whether it be true or not ||. But tho' a Clerk be a Haunter of Taverns, and a Player at unlawful Games, yet the Biſhop may not refuſe him Admiſſion, unleſs he has been guilty of frequent and ſcandalous Acts of Drunkenneſs; becauſe theſe Faults of haunting Taverns, and playing at unlawful Games, are not evil in their own Nature, but only ſo by a Prohibition of Law *: But in the 15*th* Year of *Charles* the Firſt, this Caſe was denied to be Law after much Debate by Juſtice *Berkley*, and ſo agreed by *Jones*. Nor is it ſafe for the Ordinary to refuſe a Clerk, becauſe he is the Son of the laſt Incumbent of the Church, tho' he ſhould not bring any Diſpenſation along with him, on the account of the *Canon* Law, which ſays that the *Son cannot ſucceed the Father in an Eccleſiaſtical Benefice* †; becauſe, as it has been held, the *Canon* Law in this Caſe does not obtain in the Church of *England*. *Sed Quære*; becauſe the Archbiſhop of *Canterbury* uſually grants Diſpenſations at the Requeſt of ſuch Clerks: but if the Ordinary refuſes for ſuch Cauſe, and the Patron preſents another, who is inſtituted and inducted, the firſt Clerk is without any Remedy at Law; and if he ſues the ſecond

|| Paſch. 26 Eliz. p. 27.
* Paſch. 6 Eliz.
† 15 H. 7. 20.
|| 7 H. 6.
* 38 E. 3. f. 2.
† Dyer. Rep. 293. b.
|| 38 E. 3. 2. b.
* Dyer Rep. 154.
† x. 1. 17. 3, & 4.

Clerk in the Spiritual Court, he may be ſtopped by a Prohibition from proceeding in ſuch Suit †.

† Noy. Rep. p. 91.

In a very late Caſe, the Biſhop of *Exeter* refus'd to admit a Parſon to a Living, becauſe he was Inſufficient in point of Literature, and for that Reaſon *inhabilis & minimè idoneus ad habendam Eccleſiam cum curâ animarum*; which was the Biſhop's Plea, upon a *Quare Impedit*. 'Tis true, the Courts in *Weſtminſter-Hall* held this to be too uncertain a Plea, and a looſe way of Pleading; and therefore gave Judgment for the Plaintiff in the *Quare Impedit*, which was affirm'd upon a Writ of Error in the *King's-Bench*; but the Judgment was afterwards revers'd in the Houſe of Lords†. So that all theſe Cauſes above-mentioned are now good Cauſes of refuſal to admit a Clerk to a Benefice; and they are ſuch as relate to his Perſon: But if there be no Incapacity in the Preſentee, yet he may refuſe to admit him for ſome Cauſes relating to the Patron, as I ſhall hereafter obſerve under the Titles of *Patron* and *Preſentation*.

† Caſes adj. in Parl.

It is enacted by a provincial Conſtitution in *Lindwood* *, that every Biſhop ſhall grant to the Clerk whom he has admitted unto an Eccleſiaſtical Benefice, Letters Patents touching his Admiſſion and Inſtitution thereunto, containing and ſetting forth (among other things) in what Orders the Perſon admitted was at the time of his Admiſſion, *viz.* whether he was a Prieſt or Deacon, and alſo by what Title he was admitted to ſuch Eccleſiaſtical Benefice. For theſe Letters Patents in Matters of Benefices are in the place of a Title †: and therefore it ſeems according to *Bernard* of *Compoſtella*, that if thoſe Letters are defective, the Title is naught and vicious; but I am of a contrary Opinion, becauſe a good Title to a Benefice may be proved otherwiſe than by ſuch Letters Patents; and ſo may Admiſſion likewiſe. It has been held by ſome Perſons, that if in the Letters of Inſtitution there be no mention made of the Perſon admitted to an Eccleſiaſtical Benefice, that he was a Clerk in Holy Orders at the time of his Admiſſion; this Defect ſhall vitiate his Inſtitution, and render his Title naught, becauſe there is no Evidence of a Quality neceſſary unto ſuch Admiſſion, *viz.* that of Orders or Clerkſhip; and thus an extrinſick Quality is omitted, which is not eaſily preſum'd, but ought to be prov'd. But I think that ſuch a Defect ſhall not prejudice the Perſon admitted, if it may otherwiſe appear, that the Perſon admitted was in neceſſary Orders at the time of his Admiſſion, becauſe the Truth of Things done ſhall not be vitiated by the Subtleties of Law, or by any Errors of Man †. But if he was not in ſome Orders at that time, then it ſufficiently appears, that his Title is vicious in reſpect of his Incapacity.

* Lib. 3. Tit. 6. c. 3.

† Bern. in c. 20. X. 1. 3.

* D. 1. 17. 6. 1.

Of Adultery, and the ſeveral Puniſhments thereof.

THE *Julian* Law touching Adultery, which was made by *Auguſtus Cæſar* ‖, is a Law which puniſhes not only Adultery, but likewiſe Whoredom, Inceſt, and what the *Civilians* in *Latin* ſtile *Lenocinium* *, and we in *Engliſh* call *Bawdry*, which is a wicked Practice of procuring and bringing Whores and Rogues together. The *Latin* Words *Stuprum* and

‖ D. 48. 5. 1.
* D. 48. 5. 12. & 38.

and *Adulterium*, which we call *Whoredom* and *Adultery*, are in the Books of the Civil Law promiſcuouſly made uſe of, tho' properly ſpeaking Adultery is committed in a married Woman, and *Stuprum* in a Virgin, Widow, or Boy, as may appear from the Laws quoted here in the Margin *. I ſhall here treat of Adultery, and afterwards of Inceſt and Whoredom under their proper Titles.

* D.48.5.6.1. D. 48.5.34.1. D. 48.5.101. in prin.

Now Adultery is defined to be the Violation and Defilement of another Perſon's Bed †; and it may be committed on another Man's Wife, tho' ſhe be what the *Civil* Law calls *Uxor Injuſta*: For it is enough if ſhe be a Wife, tho' ſhe does not come into her Husband's Power by *Coemption*; and according to the *Civil* and *Canon* Law, it may be committed on a *Sponſa* or Woman betroth'd, ſince the Law does not permit us to violate the Matrimonial Bed, of what Quality ſoever it be, nor the very Hope of Matrimony ||. But yet Adultery is not committed on a married Proſtitute, tho' ſhe may commit Adultery herſelf, and the Husband may puniſh this Crime in her: And the Reaſon which the Law aſſigns, is, becauſe where there is *nullius Thori Pudor*, but a promiſcuous and vulgar Turpitude by the Husband's Connivance, the Husband's Bed does not ſeem to be injured and violated thereby. *Iſidore* in his Book of *Etymologies*, ſays, that Adultery is ſo called, *quaſi ad alterius Thorum*; becauſe the Perſon committing the ſame, does approach the Bed of another Perſon. In the extended Senſe of the Word, according to the *Canoniſts*, who are not diſpleas'd with Diſtinctions, Adultery is two-fold, *viz.* *General* and *Special*: that being ſtiled *General* Adultery with them, which does not only comprehend the Violation of another's Bed, but even that which includes and takes in all unlawful Fornication; though in the proper Senſe of the Word, Adultery is only committed on the Body of a married Woman, as aforeſaid.

† 36 Q. 1.

|| D. 48.5.13. 3.

Adultery may be committed three ſeveral ways. *Firſt*, Between a married Man and a married Woman; and this is call'd *Double* or *Twofold* Adultery: For each of theſe Perſons offending, not only violates his own Bed, but alſo defiles the Bed of another Perſon. *Secondly*, It may, according to the Opinion of ſome Men, be committed between a married Man and a ſingle Woman: but according to others, this is not ſtrictly Adultery; for this laſt Act is only Adultery according to the *Canon* Law *, and by the *Civil* Law is not deem'd Adultery either on the Man's ſide, or on the Woman's †. And *Thirdly*, it may be committed between a ſingle Man and a married Woman; and thus Adultery may be in the Man, when he defiles and violates another's Bed, tho' he be not a married Man himſelf; and in the Woman, when ſhe defiles her own Bed, tho' the Adulterer be a married Man. Tho' Adultery be an Eccleſiaſtical Crime, whenever a Suit is commenced in an Eccleſiaſtical Court *ad ſeparationem Thori Matrimonialis*; yet this is not a Crime *merely* Eccleſiaſtical, ſince the Secular Judge may intromit himſelf and puniſh this as a Crime of a mix'd Nature: and in reſpect of Lay-Men, the Secular as well as the Eccleſiaſtical Judge may take Cognizance thereof; nor is the Ordinary in this Point reſtrained only to Clergymen, but has a Power alſo of puniſhing Lay-men in Matters of Adultery.

* 32 Q. 5. 19.

† C. 9. 9. 1.

The Crime of Adultery may be impeach'd and brought into Judgment ſeveral ways. For ſometimes the Husband may impeach or accuſe his Wife of Adultery; as in the Caſe, wherein *Baldus* was conſulted. And on the other hand, the Wife may ſometimes accuſe the Husband of Adultery, becauſe he has committed this Crime with ſome Woman or other; as in the Caſe, wherein *Romanus* was conſulted: And in both theſe Caſes *ad ſeparationem Thori*. And ſometimes the Husband may accuſe both

both the Wife and the Adulterer of this Crime; as in the Caſe, wherein *Baldus* and *Joh. de Ananias* were conſulted. But by the *Civil* Law, no Perſon under Twenty-five Years of Age can impeach or prefer an Accuſation of Adultery againſt any one, unleſs it be in his own Caſe, where he proſecutes the Injury of his own Marriage-Bed *, tho' he be not barr'd and hindred from preferring other capital Accuſations. And the Right of the Husband is of ſuch a Nature, according to the antient *Civil* Law, that if he accus'd his Wife of Adultery, he was not oblig'd to inſcribe himſelf to the Libel, but he might aboliſh and diſcharge the Accuſation at his own Pleaſure; and tho' he ſued and impleaded his Wife upon naked Suſpicions alone, yet he was not liable to an Action of Calumny, unleſs ſuch Calumny was plain and evident againſt him †. The Husband might, within ſixty Days, to be computed from the Divorce, in the Right of a Husband, accuſe his Wife of Adultery; and after a Lapſe of that Time, the Father of the Woman might do it ‖, and all other extraneous Perſons were admitted to do the like; but extraneous Perſons were oblig'd to inſcribe themſelves according to the uſual way of Accuſation *, and that within four Months. Therefore it appears from each of theſe Times, *viz.* from the ſixty Days and the four Months join'd together, that the Woman could only be accus'd within ſix Months from the Time of the Divorce: And theſe ſix Months, in a marry'd Woman, were reckon'd from the Day of the Divorce, and in a Widow, from the Day of the Crime committed †. And as the Term of half a Year was preſcrib'd for commencing the Accuſation againſt her; ſo was the Term of five Years limited for a Determination of the Cauſe, unleſs the ſame was eluded by ſome Prevarication, or other legal Impediment ‖. If the Woman marry'd again during the Time that the Adulterer was under an Accuſation, ſhe could not be accus'd by any one during her Marriage, if the Adulterer was acquitted, tho' he was acquitted by Colluſion *. All Perſons may be accuſed of Adultery, of what Condition or Dignity ſoever they were †, provided they knew the Woman with whom they play'd the Whore to be another Man's Wife. And not only thoſe who commit Adultery, may be accus'd; but alſo thoſe, who do any wiſe make a Gain by this Crime, may be impeach'd, as Pimps, Panders, and the like: and this Accuſation ought to be commenc'd in the Place or Dioceſs, where the Offence is committed.

* D. 48. 5. 15.

† D. 48. 5. 30. C. 49. 6. & 14. ubi Dd.

‖ D. 48. 5. 3. 4. 14. 30.

* D. 48. 5. 14. 2.

† D. 48. 5. 29. 5.

‖ D. 48. 5. 31.

* D. 48. 5. 18.

D. 48. 5. 19.

† D. 48. 5. 38.

The Husband may bring his Action either *Civilly* or *Criminally*. *Criminally*, when the Action is brought by way of Puniſhment: and *Civilly*, when the Husband ſues in an Action of Injury for Damage; or *ad ſeparationem Thori*. The Defendant cannot regularly be defended by a Proctor ‖; for the Preſence of the Defendant, as well as of the Accuſer, is neceſſary. An Eccleſiaſtical Judge may proceed againſt Laymen committing Adultery (as aforeſaid) though he cannot principally proceed againſt them *ad ſeparationem Thori*, but only *ad Vindictam publicam*; and the Reaſon of this is, becauſe according to the *Canon* Law, Adulterers are ſaid to be ſacrilegious Perſons *. But *Joh. de Ananias* ſays, That Adultery is only of Eccleſiaſtical Cognizance, when the Proceſs is *ad ſeparationem Thori* †.

‖ D. 48. 5. 11. 1.

* C. 9. 10. 30.

† vi. 2. 2.

Adultery is very hard and difficult to be prov'd, and ſo likewiſe is Fornication, being both of them Acts of Darkneſs and great Secrecy: and, therefore, they can hardly be prov'd by any direct Means. Becauſe, though one ſhould ſee a Man upon the very Body of a Woman, with her Coats up above her Middle, yet it does not neceſſarily follow from thence, that carnal Copulation did intervene or enſue between them: for the Man himſelf might be then frigid or impotent on ſome Account or other; or even the Woman her ſelf may be *nimis arcta*, ſo that he could not enter

enter her Body. Therefore, in relation to the Proof of Fornication and Adultery, by Reaſon of ſuch difficulty, it happens, that preſumptive Evidence alone, is ſufficient Proof‖. And this preſumptive Proof is collected and inferr'd *exactibus propinquis*; that is to ſay, from the proximity and nearneſs of the Acts; as the Man's lying on the Woman's Body with her Coats up as aforeſaid, and her *Pudenda* nakedly expos'd as in the uſual Act and Manner of Copulation, or elſe from ſeeing them both together naked and undreſs'd in ſome ſecret Place, (for this is a ſufficient preſumptive Proof): or elſe from ſeeing them in Bed together * and the like; the Beginning and Foundation of ſuch Indications being enough to ground a preſumptive Evidence thereon. For the finding of a Man and a Woman together by themſelves naked in a ſuſpected Place, kiſſing and embracing each other, and in a very immodeſt Poſture, and they being both ſuſpected before of Incontinency; this, I ſay, will raiſe a vehement Suſpicion, and make a preſumptive Proof of their Guilt, theſe Things being the Preludes of Debauchery, and of a libidinous Converſation. 'Tis alſo a ſufficient Preſumption of this Crime, if a Man and a Woman are found lying together in ſome ſecret or ſuſpected Place, tho' they do nothing elſe in Sight. If Witneſſes ſhould depoſe, That they ſaw ſuch a Man and Woman join'd together in venereal Embraces †; or that they found a young Man open-breaſted and with his Breeches down, his Shoes off, and the Door ſhut, in Company with a Woman alone, tho' this does not neceſſarily prove the Act of Fornication or Adultery committed, yet it is a violent and ſtrong Preſumption thereof. And, therefore, ſince Fornication and Adultery committed in ſecret are Matters of ſuch difficult Proof; Witneſſes, that are in other Reſpects improper, are herein admitted and allow'd of as good Witneſſes in Law. And thus Adultery may be prov'd by ſuch Conjectures as are receiv'd and approv'd of either by Law or Nature; and in order to puniſh Adultery, theſe Conjectures ought to be rightly and truly prov'd. That Woman is preſum'd, according to the Opinion of ſome Men, to have committed Adultery, or (at leaſt) to have willingly committed the ſame, that is found in Brothel-Houſes, or where Adulteries are uſually committed; and the ſame Thing is preſum'd from Preparatories proximate hereunto, (as aforeſaid) as in finding a Man and a Woman *ſolus cum ſolâ* and *nudus cum nudâ* in a Bed-Chamber together‖. Suſpicion and Preſumption of Fornication and Adultery ariſes, when young Men, eſpecially Scholars, do haunt and frequent the Houſe of a marry'd Woman, or other young Damſel, both night and day, without any apparent and good Reaſon for ſo doing; but then ſuch a Preſumption is only ſufficient to put the Perſon to the Rack or Queſtion, according to the *Civil* Law, and not to bring him to Condemnation.

‖ X. 2. 23. 12.

* Ut ſupra.

† Dd. in c. 12. X. 2. 23. & in c. 7. 2. 21. Dd. in. c. 1 & 5. X. 5. 16.

‖ Dam. Prax. Civ. C. 178. n. 14.

No one can ſufficiently conceive or declare, now grievous and crying a Sin this Crime of Adultery is; nor can any one enough abhor and deteſt it as an impious and execrable Vice: ſince it deſtroys the Honour of Matrimony, and ruins the good Fame and Reputation of Children; wherein (as the *Civil* Law obſerves) conſiſts the *Decus Gentium*, or the Glory of a Family. Hence it is, that *Moſes* has pronounced many ſevere and bitter Curſes againſt adulterous Women *; Adultery being a more filthy and heinous Crime than *ſimple* Fornication committed with a ſingle Woman, that is not ally'd or of kin to us by Blood; becauſe a Child begotten and born in Adultery, is born and begotten by one Perſon to inherit another Perſon's Eſtate. *Bartolus* looks upon it to be the greateſt and worſt of all Crimes under High-Treaſon; and *Thales* the *Mileſian*, held it to be a greater Sin than even Perjury itſelf; and *Euphron* in *Sto-*

* Num. ch. 5. Deut. ch. 27.

bœus affirms, there is no greater Sin or Evil among Men than Adultery. *Sybilla Erythrea*, in *Lactantius*'s Book *touching the Anger of God*, reckons it amongſt thoſe Impieties, wherewith God is greatly provok'd and incens'd. The *Spartans* proſecuted it with ſo much Hatred and Severity, that the Crime of Adultery was ſcarce ever known to be committed in that State. But why do I mention Laws relating to Men, ſince there are ſome brute Beaſts, that avoid this Crime as a moſt deteſtable Act. For *Pliny* tells us, That Elephants know no ſuch Things as carnal Copulation with any other than their own proper Mate*; and that Doves do not violate the Faith of Wedlock, as he phraſes it †: And if we may believe him, Lyons do in a very ſevere manner puniſh the Adulteries of the Lyoneſs ‖. And *Ælian* in his Hiſtory of Animals informs us, That the Stork ſometimes kills the Adulterer and the Adultereſs*. But if neither the Laws of God, the Deteſtations of the antient Philoſophers, the Execrations of the Holy Fathers, nor the Examples of Brutes, can reſtrain the unruly Luſt of Men; yet there are ſo many kinds of Puniſhments, according to the Laws of this or that Country, that are wont to be inflicted on Adulterers, that ſurely theſe would do the Buſineſs and keep them from this Deſire of the Fleſh. For, we read in ſeveral credible Authors, that ſome Adulterous Men were condemn'd to Death, ſome burnt alive, others had their Bodies chop'd aſunder with an Ax, and others whipp'd; that a Woman found in or convicted of Adultery, had her Noſe ſlit, her privy Parts cut off, both Eyes pluck'd out, and then drawn aſunder by Horſes. But I ſhall not here inſiſt on theſe Puniſhments, they being not much to my preſent Purpoſe.

* Lib. 8. cap. 5.
† Lib. 10. cap. 34.
‖ Lib. 10. cap. 3.
* Lib. 15.

The Puniſhment of Adultery, according to the *Roman Civil* Law, was ſometimes made by capital Puniſhments, ſometimes by a Thoral Separation, and ſometimes by pecuniary Puniſhments, as Loſs of Dower, and the like. As long as the Puniſhment of Adultery was Capital, it was lawful, by the *Civil* Law, for the Father to kill and put his Daughter to death, and likewiſe for the Husband to kill his Wife, being taken in the Act of Adultery; and alſo for the Husband to ſlay the Adulterer, if he found him in his Houſe after three Admonitions or open Denunciations to the contrary: and this they might do with Impunity. But tho' the *ordinary* Puniſhment of Adultery, according to the *Julian* and *Roman Civil* Law, was always Death †; yet the *extraordinary* Puniſhment thereof, was Deportation ‖ or Relegation*. But the *Juſtinian Code* and the *Novels* have remitted the Puniſhment of Death unto the Woman; and in lieu thereof, introduced the *Baſtinado*, and the thruſting of her into a Monaſtery, which yet is not obſerv'd at this Day. *Socrates Scholaſticus*, in his Church Hiſtory, informs us †, that, in *Theodoſius* his Time, if a Woman was taken in Adultery, the *Romans* puniſh'd the Delinquent, not with ſuch a ſort of Puniſhment as might make her better, but in ſuch a manner rather, as ſhould aggravate her Offence. For, ſays he, they ſhut her up in a narrow Brothel-Houſe, and forced her to play the Whore in a moſt impudent Manner. And, during the Time of her performing that moſt unclean Act, they caus'd little Bells to be rung, to the end that what was done within, might not be conceal'd from thoſe that paſs'd by, but that this ignominious Puniſhment might be known to all People. But I can ſcarce believe, that the *Romans* inflicted this ſort of Puniſhment upon Adultereſſes. For, after *Conſtantine*'s Time, they always puniſh'd Adultery in a capital manner, as may be ſeen from the *Imperial* Laws now extant in both the Codes. Moreover, we may conjecture that little Bells were not found out to puniſh Adultereſſes, but were commonly made uſe of by all Whores; who, proſtituting themſelves

† D. 24. 2. 8.
‖ D. 48. 18. 5.
* C. 9. 9. 30. 1.
† Lib. 5. cap. 18.

ſelves in their Cells, did, by this Sign, call Travellers to them, according to *Dion Caſſius* ‖. ‖ Lib 79.

But neither the *Canon* Law, nor the preſent Uſage of the *Civil* Law, do admit of this rigour of Death for this Crime, ſince the Puniſhment of Adultery, is not capital, at this Day, by either of theſe Laws, but only pecuniary according to the *Civil* Law: But, according to the *Canon* Law, the Puniſhment of Adultery in a Layman is Excommunication *; and Depoſition in a Clergyman. And *Lindwood* in his *Provincials* ſays, That ſuch Clerks as are guilty of Adultery or any other Incontinency, ſhall be, *ipſo Jure*, depriv'd of their ſpiritual Preferments: but yet he thinks that the declaratory Sentence of the Eccleſiaſtical Judge is neceſſary for the Execution of this Puniſhment. Since the Reformation, we have had ſome Inſtances of Clergymen being depriv'd for Adultery in our Law Books, *viz.* one in the 12th of Queen *Elizabeth*, another in the 16th of *Elizabeth*, and a third in the 27th Year of her Reign. And theſe Caſes are enough to ſhew, that the Eccleſiaſtical Law in this Point is allow'd, by the Judges of our Common Law, to continue in ſufficient Force among us, for Deprivation on the ſcore of this Crime. In the *Romiſh* Church, a certain Term of Pennance is enjoyn'd both unto Laymen and Clergymen, *viz.* a Term of ſeven Years Pennance unto a Layman, and ten Years Pennance unto a Clergyman committing Adultery †: But this Pennance is often bought and redeem'd by Money. For though, according to the Apoſtolical Canons, a Presbyter, who committed Fornication or Adultery, ought to be depos'd; yet Pope *Sylveſter*, to gain Money to the Apoſtolical Chamber, diſpenſing with theſe Canons, decreed, That if he did not continue in this Sin, but confeſſed the ſame of his own Accord, he ſhould riſe again, and only undergo ten Years Pennance in the following manner, *viz.* For the firſt three Months, he was to be ſhut up in ſome private Place, remote from all Converſation, with an Allowance only of Bread and Water: But on *Sundays*, and particular Holidays, he might refreſh himſelf a little with Wine, and eat Fiſh and Pulſe; tho' no Fleſh, Eggs, or Cheeſe. And being clad in Sack-cloth, he was to lie on the Ground, and conſtantly, day and night, to implore God's Mercy for the Sin he had committed. And at three Months end, he might come out of Priſon, but not appear in publick, leſt he ſhould offend the Faithful herein. For a Prieſt ought not to do publick Pennance (according to the *Canon* Law) as a Layman does. Afterwards, on reſuming a little Strength, he ought to live on Bread and Water for a Year and a half (*Sundays* and particular Holidays excepted; on which he may drink Wine, and eat Pulſe, Eggs, and Cheeſe, according to the limited Meaſure of the Canon). And at the end of the firſt Year and half, he may eat of the Sacrament of Bread and Wine, (leſt he ſhould grow hardned,) and be reſtored to the Peace of the Church; and ſtanding the laſt in the Choir, he may ſing Pſalms with his Brethren, bear the leſſer Offices in the Church, but not approach the Horn of the Altar. Then, at the end of the ſeventh Year, he was every Week, during the whole Time, to faſt three Days on Bread and Water, the *Eaſter* Holidays excepted. And then if his Brethren, with whom he did Pennance, did approve of ſuch his Pennance, the Biſhop might reſtore him, according to the Decree of Pope *Calixtus*, to his former Honour. Then, after the expiration of ſeven Years, to the end of the tenth Year, he was to live every *Friday* on Bread and Water, unleſs he thought to redeem and buy off the ſame with Money: ſo that Commutation for Pennance came very early into the Church. And a Prieſt, according to this Canon or Decree, ſhall alſo undergo the ſame Pennance for all other Crimes which bring Depoſition

* 27 Q. 1. 6.

† 82 Diſt. cap. 5.

ſition on him. And no Prieſt was to think this burthenſome to him, if after ſuch a Lapſe he was reſtor'd to his antient Honours on doing a proper Pennance. But this Pennance was ſoon thought by the Clergy to be too ſevere, after they were forbidden Matrimony, and could not contain themſelves from the Luſts of the Fleſh; and, therefore, a moderate Pennance was afterwards enjoyn'd them on the Score of Fornication and Adultery, as I ſhall obſerve hereafter in its proper Place. How happy had it been in theſe days, if the Severity of this Pennance had ſtill continued in the Church, ſince ſo many (eſpecially) of the *Romiſh* Clergy, are ſo fond of other Mens Wives!

Plato, in the ſecond Book of his Laws, order'd the Adulterer and the Adultereſs to be puniſh'd after the ſame manner; and ſo likewiſe did the antient *Canon* Law *: But by the Papal Law, Men are more grievouſly puniſh'd for Adultery than Women are; by which Law an Adulterous Husband cannot puniſh a Wife, nor proceed againſt her by way of Accuſation; nor can he do this, if he has, by his ill Behaviour towards her, given occaſion for his Wife to commit Adultery †. Both the *Civil* and *Canon* Law, forbids a Man to marry a Woman that has been condemn'd for Adultery ‖; but this it does upon different Accounts: for the *Canon* Law will have the Adultereſs to remain all her Life-time, even after her Husband's Death, without the Hopes of a future Marriage, that ſhe may perform the Sorrows of a ſevere Pennance all the Days of her Life *. But the *Civil* Law adjudges him to commit the Crime of Bawdry, and to incur the Penalty of it, that marries a Woman convicted or condemn'd for Adultery. But neither of theſe Reaſons (I think) is ſufficient. For as to the *Canon* Law, it is repugnant to the Command of the Apoſtle, who excludes no one from contracting Marriage out of the *Levitical* Degrees, but ſays, *For the ſake of avoiding Fornication, let every Woman have her own Husband, and if ſhe cannot contain, he commands her to marry, ſince 'tis better to marry than to burn* †.

* 32 Q. 6. 23.

† 32 Q. 6. 4.

‖ 32 Q. 7. 22. C. 9. 9. 9.

* 32 Q. 7. 22.

† 1 Cor. ch. 7. v. 2 & 9.

The ſecond Puniſhment of Adultery above-mention'd, is a Thoral Separation or a Diſſolution of Matrimony, commonly called a Divorce *à vinculo Matrimonii*: For the Bond of Matrimony may be diſſolv'd by Adultery, unleſs a Reconciliation intervenes between the Husband and Wife afterwards. For a Divorce is not commanded, but only permitted to the innocent Perſon, who may recede from his Right, and renounce a Favour introduced in his own Behalf ‖. And if there has been a Reconciliation between a Man and his Wife after Adultery is known to be committed by her, it is not lawful for him to bring his Action for a Divorce. The Scripture ſays, *Whoſoever ſhall put away his Wife, unleſs it be for Fornication, and ſhall marry another, commits Adultery: And he that marries the Woman thus put away, commits Adultery* *. This Place in St. *Matthew*'s Goſpel is hard to be underſtood. St. *Auſtin* ſays, That it does not appear, whether he that puts away an Adulterous Wife (as he might lawfully do) ſhall be deem'd an Adulterer if he marries another. Touching the meaning of this Text in the Holy Scripture, all Perſons, even in the primitive Church, were not ſo well agreed. *Maldonat*, among other modern Divines, ſays, That the Bond of Matrimony is not diſſolv'd by Adultery: and, therefore, in the laſt Council of *Trent*, it was decreed to be unlawful for a Man, thus putting away his Wife, to marry another. And this Opinion the *Papiſts* follow, becauſe they make Marriage to be a Sacrament: but even thoſe, or ſome of them (at leaſt) who profeſs the Reform'd Religion, tho' they reject the Decrees of that Council, yet they do not entirely diſallow of this Opinion, ſaying, That whereſoever Decrees of this Nature are extant, and in force, as being received,

‖ C. 2. 3. 29.

* Mat. ch. 5. v. 32. & ch. 19. v. 9.

receiv'd, they ought to be obſerv'd as well as the Civil or Temporal Laws. But yet they affirm, That the Bond of Matrimony may be diſſolv'd on the Score of Adultery: and, therefore ſay, That the innocent Man may marry again (according to the Permiſſion of God's Law) during the Life-time of his Adulterous *Wife*. And thus it is practis'd in *England*, *Holland*, *Frieſland*, *Zealand*, and other *Proteſtant* Countries, unleſs the marry'd Couple have been once reconcil'd after the Wife committed Adultery. But the greater Difficulty is, Whether the Perſon, guilty of Adultery, ought to be admitted to a ſecond Marriage, *viz.* after the innocent Perſon has betaken himſelf to a ſecond Marriage, and ſo by this Means has cut off all Hopes of a Reconciliation? Touching this Queſtion, even the Profeſſors of the Reform'd Religion are not well agreed among themſelves. *Beza* †, *Melanction* ‖, *Ameſius* *, *Ritterhuſius* †, and *Buchanan*, hold the affirmative Side of the Queſtion: and *Luther*, *Weſembeck* ‖, and *Carpzovius* **, three eminent and learned *Germans*, are of the ſame Opinion with *Beza*, and the others juſt now quoted.

† De Divor.
‖ In Mat. ch. 5.
* De Caſ. conſ. lib. 5. cap. 38.

But it is ſaid, That an innocent Perſon may, by Law, reclaim and recover an Adulterous Wife, even againſt her own Conſent, after a Sentence of Divorce has been pronounced againſt her, if he pleaſes to forgive the Offence, and take her to himſelf again †: And this is true even according to the *Canon* Law, if the Guilty has repented and perform'd Pennance for her Crime ‖. And the Emperor *Juſtinian* ſeems to approve hereof in his *Novel* Conſtitutions*, where he gives the Husband a Power, within the Space of two Years, to recover his Adulterous Wife, which has been ſhut up in a Nunnery, and undergone a competent Pennance for her Crime of Adultery. But if any one retains a Wife that has been caught and taken in the Act of Adultery, and not barely ſuſpected thereof, ſtill as his Wife, and connives at her Wickedneſs, he becomes a Patron of his Wife's Turpitude and Iniquity †; and hereby incurs the Guilt of the Crime of Bawdry. But becauſe Repentance does for the moſt part conſiſt in the Mind, and ſince Chriſtian Charity, as well as Marital Affection, eaſily induces a Belief thereof; this Law is therefore not obſerv'd at this day, leſt it ſhould give ſome Trouble and Diſturbance to Marriages, which are otherwiſe of a quiet and concordant Nature.

† De Diff. Jur. l. 2. cap. 9.
‖ Parat. D. de Diver. N. 11.
** Pract. crim. Q. 63. N. 40.
† Sanch. de Matrim. ‖ 32 Q. 1. 4 & 5.
* Nov. 134. cap. 10.
† 32 Q. 1. 1. 48. 5. 29. C. 9. 9. 9.

The third Puniſhment of Adultery abovemention'd, is, That if a Wife commits Adultery, ſhe ſhall loſe her Dower; which the Law adjudges to the Husband on a *Declaratory* Sentence of the Judge, tho' the Wife be only a *Putative* and not a *true* and *real* Wife: And this is the common Opinion of the Doctors, as *Bartolus* proves in his Comment on the Law quoted here in the Margin. 2*dly*, An Adulterous Wife loſes her Earneſt and her *Paraphernalia*. And, according to *Baldus*, a Wife does not only loſe her Dower, and is deprived of all conjugal Society on the Score of Adultery, but ſhe alſo loſes the ſame, if ſhe be ſeen to kiſs any other Man than her own Husband; nay, a *Feudatary* ſhall, according to the *Feudal* Law, forfeit his Fief or Benefice, if he ſhall thro' Laſciviouſneſs attempt to kiſs his Lord's Wife. Again, the Adultery of the Wife has been adjudg'd a ſufficient Cauſe of Enmity for a Donor or Teſtator to have been thought to have revok'd a Gift or Legacy *Mortis cauſa*. For a Gift made by the Husband, is preſum'd to be loſt on his Wife's committing Adultery: And 'tis the ſame thing, *ſi turpiter luſerit*, if ſhe ſhall wantonly ſport and play with a Man, or kiſs and embrace him in an amorous manner, or ſuffer herſelf to be kiſs'd and embraced by him.

By the *Civil* Law, Adultery is adjudg'd and inferr'd from the Woman's ſide, and not from the Man's, as already hinted: For if a marry'd Man or a Batchelor has carnal Knowledge, or lies with another Man's

Wife, he commits Adultery; but on the contrary, he that has a Wife, and has carnal Knowledge, or lies with a ſingle Woman, does not commit Adultery, nor ſhall he be puniſh'd as an Adulterer: but yet he ſhall be puniſh'd as a Fornicator. Becauſe he that lies with another Man's Wife, begets and propagates Children in another's Family for him to keep and maintain; and contaminates the Honour thereof, as much as in him lies: But he that lies with a ſingle Woman, does not bring a Child into another's Family; nor does he blemiſh or ſtain the Reputation thereof. But by the *Canon* Law, a Man that has a Wife, and lies with a ſingle Woman, commits Adultery; becauſe the conjugal Faith of Wedlock, which is a Sacrament in the *Romiſh* Church, and the Unity of two in one Fleſh, is hereby broken and diſſolv'd. At this day a marry'd Woman may ſue to be divorced from an Adulterous Husband upon a complaint of the Violation of Matrimony by Adultery, ſince modern Uſage and Cuſtom do allow hereof promiſcuouſly not only to the Husband, but even to the Wife.

Before a Perſon proceeds to the Proof of Adultery, 'tis neceſſary in the firſt Place to prove a Marriage, and that the Adultereſs was and is a Wife; becauſe Adultery is only properly committed with a marry'd Woman *. Therefore, if a Perſon impeach'd or accuſed of committing Adultery with *Seia* the Wife of *Titius* ſhall (by way of Anſwer) to ſuch Accuſation acknowledge, That he has lain with *Seia*, and ſay nothing more in reſpect of the Woman's being a Man's Wife, he ſhall not be puniſh'd for Adultery, but ought to be acquitted, if the Matter be not prov'd in reſpect of her being a marry'd Woman †. But it is not neceſſary for a Stranger to prove, that ſhe was his true Wife, but only that ſhe was accounted and taken as ſuch, as other Wives are uſually held and accounted: But 'tis otherwiſe, if the Husband impleads his Wife of Adultery, *Jure Mariti*; for then he ought to prove her to be his true Wife ||. And the ſame thing alſo holds good when the Wife impleads her Husband of the ſaid Crime; becauſe ſhe ought to prove, that he was her Husband at the time of the Adultery committed *. In a Charge of Adultery, the Accuſer ought to ſet forth in the accuſatory Libel or Inquiſition, which ſucceeds in the Place of Accuſation, ſome certain and definite time, *viz.* the Year and Month †, wherein the Crime of Adultery is ſaid to be committed, otherwiſe the Libel or Inquiſition ſhall not be deem'd valid in Law; nor ſhall the Court proceed in the Cauſe, if ſuch certain and definite Time be not expreſs'd therein, even tho' the Party accus'd ſhould not oppoſe ſuch Proceeding ||. And hence I infer; That if, in ſuch Accuſation or Inquiſition of Adultery, a ſtated time of the Year, Month, or Day be inſerted, the Proof of ſuch Time is of the Subſtance of the Proof, and entirely neceſſary thereunto; inſomuch, that tho' the Crime of Adultery ſhould be prov'd, yet if the Quality of the Time be not proved, the Perſon accuſed thereof ought to be acquitted *.

* D. 48. 5. 13. 4. D. 48. 5. 6. & 34.

† Bart. conſ. 33. N. 16. vol. 2.

|| Bart. in l. 13. D. 48. 5. 31. 4.

* Roman. conſ. 167.

† Bart. & Dd. in l. 3. D. 48. 2.

|| D. 48. 2. 3.

* D. 48. 5. 17. 3.

It has been ſaid, that Adultery is ſufficiently prov'd by a ſtrong and violent Preſumption thereof, from the Depoſition of Witneſſes, ſaying, That they ſaw ſuch a Man and a marry'd Woman join'd together in venereal Embraces †: From whence I infer, that if Witneſſes only depoſe, That they ſaw ſuch a Man, and ſuch a marry'd Woman lying together in ſecret, or the Man lying upon the Woman, and do not ſay in *venereal Acts* or *Embraces*, they do not prove Adultery; ſince this (perhaps) may happen without the Man's having any carnal Knowledge of the Woman's Body ||. But if the Witneſſes do by way of Evidence depoſe, That they ſaw a marry'd Woman lying naked in Bed with a Man, they do hereby prove Adultery *. But in a criminal Cauſe of Adultery, it is not

† Vid. Pag. ant. 45.

|| Dd. in c. 7. X. 2. 21.

* Felin. in dict. cap.

not ſufficient Proof to diſſolve the Marriage *à vinculo Matrimonii*, tho' the Witneſſes ſhould depoſe, that they found a Man and a married Woman *ſolus cum ſolâ* locked up in a Bed-chamber together with the Man's Breeches down, and the Woman refuſing to open the Door; yet this is otherwiſe in a Civil Cauſe, when the Action is only commenced for a Loſs or Forfeiture of Dower, according to *Baldus* *, *Menochius* †, and the reſt of the Doctors. Nor is Adultery preſumed to be committed by ſuch Perſons, who can defend the Action of being alone together in a Bed-chamber, either upon the Account of Nearneſs of Kin, ardent Affection, or the Cuſtom of the Country, and the like; for the Violence of the Preſumption is deſtroy'd by the Nearneſs of their Kindred ||: and 'tis the ſame thing if they are naked together, thro' want of Cloaths, provided they be not lock'd up in private together, and refuſe to open the Door upon demand. But yet even in theſe Caſes, the Doctors ſay they ought to purge their Innocence *. But tho' an *Abſolutory* Sentence ſhould be pronounced in Favour of the Perſons upon the Account of Nearneſs of Blood; yet if Adultery ſhall afterwards be truly proved, or ſuch Preſumption which ariſes from Nearneſs of Blood ſhall ceaſe, *viz.* becauſe he afterwards married the ſaid Woman; he may be again proceeded againſt as an Adulterer, and condemned thereon, notwithſtanding the ſaid Sentence †. But if the Adulterer be acquitted, the Adultereſs ſhall alſo be acquitted: For though the Condemnation of the Man does not affect the Woman; yet his Abſolution or Acquittal ſhall be for her Advantage †.

* Conſ. 6. Lib. 5.
† Conſ. 31. N. 25.
|| Jacob. de Belv. Prax. Crim. Tit. de Len. N. 45. & 46.
* Dict. Belv. eod. Tit. n. 48.
† C. 9.9. 34.
† Hipp. Marſ. in l. 5. D. 48. 18.

If Witneſſes ſhall depoſe that they ſaw a Man and a married Woman *ſolus cum ſolâ* embracing and kiſſing each other, in ſome ſecret Place, it is a ſufficient Proof of Adultery in reſpect of depriving her of her Jointure ||; but it is not good Proof in a Criminal Cauſe to diſſolve the Marriage: But even this admits of a Limitation in a Clergyman embracing a Woman, becauſe (ſays the *Canon* Law) he is not preſum'd to do it on the account of Adultery, but rather on the ſcore of giving his Benediction or exhorting her to Pennance *. And this is more eſpecially true in reſpect of a Clergyman, if the Woman be ſixty Years of Age (at the leaſt) or ugly and deformed in Perſon in ſuch a manner, as it may deſtroy all ſuſpicion of Adultery in ſuch a Man. But this filthy Doctrine, tho' it be well enough approv'd by ſome of the *Canoniſts*, and countenanced by the *Romiſh* Clergy, yet it is condemned and rejected by ſome of the more modeſt *Canoniſts* †. Tho' one Witneſs ſhould depoſe that the Adultery was committed on ſuch a Day and in ſuch a Place, and another ſhould ſay, that it was committed on another Day, and in another Place, and by this means become ſingle in their Depoſitions: Yet the Proof of Adultery does not hereby vaniſh on that Account, becauſe the Law ſupplies the concurrence of their Teſtimony ||, but this Doctrine (I think) only holds good in reſpect of the Loſs of Dower, and not in the Caſe of a Divorce *à vinculo Matrimonii*. And ſo likewiſe are Witneſſes ſaid to be *Conteſtes*, or agree in their Depoſitions in order to prove Adultery, who do by Turns one after another peep through a Chink or Hole, and ſee a Man and a married Woman in the uſual Act or Poſture of carnal Copulation *. Adultery is even proved by Fame alone, but then this is only thus prov'd, in order to hinder and prevent a Solemnization of Matrimony: As when a Man is willing to contract or ſolemnize Wedlock, and it is objected to him that he has already defiled himſelf by committing Adultery with his Kinſwoman; for then if there be a Fame or Rumour thereof, it ſhall (according to *Baldus*) be an Impediment to the Marriage, till he has purged his Innocence †. A Woman incurs ſuch a ſuſpicion of Adultery by her Departure from her Husband alone, that (aecording to *Felinus*) Adultery is prov'd

|| Decii conſ. D. 77. N. 12. Hipp. conſ. 1. N. 45. vol. 1.
*Gloſs. in c. 14. Q. 3. 11.
† Abb. in c. 1. X. 3. 4. Felin. in l. 7. X. 2. 21.
|| Jaſon conſ. 11. vol. 1. Crav. conſ. 73. N. 3.
* Abb. in c. 7. X. 2. 21. In cap. 7. X. 2. 23.
† In cap. 7. X. 2. 21.

prov'd from her lying all Night out of her Husband's Houſe without any juſt or probable Cauſe for ſo doing, or againſt her Husband's Will and Conſent; and ſo ſays the *Civil* Law *: But then this is only in reſpect to the Forfeiture of her Dower or Jointure, and not in any other Reſpect.

* C.5.17.8.3

Adultery is generally eſteemed to be a ſpiritual Offence, not from its own Nature (for 'tis no more a ſpiritual Crime than Murder, ſince they are both Offences againſt the ſecond Table) but from the Quality of the Perſons that are made Judges of it; and thoſe are Biſhops, who obtain'd this Juriſdiction after the following manner, *viz.* when the *Roman* Emperors became Chriſtians, thoſe Biſhops, who were inſtrumental in their Converſion from *Paganiſm*, were in ſo great Reverence with them, that they granted them a Power of Judicature in certain Caſes, whereof Marriage was one; becauſe that was always ſolemnized in the Face of the Church, where the Biſhop or his Miniſters preſided. And becauſe Matrimonial Cauſes were ſubject to their Juriſdiction, it ſeemed reaſonable, that the Violation of Marriage ſhould be ſo too. But the Biſhops for a long time did not govern themſelves in this Matter according to the Canons of the Church, but in Purſuance to the Rules of the *Imperial* Laws: And this appears from the Puniſhment of this Offence, which has been changed according to the different Laws and Cuſtoms of each particular Nation.

By the *Levitical* Law, both the Man and the Woman were ſtoned to death, and ſo heinous a Crime was the Sin of Adultery here in *England* formerly, that our *Saxon* Anceſtors compelled the Adultereſs to ſtrangle herſelf; and he who debauched her, was to be hanged over her Grave. By an Ordinance of King *Canutus*, the Man was to make the injured Party ſuch Satisfaction as the Biſhop ſhould enjoin; and then he was to be baniſh'd; but if it was a Woman that had offended, her Noſe and Ears were to be cut off: tho' I never read that any Woman was thus puniſh'd. By the Laws of *William* the Conqueror *, the Adultereſs was to be put to death. And *Bracton*, an old Writer of the Law, tells us, That ſince the Woman was to undergo the Puniſhment above-mentioned, it was but reaſonable that the Man ſhould be puniſh'd, not with Death, but *in eo Membro quo deliquet.* And accordingly *John Britton* in the Reign of *Henry* the Third †, puniſhed one *Jeffery Miller* of *Norfolk* for debauching his married Daughter: but the King was angry and baniſh'd *Britton*; and iſſued out a Proclamation, that no Man ſhould preſume to do the like, unleſs it was in the caſe of his Wife.

* Seld. in ead. 185.l.37.

† Selden. Jan. 35.

The aforeſaid *William* not only alter'd the Puniſhment of this Crime, but took away this Juriſdiction from the Biſhops Courts, eſpecially in Caſes where either his Servants or Tenants *in Capite* were concerned: For he prohibited the Biſhops without his Leave to implead, excommunicate, *vel ullâ aliâ Eccleſiaſtici rigoris pœnâ conſtringere Barones vel Miniſtros ſuos Adulterio denotatos.* And the Offenders were afterwards try'd in the *Leet* ||, which is a Temporal Court, and on Conviction were fined; which was always paid into the *Exchequer*, unleſs the Crime was committed in *Kent*, the Archbiſhop's Reſidence; and then he had a ſhare of the Fines, that is to ſay, if the Man was the Offender, the King had the Fine; but if a Woman, then it was paid to the Archbiſhop. But in many Places the Lords of Mannors had a Privilege to puniſh their own Servants offending in this Nature within particular Limits, and the Fines were paid to them *: And this may be the Reaſon why both the Temporal and Spiritual Courts took Cognizance of this Crime by Turns, tho' I find no ſtruggling between theſe Courts as long as the Offence was Capital, but only ſince *Commutation* came in Play.

|| Spelm. Gloſs. v. *Lairnite.*

* Spelm. ut ſupra.

Of

Of Advocates, their Office and Qualifications.

AN *Advocate*, in the general Import of the Word, is ſaid to be that Perſon, who has any wiſe to do in the Pleading and Management of a *Judicial* Cauſe or Controverſy. And in this Senſe ſome (perhaps) will ſay, that even *Proctors* are called *Advocates:* But, in a ſtrict way of ſpeaking, only that Perſon is ſtiled an *Advocate*, who is the Patron of the Cauſe, and is often in *Latin* termed *Togatus* *, and in *Engliſh*, a Perſon of the *Long Robe*. For tho' *Proctors* are Aſſiſtants to Cauſes in ſome meaſure, yet they are not properly *Advocates*; becauſe thoſe Things do not concur in *Proctors*, which are neceſſarily required in *Advocates*, *viz.* That they ſhould have been Students in the Law for five Years, well skilled and verſed in the Knowledge thereof, and approved as ſuch by ſome Doctor or other †. And for that *Advocates* ought to be preſent at *Informations* in Law, either in the principal Cauſe, or that of an Appeal, or in both, or one only; ſo that in the general Acceptation of the Word, an *Advocate* ſignifies a *Patron:* And hence *Advocates*, *Patrons* and *Pleading* Lawyers, do at this day ſignify the ſelf-ſame Thing; their Duty and Office being to ſpeak to the Merits of a Cauſe, after the *Proctor* has prepared and inſtructed the ſame for a Hearing before the Judge.

* C. 2. 7. 6. & 14.

† C. 2. 7. 11.

In the Books of the *Civil* Law, *Advocates* are ſometimes ſtiled *Orators*, ſometimes *Rhetoricians*, and ſometimes *Men of the Gown* or *Long Robe*, as aforeſaid. But, in Propriety of Speech, an *Advocate* differs from a *Patron*, a *Patron* being the Perſon that pleads the Cauſe, whereas an *Advocate* is only called thereunto for his Advice and Counſel: for both *Gothofred* and *Aſconius* define him to be a *Patron*, who ſpeaks to the Merits of a Cauſe; but this Diſtinction is little now regarded. I have ſaid, that *Advocates* ought to be well skilled in the Knowledge of the Laws, becauſe it is their Buſineſs to aſſiſt the *Litigants* with ſafe and wholeſome Advice: And tho' *Proctors* have ſeldom much Skill in the Laws, yet they ought to be perfectly well acquainted with the Practice thereof. *Advocates* are, as it were, the *Guardians* and *Tutors* of a Cauſe; but *Proctors* are only in the Place of *Curators* in that reſpect. Wherefore a Perſon is ſaid to be a *Client* to his *Advocate*, but a Maſter and a *Mandator* to his *Proctor*; and, conſequently, an *Advocate's* Office may be perform'd out of Court, or the Place of Judicature, which a *Proctor's* cannot be. The Office of the former is difficult and honourable *; but the Duty of the latter is eaſy, and of no honour at all †.

* C. 2. 8. 4.

† C. 10. 31. 34.

Every Perſon may exerciſe the Office of an *Advocate*, provided he be able, and well qualify'd to execute the ſame, and be a Perſon, whom the Law has not condemn'd, and ſet aſide from the Exerciſe of this noble Office: For the Act of a *Patron* or *Advocate* is a free Act; and, therefore, every Man may undertake and execute the ſame, unleſs as before excepted. And, according to the *Civil* Law, a neceſſary Qualification hereunto, is, That the Perſon exerciſing the ſame, ought to prove by ſufficient Teſtimony, that he has ſpent five Years in the Study of the *Imperial* Laws, and has undergone a ſtrict Examination therein ‖; but, by

‖ C. 2. 7. 11.

the Uſage and Practice of *England*, *Holland*, and other Countries at this day, a Perſon may be admitted to this Office, on his taking of a Doctor of Law's Degree; which, in our *Engliſh* Univerſities, too often happens without the leaſt Knowledge in the *Civil* Law, as appears from ſome that have taken that Degree, without being able to tranſlate the ſhorteſt Law in the *Digeſt* or *Code* into their Mother Tongue. But tho' the Emperor *Juſtinian* has, in the Proem to the *Digeſts*, and alſo in his *Code*, only prefix'd the Term of five Years for ſtudying the Laws, as aforeſaid; ſo that a Man might, after that time, ſue for the Degree of a *Licentiate* or *Maſter* in this Faculty: yet whoever rightly and truly contemplates the vaſt extent and compaſs of the *Civil* and *Canon* Law, will acknowledge a longer ſpace of Time to be neceſſary, than is therein preſcrib'd. Indeed, *Nerva* and *Celſus* are ſaid to have made ſuch a Progreſs in the Knowledge of the *Civil* Law, that each of them became publick Profeſſors, and expounded the ſame at eighteen Years of Age; but then it is to be obſerv'd, that the *Civil* Law then was their only Study, and lay within leſs compaſs: And, moreover, this was then ſuffer'd, becauſe the *Prætor* or Judge thought this Age to be ſufficient for a Perſon to obtain and proceed in publick Employments, and to aſſume the *Toga virilis*, on laying aſide the *Prætexta Puerilis*, or the Child's Gown *. And thus, by the *Civil* Law, a Minor that was ſeventeen Years of Age compleat, might be an *Advocate* †; and a Perſon above eighteen Years of Age, might be a Judge or Umpire, and pronounce Sentence in a Cauſe by conſent of Parties; and if ſuch Perſon became a Magiſtrate, his Juriſdiction was not rejected and diſallow'd of ‖.

* D. 3. 1. 1. prin. D. 45. 1. 91. 3.

† D. 3. 1. 1. 3.

‖ D. 42. 1. 57.

By a Provincial Conſtitution of *Peckham* Archbiſhop of *Canterbury*, in *Lindwood* *, it is ordain'd; That for the future, no one ſhould be allow'd to practiſe as an *Advocate* in any publick Court of Law, without his being firſt a diligent Hearer of the *Civil* and *Canon* Law for three Years, at leaſt; which he was to prove by his own corporal Oath, if the ſame did not appear either by a Teſtimonial from the Profeſſor, under whom he had ſtudy'd the ſame; or elſe *per facti evidentiam*, *viz.* by his undergoing an Examination: For if a Perſon on his Examination ſhall not be found qualify'd, in reſpect of his Knowledge in the Law, he ſhall not be admitted to be an *Advocate*, tho' he has ſtudy'd the ſame for three Years. But, I think, the number of Years ought not to be much regarded; but the Knowledge of the Law, and the Induſtry of the Perſon, ought only to recommend him, and give him the Name of a Lawyer. Letters Teſtimonial from the Chancellor of the Univerſity where he has ſtudy'd the Law, ſhall alſo be ſufficient in this Caſe, if it be doubted whether he has ſtudy'd the Laws, or taken a Doctor's Degree therein. And the Perſon may alſo prove the ſame by Witneſſes; and it ſhall be well enough. When I ſay a Hearer of the *Civil* and *Canon* Law, I mean, that he ought to hear the ſame as a Scholar or Student, under ſome Doctor or Maſter thereof. But it matters not whether he has heard the ſame read in an Univerſity or elſewhere; provided he has apply'd his Mind to the Study and Knowledge thereof with due Induſtry, becauſe the Conſtitution here, ſpeaks *generally* without the Specification of any Place. But the preſent Practice is, that he ought to hear the Laws read under ſome Doctor or Profeſſor thereof, in ſome Place where theſe Laws are publickly read and taught †. But to return to the aforeſaid Conſtitution: I cannot ſee what ſhould move the Perſon that made it, to limit and appoint a leſs time for the Study of the Laws, than the *Civil* Law has done, unleſs this Conſtitution may be underſtood only to relate to Advocates in *Curiis Pedaneis & Inferioribus*, where Cauſes of Weight and

* Lib. 1. Tit. 17. cap. 2.

† C. 2. 7. 11.

and Moment are not heard and diſcuſſed, but only Cauſes of light Importance. For in light Cauſes, it ſeems ſufficient, if the Perſon be well verſed in the Buſineſs of Cauſes, and has acquainted himſelf with the Theory and Practice of the Law for three Years. But in Courts of greater Power and Dignity, wherein Cauſes of a more arduous Nature are handled, the *Advocates* are required to have more Knowlege and Learning in the Law.

The Office of an *Advocate* is of a neceſſary publick Nature*, and therefore, ſince the Law permits and allows thereof, Audience ought not to be deny'd him in defending the Cauſes of private Men, unleſs it be an atrocious Offence, or when he acts againſt the Intereſt of the State or Commonwealth wherein he bears this Office and Honour. But by the *Canon* Law, and a Provincial Conſtitution in *Lindwood* †, an *Advocate* ſhall, *eo ipſo*, be depriv'd of his Office of an *Advocate* for one Year, if he ſhall oppoſe a Sentence pronounc'd in favour of Matrimony, unleſs the Judge ſhall, in expreſs Terms, excuſe him by reaſon of ſome juſt Error in the Sentence, or elſe on the Account of ſome probable Ignorance. The Office of an Advocate is not to put the Seal of the Office to any thing, but to take care of his Client in ſuch Matters as are Matters of Law, to propound his Client's Requeſt in Judgment, and to plead his Cauſe in a publick manner *. An *Advocate* ſubſcribing himſelf to the Advice and Opinion of another *Advocate*, ſeems to approve of ſuch Opinion and Advice.

* D. 50. 4. per tot.

† Lib. 1. Tit. 17. c. 1.

* D. 3. 1. 1. 2.

A Perſon under the Age of Seventeen, and likewiſe a Perſon that is ſo deaf by Nature, that he cannot hear the Command of the Magiſtrate, or the Decree of the Judge, cannot be an *Advocate* either for himſelf, or for other Perſons ‖; nor can a Clergyman, in the Cauſe of Blood *: becauſe theſe Perſons are barr'd by a Prohibition of Law. But though a Woman cannot be an *Advocate* in the Cauſes of others, leſt ſhe ſhould offend againſt that Modeſty which is ſo agreeable to her Sex; yet ſhe may be an Advocate in her own Cauſe †: and ſo may alſo Perſons, that are blind of both Eyes, become Advocates in reſpect of their own Cauſes. But Perſons that are Infamous, or branded with any Note of Infamy, or condemn'd of Calumny in any publick Court of Judicature, and Perſons convicted of any capital Crime, are *ipſo Jure* forbidden to be *Advocates* either for themſelves or others*. An *Advocate* may incur the Cenſure of the Court, and be puniſh'd for Prevarication, Saucineſs to the Judge, reproachful Language in reſpect of the Parties in Suit, for agreeing with his Client for any part of the thing in Diſpute during the Suit, and for being a Brawler in Court on purpoſe to lengthen out the Cauſe: But if ſuch Agreement is made after the Suit is ended, it is not unlawful, provided, it does not exceed a lawful Sum, which, according to the *Civil* Law, was an Hundred *Aurei*, or Crowns, for each Cauſe he pleaded, or was engaged in †.

‖ D. 3. 1. 1. * 23 Q. 8. 30.

† D. 3. 1. 1.

* D. 3. 1. 1. 5 & 6.

† D. 50. 13. 1. 12.

It belongs to the Office of the Judge, yea even of a delegated Judge, to decree and provide an *Advocate* for the Benefit of a Perſon, who cannot, by his own means, procure ſuch *Advocate* for himſelf*; and a Judge may, by virtue of his Office, compel an *Advocate* to undertake the Defence and Patronage of an indigent Perſon for a *competent Reward* or *Salary*, unleſs his Cauſe be bad; nay, oblige an *Advocate* to plead the Cauſe of a *Pauper*, without any Fee or Gratuity at all †: for if the Party has not an *Advocate*, he cannot be compell'd to give a *perſonal* Anſwer: and if *Advocates* and *Proctors* ſhall refuſe to plead the Cauſes of ſuch Perſons *gratis*, they may be depriv'd of their Office ‖. When there is any Diſpute about this Salary, the Judge ought to appoint the Sum according to the Eloquence and Ability of the *Advocate* in the firſt Place; 2*dly*, In Proportion

* D. 3. 1. 1. 4.

† C. 2. 6. 7.

‖ Dd. in l. 156. D. 50. 17.

tion to the Import of the Cauſe; 3*dly*, According to the Eſtate and Circumſtances of the Client; and, laſtly, According to the Stile and Practice of the Court †: And this I mean by a *competent Salary*. An *Advocate* may even *ex nudo Pacto*, demand and ſue for his Salary: But in demanding and ſuing for it, that which is demanded for the Payment of it, ought to be certainly ſtated and adjudg'd by a Computation of what is due, leſt either Party ſhould exceed a lawful Sum. And thus 'tis practiſed in the *Imperial* Chamber, whenever the Labours of *Advocates* and *Proctors* come to be rated and tax'd by an *Interlocutory* Decree: it being decreed, that that ſhould firſt of all be deducted, which was given before by way of Payment. And *Advocates* and *Proctors* in the ſaid Chamber, take an Oath at their Admiſſion, that they will not demand or exact any thing beyond the Sum tax'd by the Judge, as appears from the Form of the Oath. Though *Advocates* and *Proctors* regularly ought not to make any Pact, Contract, or Agreement with their Clients *de Quotâ litis* *; becauſe ſome Clients would give the greateſt part of their Eſtates thro' fear of loſing their Suit or Cauſe, as a weak or ſick Man would do to his Phyſician thro' fear of Death: yet, according to ſome Men's Opinion, a Pact or an Agreement made *ratione Palmarii*, is a good and valid Stipulation, if ſuch Advocate gets the Victory in the Cauſe †; and the Party may recover the ſame either by a *Perſonal* Action, by an Action *ex ſtipulatu*, or elſe by imploring the Judge's Office. But this is not practis'd in *England*, by reaſon of the Statutes of *Maintenance* and *Champerty* ‖. Modeſty in *Advocates* is a very laudable Thing: and, therefore, they ought not only to be cloath'd with Decency and Comelineſs, but even in giving their Counſel and Advice, it is much more Modeſt as well as ſafe, for them to ſpeak by the Word *Credo*, or *thus it ſeems to me*, and the like, than to aver any Thing *poſitively*. They ought to be brief, and not too verboſe in their way of ſpeaking, and to propound the matter of their Argument in a mild and gentle manner, and not with a tumultuous or contemptuous Voice; nor ought they to make great Gain, and filthy Lucre, but Juſtice their chief Deſign; and in their Buſineſs they ought to give a quick Diſpatch to ſuch Matters as come before them. An *Advocate* is ſaid to retain ſo great an Affection for a Cauſe, wherein he has been concern'd as an *Advocate*, that he cannot be a Witneſs therein if it ſhould happen to be appealed. Thoſe Perſons are ſaid to be cavillous and unfaithful *Advocates*, by whoſe Fraud and Iniquity, Juſtice is deſtroy'd; and, therefore, they ought to be ſeverely puniſh'd, as aforeſaid. The *Papiſts* ſay, That *Advocates* ought not to propound any thing of Scripture for an Argument in their Pleading, according to their own ſenſe of the Matter, but according to the Judgment of the Church *, that is to ſay, the Clergy: but this gainful Doctrine to the Clergy, we *Proteſtants* deny to be Law.

†D.50. 13. 1. 10.

*C. 2. 6. 6. 2. C. 2. 6. 5.

† C. 2. 6. 6. 2.

‖ Weſtm. 1. 3. E. 1. 28. 20. E. 3. ch. 4. 7. R 2. ch. 15. 32. H. 8. 9.

* 57 Diſt.

I ſhall here, in the laſt Place, conſider for what Reaſons an *Advocate* may be ſaid to contract *Infamy* in Reſpect of the Parties *litigant*. And *Firſt* when an *Advocate* does or ſhall, on the Judge's command to attend the Cauſe of any Perſon, deny his Patronage to the Party, through ſome lame or bald Excuſe or other; and ſuch as the Law and Cuſtom does not warrant him in: for tho' regularly no one may be compell'd againſt his Will to be a *Proctor* to any one †, yet the Judge may oblige every exercent *Advocate* to give his Patronage and Aſſiſtance unto a Litigant in Diſtreſs for want of an *Advocate* ‖. For the Office of an *Advocate*, being in ſome meaſure a publick Office (and this being his Profeſſion) he may be compell'd to do that which belongs to his Office and Profeſſion, under the Penalty of being depriv'd of his Office by the Judge of the Court *:

† D. 3. 3. 8. 1.

‖ D. 3. 1. 1.

* Dd. in l. 156. D. 50. 17.

And

And this is constantly practis'd in the *Imperial* Chamber, especially in the Causes of *Paupers* *. And if he shall disobey the Judge's Order herein, or elude the same by any Subterfuge or Tergiversation, he shall be for ever turn'd out of Court, and interdicted Pleading in such a manner as never to be restor'd again †. The second Cause of *Infamy* in an *Advocate* (as aforesaid) is Avarice, *viz.* when not being contented with a competent Fee or Salary, he bargains with his Client *de Quotâ litis* in case of Victory, which is not lawful for him to do, according to the *Civil* Law ‖, in any Sum exceeding a Hundred *Aurei*, though he might receive some moderate Present *nomine Palmarii*, if he obtain'd Victory in the Cause: For to make an Agreement with his Client for any part of the Sum or Thing in demand, was look'd upon as Rapine and Depredation committed on his Client. The third Cause of *Infamy* (as aforesaid) is, when an *Advocate* on one side reproaches the adverse Party with foul Language, beyond what the Necessity of the Cause requires, and injuriously inveighs against him under a Pretence of serving his Client's Cause, supporting the same rather by Ribaldry than sound Reason and Arguments in Law: which is expresly forbidden by a Law in the *Code* *, since there is nothing more indecent than for those who would assist some, to annoy and offend others. *Cicero*, the Prince of the *Roman* Orators, was too much guilty of this Fault, and is highly condemn'd by all sober Writers. But a Lawyer or Advocate shall be much more liable, if he shall, through want of Modesty and due Reverence, attack the Person or Character of the Judge himself with injurious and bitter Language †. The fourth Cause of *Infamy* in an *Advocate* (as aforesaid) is *Prevarication*, *viz.* when he gives his Advice and Assistance to each of the Parties *litigant*: But as I have already hinted at these Matters, I shall here proceed no further in the Consideration of them; but only note, that they deserve the Censure of the Court in respect of Infamy and Deprivation, as the Law directs, as well as the just Displeasure of all honest Men.

* Myns. cent. 4. obs. 32.

† C. 2. 7. 7.

‖ D. 2. 14. 53.

* C. 2. 7. 6. 1.

† D. 32. 1. 78. 6.

The *Canon* Law forbids a *Clergyman*, *even in the lesser Orders*, to become an *Advocate*, and plead Causes in a secular Court before a Temporal Judge; unless he either prosecutes his own Cause or that of the Church, or be employ'd in the Causes of such miserable Persons as cannot pay for pleading their own Cause ‖. Nor ought Monks and regular Canons to engage themselves as *Advocates*, unless it be for the Advantage of their Church or Monastery; and by the Order and Command of their Abbot *. But no one can be an *Advocate* against the Church, wherein he has a Benefice, because it savours of Ingratitude: And if he shall act as an Advocate against such Church, he shall be deprived thereof as an ungrateful Wretch †. *Advocates* and *Proctors* ought to take an Oath at the time of their Admission, That they will not undertake or cherish an unjust Cause; or receive more than the usual and lawful Fees commonly given, which ought to be consider'd according to the Custom of this or that Country, and the Importance of the Cause. And if an *Advocate* shall act contrary hereunto, he shall not only be compelled to make Restitution, but shall likewise suffer a three Years Suspension: And a Proctor, that offends herein, shall be punish'd by a perpetual Deprivation *ab Officio*. And thus 'tis also enacted by a *legatine* Constitution of *Otho* in *Lindwood* ‖, that Advocates shall, at their Admission to this Office, take an Oath before the Diocesan, of the Place of their Birth or Dwelling, 'That they 'will, in all Causes they undertake, behave themselves as faithful Pa-'trons, without taking away or delaying Justice to either of the Parties, 'but will defend their Clients Causes according to the Laws, and support 'them with proper Arguments.'

‖ X. 1. 37. 1.

* X. 1. 37. 2.

† X. 1. 37. 3.

‖ Tit. 28.

Of Alimony, and the Nature of it.

THE Word *Alimony*, in the *Latin* Tongue call'd *Alimenta*, in a ſtrict and proper Signification thereof, imports the ſame as *Victuals* or *Nouriſhment* in the *Engliſh* Tongue: But theſe Words *Alimony* and *Victuals* are uſed in a larger Acceptation, and denote all kind of Maintenance whatever, without which, the Life and Body of Man cannot ſubſiſt, as Meat, Drink, Cloathes, Lodging, and the like *. And the *Latin* Word *Alimenta* differs from that of *Cibaria*, as a *Genus* differs from its *Species:* for all thoſe Things are comprized under the former Term, which relate to the Neceſſaries of human Life in general; but under the latter, we only mean thoſe things which bear a Relation to Food. But, in the Senſe I ſhall here uſe the Word *Alimony*, it ſignifies that legal Proportion of the Husband's Eſtate, which, by the Sentence of the Eccleſiaſtical Court, is allow'd to the Wife for her Maintenance; upon the Account of any Separation from him; provided, it be not caus'd by her *Elopement* or *Adultery*. *Blount* in his *Nomo-Lexicon*, or *Law-Dictionary*, mentions an antient Record, wherein *Alimony* is termed *Rationabile Eſtoverium*.

* D. 34. 1. 6.

By *Elopement*, I here mean that *voluntary* Departure of a Wife from her Husband to live with an Adulterer, and with whom ſhe lives in breach of the matrimonial Vow; whereby ſhe does, by the *Civil* Law, as well as by the Law of *England* †, incur the Forfeiture of her Dower or Jointure; unleſs her Husband, on her *free* and *voluntary* Submiſſion, ſhall think fit, by way of Reconciliation, to receive her again, and readmit her into her former conjugal Relation. And, a Woman being in this Senſe ſaid to *elope* from her Husband, the Law will not, in this Caſe, compel him to allow her *Alimony:* For a Wife, that *elopes* or departs from her Husband in this manner (though it be with her Husband's conſent) ſhall, according to that remarkable Caſe of Sir *John de Camois* ||, loſe not only her Dower or Jointure, but her Alimony too. This *Alimony*, in ſtrictneſs of Law, being a Duty properly due from the Husband to the Wife, during her Cohabitation with him, the *Canon* Law ſays, That if ſhe does, without any Default of his, (of her Accord,) depart from him, he ſhall not be oblig'd to allow her *Alimony* during ſuch her wilful Deſertion of him, tho' ſhe be not charged with Adultery *; and tho' he had a conſiderable Dowry with her: it being a Rule in Law, *viz. Qui non facit quod debet, non recipit quod oportet* †. But if ſhe departs from her Husband through any Default of his, as on the Account of Cruelty and the like, then he ſhall in that Caſe be compelled to allow her *Alimony*, though he had no Dowry with her: For the Law deems her to be a dutiful Wife, as long as the Fault lies at his door and ſhe is in no wiſe imputable; ſhe being conſtrain'd to appear otherwiſe ||, according to the Opinion of *Cynus*, and all the Doctors on the Law quoted here in the Margin *. And if it be doubtful, thro' whoſe Fault it is that they live aſunder, the Law, in that Caſe, concludes the Party that was laſt in Fault to be leaſt blameable †. And, therefore, if the Wife, who did by her Default wilfully leave her Husband, ſhall afterwards on Repentance ſubmit herſelf

† Weſtm. Stat. 2. cap. 34.

|| Cok. Inſt. pt. 2d. p. 475.

* 33 Q. 5. 13.

† C. 6. 46. 3.

|| D. 35. 1. 24.

* C. 2. 19. 13.

† D. 18. 6. 17.

ſelf to him, and deſire a Reconciliation, and to be admitted to a Cohabitation with him, he ſhall, on his refuſal of her, be oblig'd to allow her *Alimony*, except in the Caſes aforeſaid ||. See *Hoſtienſis* in cap. eod. v. *Reſtitui*; And all the Doctors in common thereon. On the other hand, if the Wife ſhall by reaſon of the Husband's Cruelty, without any Fault of her own, go from him, and the Husband ſhall offer ſufficient Caution or Security for his future good Behaviour to her, and for her Peace and Safety with him; and the Cruelty or ill Uſage is not ſuch, but that the Wife's Peace and Safety may be undoubtedly ſecur'd by ſuch Caution; and yet the Wife refuſes to return: I ſay, that in ſuch a Caſe, the Law will not compel him to allow her *Alimony* *; *Quia ultima ea culpa uxori nocet*, according to *Barboſa*, in his Comment on the *Digeſts*, Tit. *Divorce*, N. 44. But notwithſtanding the Premiſes, a Husband regularly ſpeaking, is bound to allow his Wife *Alimony*, pending Suit, whatever the Cauſe be †; and afterwards, in moſt caſes of Separation, not occaſion'd by *Elopement* or *Adultery*, as aforeſaid; nor in Caſe of a total Divorce, by reaſon of ſome legal Impediment, whereby the Marriage was null and void *ab initio* ||.

|| Gloſs. in c. 4. X. 4. 19.

* Ferret. conſ. 34. N. 18.

† D. 25. 3. 7.

|| Sanch. Tom. 2. lib. 7. Diſp. 93. N. 22.

By the *Civil* Law, if a Dowry or Marriage Portion with a Wife be promiſed and not paid to the Husband, he is not obliged to allow her *Alimony*; and the Reaſon is, becauſe ſuch Portion is given as a Price or Means to diſcharge the Incumbrances of Matrimony *. But if her Parents, or ſuch as undertook for the Payment thereof, do after become inſolvent by reaſon of ſome Misfortune, ſhe ſhall have *Alimony* (notwithſtanding) even by that Law (which in other reſpects ſeems ſomewhat ſevere): And this is true, unleſs you can affect them with Fraud, in promiſing what they knew they were not able to perform †. Or in caſe two Perſons lay claim to the ſame Woman, each pretending ſhe is his Wife by Marriage, and one of them moves to have her kept under *Sequeſtration* till the Caſe be decided: in this Caſe ſhe ſhall have *Alimony*, pending Suit, of that Perſon at whoſe Motion ſhe is ſo ſequeſtred ||. But if the Controverſy be only between a Man and a Woman, touching the Validity of a Marriage, as whether a Marriage or not; in ſuch a Caſe no *Alimony* is due, till ſome matrimonial Proof appears, or there be ſome *Conſtat* of a Marriage; but wherever Marriage appears, there *Alimony* ſhall be due *pendente Lite* *. A Feme-covert ſhall not ſue for *Alimony* as long as ſhe cohabits and lives with her Husband †.

* C. 5. 12. 20.

† Barboſ. in D. Tit. 3. lib. 24. n. 71.

|| D. 49. 1. 14.

* D. 25. 3. 7.

† Mor. Rep. 874.

The Ordinary has the proper Cognizance of *Alimony*, and no other Court ||: 'Tis true, there lies an Appeal, but ſtill it is to the Eccleſiaſtical Judge; and if the Perſon condemn'd will not obey the Sentence of that Judge, he may be excommunicated. The Form of proceeding in ſuch Caſe is thus, *viz.* The Proctor, by a Libel, alledges the Marriage of the Parties; and prays, that the Husband may be condemn'd in Expences of Suit and in *Alimony*; and, upon Proof or Confeſſion of the Libel, the Judge condemns him in Purſuance of ſuch Petition. And then the Proctor gives him a Bill of Coſts; and at the Bottom writes thus, *viz.* *Petit Pars dicta* D. *ſumptum Alimoniæ*, from the Citation iſſued forth, *durante lite juxta Ratam* of ſo much *per* Week (leaving a Blank for the Judge to inſert it) *uſque ad finem litis*. Then he taxes a Bill of Expences of Suit; and, being certify'd of the Ability of the Man, he taxes ſo much for *Alimony* Weekly, *&c.* *Niſi aliter per nos decretum fuerit*: And the uſual Sum is the third, or (at leaſt) the fourth Part of the yearly Value of the perſonal Eſtate of the Husband. But this is not very Beneficial, becauſe it is not a final Sentence, and by the Form of it, is abſolutely in the Judges

|| Rolls Rep. pt. 1. p. 110. Crok. Rep. pt. 3. p. 220.

Judge's power to alter it: For it is *niſi aliter per nos decretum fuerit*; whereas the Judgment (I think) ought to be, *niſi cauſa fuerit oſtenſa in contrarium.*

Hiat pray'd a Prohibition to the Conſiſtory Court of *London*, becauſe he was ſued there by his Wife to be ſeparated from her *propter Sævitiam*, and Sentence was there given againſt him, *viz.* That his Wife ſhould live from him, and that he ſhould allow her five Shillings and Sixpence *per* Week for *Alimony*, tho' the Husband offer'd Reconciliation, deſired Cohabitation, and proffer'd Caution to uſe her fitly. But the Court deny'd the Prohibition, becauſe the Eccleſiaſtical Court is the proper Court for the allowance of *Alimony*, and may decree a Separation or Divorce *à Menſa & Thoro*, if the Wife be uſed with Cruelty*. In an Action of Treſpaſs brought by *Plowden* againſt *Plowden*, for taking the Plaintiff's Wife *cum Bonis viri, &c.* the Caſe was, That the Plaintiff did eject and reject his Wife without any Allowance of *Alimony*; for which ſhe had a Sentence in the High-Commiſſion Court; and the Defendant took thoſe Goods for the *Alimony* and *Maintenance* of his Wife. And Judge *Berkley* ſaid, That the Defendant might plead *not guilty*: For where a Man puts away his Wife from him, the Eccleſiaſtical Court may compel him to allow her *Alimony*†. And thus it plainly appears by the Conceſſion of the Temporal Courts, that the Ordinary has the proper Cognizance of *Alimony*, as aforeſaid.

* Crok. Jac. p. 364.

† March. Rep. p. 22.

Of Altarage, and what is underſtood thereby.

THE next Thing which occurs to the Reader's View, according to the Method of Things propoſed in this Undertaking, is the Title of *Altarage*, which is in *Latin* ſtiled *Altaragium*, taking it's Denomination from the word *Altar*; becauſe *ex vi termini*, according to a *Legatine* Conſtitution of *Otho**, commented on by *John de Athon*, Altarage is an Emolument ariſing to the Prieſt from Oblations *ratione Altaris*, thro' the Means of the *Altar*. For when the Mother-Church was appropriated to a Religious Houſe, the Oblations made in the Chapel of Eaſe did not belong to the Convent, but to the Prieſt who officiated at the Altar; and from thence it had its Name. And it is a Word that was generally inſerted in the Endowment of a Vicaridge†: For we read, that a Parſonage was appropriated *ſalva vicariâ quæ conſiſtit in* Altaragio *& in minutis Decimis totius Parochiæ.* And in a larger Senſe, it is a Word that comprehends all the ſmall Tithes, which the Vicars had for their Maintenance. But then there muſt be either ſome Cuſtom or Uſage to make it ſo extenſive.

* Tit. 4. v. *Proventus.*

† Crok. Rep. pt. 1ſt. p. 578.

Now touching this *Altarage*, there is an antient Record in King *Henry* the IIId's Reign, about the Year 1234, in the Chronicle of *William Thorn*, an *Auſtin* Monk of *Canterbury*, whereof (among other Things) we have mention made in a certain Compoſition between *Edmund* Archbiſhop of *Cant.* and the Abbot of St. *Auſtin*'s in *Canterbury*, as to whom it may be paid, and to what Value it might extend. The Compoſition runs thus, *viz.* *Noverint univerſi præſens ſcriptum inſpecturi vel audi-*

turi,

turi, quod cum inter Dominum Edmundum *Dei gratiâ* † Cantuarienſem *Archiepiſcopum totius* Angliæ *Primatem, Magiſtrum* S. de Langeton ex unâ parte, *& Dominum* Robertum *Abbatem & Conventum S.* Auguſtini Cantuariæ *ex alterâ; controverſia diutius* mota fuiſſet ſuper *Eccleſiâ* de Chiſtlet *& Juriſdictione*, &c. *Item pro Bono pacis concedant Abbas & Conventus, quòd Archidiaconus quando viſitationis exercet officium in Eccleſiis eorum ſicut in aliis Eccleſiis Dioceſis* Cantuarienſis *recipiat Procurationem conſuetam, exceptis, &c. In capellis verò* de Menſtre, *ſcil. Sanct.* P. & Johannis *&* Laurentii *præſentabunt domino Archiepiſcopo idoneos Capellanos ad* Altaragia, *ità tamen quod ſingula* Altaragia *valeant decem Marcas, qui hâc portione tantum erunt contenti ſub pœnâ amiſſionis dictæ portionis, ſi coram Judice quocunq; ex certâ plus aliquando petierint, præſertim cum vicarius Matricis Eccleſiæ de* Menſtre, *&c.* ‖. Whereby it appears, that theſe *Altarages* iſſued out of the Offerings made to the Altar, and were anciently payable to the Prieſthood, as well as Tithes and other Oblations. 'Tis very probable, that the greateſt Annual Revenue by *Altars* in *Popiſh* Times here in *England*, if not by *Altarages* in any one Church within this Realm was in that of St. *Paul*'s *London*. For it ſeems, that when Chauntries were granted to K. *Henry* VIII. whereof there were forty ſeven belonging to St. *Paul*'s, there were in the ſaid Church, at that time, no leſs then fourteen ſeveral Altars*: And tho' they were but Chauntry-Prieſts that officiated at them, and had their Annual Salaries on that Account, diſtinct from *Altarages* in the Senſe of Oblations; yet becauſe the Annual Profits accrued by their Service at the Altar, they may not improperly be term'd *Penſion-Altarages*, tho' not *Oblation-Altarages*.

‖ Vid. Hiſt. Angl. ſcript. col. 1882. & 1883.

* Full. Ch. Hiſt. lib. 6. p. 352.

Tho' the Word *Altarage* be now grown ſomewhat obſolete among us, as being a Relique of *Popery*; yet its ſignification is of Eccleſiaſtical Cognizance, and according to the Intent thereof, practicable at this Day. Mr. *Blount* † takes notice of it as a Word, which comprehends not only the Offerings made on the *Altar*, but likewiſe all other Profits which accrue to the Prieſt by Reaſon of the *Altar*, and ſtiles it an *Obvention of the Altar*. And for a further Proof and Illuſtration of this Matter, he there quotes a Precedent out of the Orders and Decrees of the Exchequer in Queen *Elizabeth*'s Reign to this Effect, *viz.* That, upon hearing the Matter between *R. T.* Vicar of *Weſt-Haddon*, and *E. Andrews*, it was order'd, That the ſaid Vicar ſhould have, by reaſon of the words (*Altaragium cum manſo competenti* ‖) contain'd in the Compoſition of the Profits aſſign'd for the Vicar's Maintenance, all ſuch Things as he ought to have, by theſe Words, according to the Definition of them given by *John* Biſhop of *London*, on a Conference had with the *Civilians*, being all Doctors of Law, *viz.* That by *Altaragium*, are included Tithes of Lamb, Wool, Colts, Calves, Pigs, Goſlins, Chickens, Butter, Cheeſe, Hemp, Flax, Honey, Fruit, Herbs, and ſuch other Tithes, with Offerings that ſhall be due within the Pariſh of *Weſt-Haddon**. The like Caſe was for *Norton* in *Northamptonſhire*, heard of late Years in the ſaid Court; and, upon hearing the Cauſe, order'd in the like manner, as aforeſaid. Thus all Oblations, whether in Money or Bread, given to ſuch or ſuch an Altar, either out of Devotion or meer Cuſtom, made either by the Pariſhioners or by Strangers, were deem'd to be offer'd *nomine Altaragii*.

† In Nomol. Lexic.

‖ Vid. Nomo Lex. ut ſupr. v. *Altaragium.*

* Mich. 21. Eliz. in Stat. int. *Turner & Edwards.*

† Note, *Such was the Pride of Biſhops and Archbiſhops in thoſe days, that they compar'd and equall'd themſelves unto Kings and Princes; writing themſelves in the Style of their Office,* by the Grace of God, *Biſhop or Archbiſhop of ſuch a Place: But happy had it been for Religion, if they had conducted themſelves in their Office* by the Grace of God, *inſtead of purſuing Power and Riches in the Church.*

Under which we may reckon Oblations, Obventions, and Offerings, which in effect ſeem to be but one and the ſame thing; and that, which may become meerly ſpiritual: Oblations being ſuch Things Real or Perſonal as are offer'd to God and his Church, which ſeem to be included under *Obventions*; the other Profits conſiſting in Tithes *Prædial* and *Perſonal*, as alſo in the Glebe. *John de Athon*, in his Gloſs on *Otho*'s Conſtitutions, deſcribing the *Proventus ex Altari* † ſays, That they are Offerings either in Bread or Money, or elſe conſiſting in other minute Oblations, vulgarly called *Altaragium*. Which Word extends itſelf likewiſe to all Things appertaining to the Altar, and to the Ornaments thereof, which were by King *Edgar*'s Canons and Conſtitutions to be *Mundiſſima & apprimè concinnata* ‖, according to an ancient Manuſcript *Saxon* Code in *Bennet* College, *Cambridge*. But this cannot properly refer to the Word *Altaragium*, otherwiſe than in a large Senſe of the Word, for by the genuine Signification thereof we mean only the Obventions, Oblations and Profits of the Altar, and not the Ornaments of it.

† Tit. 4. v. *Proventus.*

‖ Can. 42.

In Cardinal *Otho*'s Days this Revenue of *Altarage* was ſo groſly abus'd by many of the Clergy, that he made a ſevere Canon or Conſtitution * againſt the Offenders in that kind. For in thoſe Days (as the Conſtitution obſerves) theſe wretched Prieſts (for ſo he calls them) to advance the Profits of their Vicaridges out of a ravenous Covetouſneſs, by the exceſſive Gain of their *Altarages*, would admit none to their Penitential Confeſſions, unleſs they firſt depoſited ſome Money in Purſuance of a precedent Compact (as the Gloſs has it) by way of Simoniacal Extortion, far exceeding the allow'd and accuſtom'd Oblations: And, therefore, firſt declaring them not only unworthy of the Kingdom of God, but alſo unworthy of all Eccleſiaſtical Benefices, he decreed; That the Biſhops in their reſpective Dioceſſes ſhould make a moſt exact enquiry touching this horrid Abuſe, and that all ſuch as were found guilty thereof, ſhould be remov'd from and depriv'd of the Benefices they poſſeſs'd; and for the future be rendred incapable of all Eccleſiaſtical Preferments, and wholly ſuſpended from their Function. But, notwithſtanding this Law, there being then another kind of Simoniacal Artifice practis'd by the Clergy to advance the Exceſs of *Altarages*, by letting them and other Eccleſiaſtical Revenues to Farm, another Conſtitution was then made by him, forbidding all Farms of *Altarages* in any kind for the future *. Where *John de Athon* in his Gloſs thereon ſays, That it was ordain'd for the prevention of Simony: and then occaſionally puts a Queſtion, Whether it be lawful to allow a Parochial Chaplain (for his Stipend) the Annual Obventions of *Altarage* in whole, or in part? Tho' the Negative ſeems to be inferr'd from the Text of the Canon; yet he, in his own Opinion, is of another Judgment, becauſe it matters not whether his Salary be paid in Money, or in any other Eccleſiaſtical Thing. And he concludes, that an Aſſignment of ſuch *Altarages* may be ſafely tolerated; and the Prieſt, to whom *Altarages* are due, may appoint his Proctor to collect the ſame; and, being ſo collected, they may be lawfully aſſign'd him for his Stipend. And tho' the Conſtitution forbids the letting to Farm the *Altarages*, and other Profits of the Church; yet the *Gloſs* holds †, that the Temporal Revenues of an Eccleſiaſtical Juriſdiction may be ſold or let to Farm, but not the ſpiritual Right of the Juriſdiction itſelf.

* Tit. 4.

* Tit. 7.

† Tit. 7. v. *Eccleſias.*

There was a Compoſition, That the Parſon ſhould have the Tithe of Grain and Hay, and the Vicar ſhould have *Altarage*: And, in the Caſe of *Wood* againſt *Greenwood*, the Queſtion was, whether the Vicar ſhould have the Tithe of Underwood, by virtue of that Word. And it was held, that if ever ſuch Tithe had been paid him, it ſhould be ſtill paid ‖. 'Tis true,

‖ Hetl. Rep. p. 135.

true, that Wood is not due to the Vicar of *common Right*, but by Preſcription or Uſage only; becauſe 'tis a great Tithe, and therefore will not paſs by the Word *Altarage* ſtrictly taken, this being only what is offered at the *Altar:* but when Tithe-wood has been paid to the Vicar by Cuſtom or Uſage, it ſhall be conſtrued to paſs by that Word *Altaragium*; and by Cuſtom or Uſage, it will likewiſe paſs Tithe-wool to the Vicar *.

* Winch. Rep. *Bret.* v. *Ward.*

Of Annats or Firſt-Fruits.

ANNATS in *Latin* called *Annates*, are all one with *Firſt-Fruits* in the *Engliſh* Tongue: And the Reaſon of this Name, is, becauſe the Rate for Firſt-Fruits, paid from Eccleſiaſtical Livings, was after the Value of one Year's Profit of the Benefice, when the *Liber Valorum* was firſt made. *Annates more ſuo appellabant primos fructus unius anni ſacerdotii vacantis aut dimidiam eorundem partem*, ſays *Polyd. Virgil* ‖: And my Lord *Coke*, in his *Reports*, obſerves, that *Primitiæ* and *Annates* are all one. As for theſe *Annats* or *Firſt-Fruits*, it is Hiſtorically reported to us, that they were firſt introduced into *England* by Pope *Clement* the Vth, who ſucceeded Pope *Benedict* the XIth. For this Pope, after the Death of *Benedict*, was no ſooner elected and enthron'd in *France*, (for ſo Biſhops would be ſaid to be) but that he began to exerciſe his new Rapines here in *England* by a compliance with the ſaid King *Edward*, in granting him a two years Diſme from the Clergy for his own Uſe, tho' pretended for the Aid of the *Holy-Land*, that he himſelf might with the more eaſe exact the *Firſt-Fruits* of vacant Eccleſiaſtical Benefices, to augment his own Revenues, tho' not within his own Territories. This is ſaid to be the firſt Precedent of any Pope's reſerving or exacting *Annats* or *Firſt-Fruits* of all Eccleſiaſtical Dignities and Benefices throughout *England*, extant in our Hiſtories: which tho' reſerved but for two Years by the Pope at firſt; yet afterwards grew into a Cuſtom by degrees, both here in *England* and elſewhere. And thus they remain'd in the Pope, till the Act of Parliament entitled the Crown thereunto in King *Henry* the VIIIth's time †, which Queen *Mary* afterwards reſtored again to the Pope: But in the firſt Year of Queen *Elizabeth*, an Act paſs'd, for reſtoring the *Tenths* and *Firſt Fruits* to the Crown. But (notwithſtanding the Report of ſome Hiſtorians touching the firſt Introduction of *Firſt-Fruits* into *England*, as aforeſaid;) yet 'tis evident, they were paid here in *England* ſome hundred Years before that Time, as appears by the Laws of *Ina*, King of the *Weſt-Saxons*, who began his Reign, A. D. 712. And by the Laws of King *Edgar*, who began his Reign 959, it is ordain'd in theſe Words, *viz. Ex omni quidem ingeniorum terrâ ipſæ ſeminum primitiæ primariæ penduntur Eccleſiæ.* The like you have in the Laws of King *Canute*, who began his Reign 1016, *ſeminum Primitiæ ad Feſtum divi* Martini *pendentur: Siquis dare diſtulerit, eas Epiſcopo undecies præſtato, ac regi Ducenos & viginti ſolidos perſolvito* ‖. 'Tis ſuppos'd, that *Boniface* Archbiſhop of *Canterbury*, in King *Edward* the IIId's Reign, was the firſt that made way for Popes to appropriate *Annats* and *Firſt-Fruits* in this Kingdom to themſelves: for this Archbiſhop, on a feign'd Pretence *, that his Church of *Canterbury* was involv'd in very great Debts by his Predeceſſor,

‖ Lib. 8. c. 2. de rer. Inv.

† 26 H. 8. ch. 3.

‖ Vid. Lamb. Leg. Sex.

* A. D. 1240.

ceſſor, but in truth by himſelf, to carry on foreign Wars, and gratify the Pope, procured from Pope *Innocent*, a Grant of the firſt Year's Fruits of all Benefices that ſhould become void within his Dioceſs for the ſpace of ſeven Years, till he ſhould raiſe from thence the Sum of 10000 Marks yearly out of the Biſhoprick. So that this Grant of *Firſt-Fruits* to the ſaid *Boniface*, ſoon after made way for the Pope to appropriate them unto himſelf. But in Proceſs of Time the Parliament having ſettled them (as aforeſaid) on King *Henry* the VIIIth, there was an Office there-
† A.D. 1538. of eſtabliſh'd in *London* †, whereby the King's Revenue increas'd exceedingly from this Office on the Receipt of *Firſt-Fruits* and *Tenths*. For now the Pope being dead, in *England*, the King was found his Heir at Common Law, as to moſt of the Power and Profit he had uſurp'd; and the Rents which the Clergy paid, were now changed together with their Landlord: for Commiſſioners (whereof the Biſhop of the Dioceſs was always one) were appointed to eſtimate their Annual Revenues, that ſo their *Firſt-Fruits* and *Tenths* might be proportion'd accordingly.

And thus this Revenue ſtood to the Crown, till Queen *Anne* taking into Conſideration the inſufficient Maintenance of the poor Clergy, ſent a Meſſage to the Houſe of Commons by one of her Principal Secretaries of State, ſignifying her Intention to grant the *Firſt-Fruits* and *Tenths* for the better Support of the Clergy; and that they ſhou'd find out ſome Means to make her Intentions more effectual. Whereupon an Act paſſed the Parliament by which the Queen was to incorporate Perſons, and to ſettle on them and their Succeſſors the Revenue of the *Firſt-Fruits*; but with a *Proviſo*, that the Statutes before-mention'd ſhould continue in Force for ſuch Intents and Purpoſes as ſhould be directed in her Grant: and that this new Act ſhould not extend to impeach or make void any former Grant made of this Revenue. And in Purſuance of this Law, the Queen did, in the third Year of her Reign, incorporate ſeveral of the Nobility, Biſhops, Judges, and others, by the Name of the Governors of the Bounty of Queen *Anne*, for the Augmentation of the Maintenance of the poor Clergy, to whom ſhe gave the *Firſt-Fruits*, *&c.* and appointed the Governors to meet at the Prince's Chamber in *Weſtminſter*, or in any other Place in *London* or *Weſtminſter*, to be appointed by any ſeven of them, whereof a Privy Counſellor, Biſhop, Judge or Counſellor at Law to be of the *Quorum*; there to conſult about the Diſtribution of this Bounty.

|| In Repet. Jur. Can. Tom. 6. p. 2. fol. 54.

Gammarus the *Canoniſt* ||, in Favour of the Apoſtolick See, aſſerts, That *Annats* were very juſtly required by the Pope *pro conſervando decenni Statu*; and compares it to *Aaron* the High-Prieſt's receiving the Tithe of Tithes, the Tithes of ſuch Tithes as were given to the other Prieſts: adding withal, that *Annats* are of very great Antiquity. For this Revenue was long ſince granted to the Pope, when he had not ſuch large Poſſeſſions as he now has, but was at a vaſt Charge and Expence in maintaining his ſpiritual Pride and Dignity: and, therefore, *Annats* were at firſt only impos'd on ſuch vacant Benefices as he himſelf conferr'd, and afterwards on all others by degrees; which, *Hoſtienſis* ſays, was often complain'd of as a very great Grievance. And it is an Obſervation of no leſs Truth than Antiquity, That there never was any Invention that ever brought more to the Pope's Treaſure than this of *Annats*.

At a Parliament held at *Carliſle*, great complaint was made of the Oppreſſion of Churches, *&c.* by *William Teſta* (call'd *Mala Teſta*) the Pope's Legate, in which Parliament the King, with his Barons aſſent, deny'd Payment of *Firſt-Fruits*, and to this effect he wrote to the Pope: whereupon the Pope relinquiſh'd his demand, and the *Firſt-Fruits* were for two Years, by that Parliament, given to the King.

Of

Of Perſonal Anſwers in Judgment.

AFTER Conteſtation of Suit, and the Oath of Calumny taken by both the *Litigants*, which I ſhall treat of under their proper Titles, the next Thing which follows in Courſe of Practice, if the Suit proceeds, is the Demanding and Giving in of what the *Civilians* call *Perſonal Anſwers*, which are made in Writing to the ſeveral Articles or Poſitions of a Libel, or to any other *Judicial* Matter exhibited in Court: And theſe Anſwers ought to be made in very clear and certain Terms; and upon the Oath too of the Perſon that exhibits them *, unleſs it be in a *Criminal* Cauſe, wherein no one is bound to accuſe himſelf. For *Perſonal Anſwers* are therefore provided in Law, that by the Help of them the Adverſe Party may be reliev'd *ab onere probandi* †: Therefore they ought to be made *pure & ſimpliciter* by the Words of *Credo* or *non Credo*, or the like ‡. And this ought to be done, that the Adverſe Party may certainly know what he ought to prove, tho' theſe Anſwers are ſometimes given in contrary to good Practice (I think) after Publication of the Depoſitions of Witneſſes, even till a Concluſion of the Cauſe, in order to get the Truth from the Perſon himſelf; and if theſe Anſwers are not clear, full and certain, they are deem'd and taken in Law as not given at all, and upon a Motion made the Judge ought by an *Interlocution* to enjoin new Anſwers, it being the ſame Thing to give no Anſwer at all, as to give a general and inſufficient Anſwer *.

* Gail. lib. 1 obſ. 79. n. 10.

† Gail. lib. 1. obſ. 79. n. 5.

‡ C. 2. 59. 2. 2. Gloſſ. ibi in v. *exiſtimat.*

* D. 11. 1. 11. 7.

A *Perſonal Anſwer*, therefore, ought to have three Qualities in it, *viz. Firſt*, It ought to be *pertinent* to the Matter in Hand. *Secondly*, It ought to be *abſolute* and *unconditional*. And, *Thirdly*, It ought to be *clear* and *certain*. That Anſwer is ſaid to be made *abſolutely* and *ſimply*, which is made without Shiftings and Doublings; and to which nothing is or can be added. And hence 'tis, that in the *Imperial* Chamber this vulgar Anſwer is not admitted, *viz. I do not believe it as the Matter is propounded and alledg'd*, or in *Latin* thus, *non credo ut ponatur*. And the Reaſon of this Non-admiſſion is, becauſe of its great Uncertainty †. Nor is ſuch an Anſwer as this ſufficient, *viz. That ſuch Poſition concerns the Fact of another Man: And, therefore, no Anſwer ought to be given thereunto.* But ſuch an Anſwer is good and valid, according to the common Rules of Practice ‡, tho' it be not ſo in the *Imperial* Chamber: Becauſe of another's Fact we may probably be ignorant; and a Perſon ought rightly to article and propound touching his own Act, and not touching that of another Man. But when he is ignorant of another's Act, he may deny the Poſition without incurring the Danger of Perjury: And this is practis'd in the *Imperial* Chamber as well as in other Courts, to avoid and put an end to the *Ambages* of Law-Suits. And for the ſame Reaſon in the ſaid Chamber, and other Courts of Law, other Anſwers that are ſufficient of *Common Right*, are not admitted there. As when they are made to a Poſition too general, negative, obſcure, doubtful, impoſſible, captious, criminal, manifold, and the like ‡. Tho' the Parties are by ſuch ſort of Anſwers uſually wont, thro' Fraud and Malice to protract Law-Suits; yet the Judge ought to be circumſpect, that the Party be not injur'd by a prejudicial Anſwer; in which Caſe Recourſe

† Gail. lib. 1. obſ. 82. n. 7.

‡ Gloſſ. in c. 2. vi. 2. 9.

‡ Gloſſ. in c. 2. vi. 2. 9. v. *rationabili.*

ought to be had to the Common Law and Rules of Practice; and the Party ſhall not be compelled to anſwer, if the Poſition be ſo captious, that Perjury would probably enſue by ſuch an Anſwer *.

* Specul. Tit. de poſ. Sect. 7. n. 20. 27. & 34.

But, in the *Imperial* Chamber, regularly a Poſition of Law wants no Anſwer; nor is an Anſwer given thereunto: Whereupon if the Poſition be founded on the Common Law, it is a valid Anſwer to ſay, *That it is a Poſition of Law:* Becauſe ſince the Law is certain, there is no need of Proof, and conſequently no occaſion of giving an Anſwer to it †. But 'tis otherwiſe in a Poſition founded on a Cuſtom. For tho' it be the *Municipal* Law of that Place, where ſuch Cuſtom prevails, yet this Cuſtom conſiſting in Facts ‡, and, Facts being never preſum'd, the ſaid Cuſtom ought to be prov'd: And, conſequently, the Party ought to anſwer to ſuch a Poſition *. If the Poſition contains ſeveral Heads, a diſtinct Anſwer to each particular Head ought to be admitted; and the Party may confeſs in Part, and deny in Part †: But the whole Poſition being partly true, and partly falſe, cannot be deny'd *in ſolidum* without Perjury. As for Example, if any one in an Allegation propounds and ſays, that Twenty Pounds are due to him, the *Narrata* of the Poſition as narrated, according to the common way of Pleading, ought to be deny'd, if only Ten Pounds are due: So that ſuch an Anſwer ought not to be had and taken for a *ſimple* Anſwer ‡.

† D. 34. 2. 37. Bald. in l. 7. C. 9. 2. n. 15.

‡ vi. 1. 4. 1.

* Bart. in 82. C. 59. 2.

† Specul. de poſ. Sect. 7.

‡ D. 34. 5. 13. Gloſſ. in c. 2. vi. 2. 10. v. *Sigillatim.*

But we ought do diſtinguiſh, whether a Poſition contains the Sum or Quantity, or the Quality only of ſome Matter in Demand. In the firſt Caſe a Poſition partly falſe and partly true cannot *ſimply* be deny'd without Fear of Perjury; becauſe in Judicature an Interrogation *de toto* is underſtood to be made touching every Part thereof: And after the ſame manner an Anſwer *de toto* is deem'd to be made touching every Part thereof; becauſe a Part is in the Whole *: Wherefore if a Man denies a Thing to be his, he alſo ſeems to deny it to be in common due to him †.

* D. 44. 2. 7.

† D. 31. 1. 78.

Skilful Advocates, to take away all Difficulties, are wont to add a Clauſe to Poſitions, that contain a certain Quantity, *viz.* "If the Defendant does not believe the Sum *Articulate*, let him anſwer *de quantâ* "*credat*; that is to ſay, how much he does believe to be true:" For otherwiſe by a *ſimple* Negative Anſwer, he ſhall not be excuſed from the Guilt of Perjury.

In the ſecond Caſe the whole Poſition is rightly deny'd. As for Example: If it be propounded and alledg'd, That *Titius* has made a *pure* and *abſolute* Promiſe, whereas in Truth the Promiſe is *ſub Conditione vel in diem:* Becauſe properly ſpeaking a conditional Debtor is not a Debtor: And by this Means another Thing and a different Fact is propounded ‡; ſo the whole may be deny'd. Again, I remember, it has been a Doubt, whether the following Anſwer be a *certain* and *ſimple* Anſwer, *viz. I do not believe the Poſition or Article to be true, unleſs it be proved.* But, according to *Baldus*, it has been held by a Majority of Voices, That this kind of Anſwer is not only ſufficient, but it is very Prejudicial to the Reſpondent: For by ſuch a kind of Anſwer, if the Article be afterwards proved, there is a kind of *geminata Probatio* induced, *viz.* an Anſwer by Confeſſion, and an Anſwer by Teſtimony of Witneſſes. And the Effect of ſuch a *geminata Probatio* is, that the Perſon caſt in the Suit cannot appeal, becauſe he that confeſſes a Matter in Judgment, cannot appeal the Cauſe *. And this Concluſion is founded on the Force of the Word *niſi*, or *unleſs*, in the Anſwer; which always avers or affirms ſomething, if a Negative Sentence goes before it. Hence Matrimony *de præſenti* is contracted by ſuch Words as theſe, tho' the Words do import a Habit, and not an Act of the Future Tenſe;

‡ Covar. Reſ. lib. 1. c. 2. n. 5.

* C. 7. 65. 2.

Tenſe; for this Word *niſi* in a negative Sentence or way of Speech has the Force of an Affirmative.

It is alſo a receiv'd Opinion among the Doctors, That this is a ſufficient Anſwer, *viz. I believe it to be contain'd in ſuch an Inſtrument or Writing*, when the Poſition of the Libel mentions a certain Inſtrument or Writing; otherwiſe it is not: And ſuch a kind of Anſwer ſhall be deem'd either *Affirmative* or *Negative*, according to the Tenor of the Deed or Inſtrument referr'd to *. For the Thing referr'd to with all its Qualities is deem'd to be inherent to the Thing referring; and that, which is inferr'd from a Relation, is ſaid to be truly and properly ſo. For to declare a Thing *expreſſly* as by a Relation had to another, is the ſelf-ſame Thing, when it appears from the Thing referr'd; otherwiſe the Thing referring is null and void. But ſuch an Anſwer as this is reprobated and diſallow'd of in Law, *viz.* "I do not believe it, unleſs the "Deed or Inſtrument appears;" becauſe ſuch an Anſwer does not relieve the Adverſe Party from the Obligation of proving the ſame, according to *Bartolus* †.

* Guid. Deciſ. 334. per tot.

† in l. 11. D. 11 1. 7.

Anſwers ought to be made before the ſame Judge, before whom the Poſitions were produc'd and exhibited, or elſe before Commiſſioners nam'd by him, leſt the *Continence of the Cauſe* ſhould be divided; or, in other Terms, leſt there ſhould be a diſcontinuance of the Cauſe. In preparing and giving an Anſwer it is neceſſary, That the Party Reſpondent ſhould be preſent in Court, and be Perſonally admoniſh'd by the Judge to anſwer ſuch Poſitions on the Judge's Examination or Interrogation of him; otherwiſe he ſhall not be reputed Contumacious for not giving an Anſwer; nor ſhall thoſe Poſitions be held and taken as confeſs'd. It is a good Caution, before a Man makes or gives an Anſwer, for him to premiſe ſome Exceptions and Proteſtations at the Head of his Anſwer, leſt he ſhould prejudice himſelf in his Right by *ſimply* anſwering thereunto: And let himſelf alſo take Care, that the Judge makes an *Interlocutory* Decree thereon. A Perſon making a *ſimple* Anſwer to the Poſitions of the Adverſe Party, ſeems to confeſs all the Qualities and Coherences thereof according to the aforegoing Interrogation made ‡.

‡ D. 11. 1. 9. 3.

Of Apparitors and their Offices.

APPARITORS are ſuch Perſons as are always ready at Hand to execute the proper Orders and Decrees of the Magiſtrate or Judge of any Court of Judicature; and they conſtantly wait in Court to make a due Return or Report of what they have done in Purſuance of ſuch Orders and Decrees, and to receive ſuch other Commands as the Judge ſhall pleaſe to iſſue forth *: For, without the Decree and Order of the Judge, no one ought to be arreſted, ſummon'd or puniſh'd in any wiſe; and ſuch an *Apparitor*, as ſhall attach any Man's Perſon or Goods without the *Mandatory* Letters of the Court, may with Impunity be reſiſted with Force †; but if he has the Mandate or Order of the Court for ſo doing, he ought not to be reſiſted with Force, tho' he does exceed the Bounds of his Commiſſion,

* C. 1. 3. 33. 5.

† C. 10. 1. 5.

miſſion, but ſuch an exorbitant Execution thereof ought to be puniſh'd by the Court *, as in *Holland* and other Places.

* Groenew. de Leg. ab og. C. 7. 65. 5.

There was heretofore among the *Romans* a College or Body Politick of thoſe Men commonly called *Executors*, over which there preſided a Dean and a Sub-Adjutor, in *Latin* ſtiled *Primi-Scrinius* †, whoſe Buſineſs it was to aſſign and appoint *Apparitors*; and out of this College or Body Politick *Apparitors* were always taken and made Choice of: And over theſe the Judges had formerly ſo great an Authority, that if they treſpaſs'd or offended in their Office, they could puniſh and even remove them from thence, and ſubſtitute others in their Room. Theſe *Apparitors* were anciently in *Latin* term'd *Viatores* †, *Lictores*, *Accenſi*, and alſo *Stratores*: But in Proceſs of Time they were ſtiled *Executors* * and *Officials* ‡; and might be remov'd at the Pleaſure and Diſcretion of the Judge. And having different Titles and Appellations according to the reſpective Magiſtrate, unto whom they gave Attendance: They were in this manner called *Cæſariani*, *Catholici*, *Præfectiani* *, *Præfectorii*, *Magiſteriani*, *Auguſtani*, *Præſidiales*, *Rationales*, and the like. But in latter Ages they have been in *Latin* term'd *Bajuli*, *Maſſarii*, *Bedelli Biruarii*, *Oſtuarii*, *Nuncii* †, *Servientes*, and the like; their Office being to wait on the Magiſtrates, and to attend on Judges and Rectors of Provinces. At this Day Eccleſiaſtical Judges chuſe their own *Apparitors*, which by the Statute of 21 *H.* 8. *ch.* 5. and by 138*th* of King *James*'s Canons are therein called *Summoners* or *Somners*; and theſe they may remove at Pleaſure if they misbehave themſelves in their Office; and (according to ſome Mens Opinions) they are oblig'd ſo to do.

† C. 3. 2. 1.

† I. 4. 6. 24.
* C. 3. 2. 2.
‡ C. 9. 2. 7.

* C. 3. 2. 3.
C. 9. 49. 9.

† X. 1. 29. 21.
X. 2. 28. 19.

The proper Buſineſs and Employment of an *Apparitor* then is, according to the *Novel* Conſtitutions, to convene and cite Defendants into Court, to introduce the Proceſs emitted by the Judge, and to admoniſh or cite the Parties in the Production of Witneſſes, and the like; the preparing the Proceſs being now more the Buſineſs of the *Actuary* than the *Apparitors*, tho' it was otherwiſe formerly. And thus do theſe Perſons ſerve all ſuch Proceſſes as do iſſue out of Spiritual or Eccleſiaſtical Courts; and, as Meſſengers, do ſummon Offenders and others thereunto in order to make their Appearance therein, as Occaſion ſhall require. To prevent all Grievances and Exceſſes, which may happen by the *Beadles* or *Apparitors* of Deans and Archdeacons, it is provided by a Provincial Conſtitution in *Lindwood* ‡, That when ſuch *Beadles* or *Apparitors* do go to the Houſes of Rectors, Vicars, Pariſh-Prieſts or others not having a Parochial Cure, on the Execution of ſuch Mandates as are directed to them, or on any other Buſineſs touching the Office of a Dean or Archdeacon, they ſhall not demand any Thing of them on the Account of Procurations or any other Service relating to the Duty and Office of ſuch *Apparitor* in reſpect of executing their Mandates, ſince he, that ſends them, is bound to reward them for their Service *. But let them content themſelves with Thanks; receiving only ſuch Meat and Drink (by way of Hoſpitality) as ſhall be ſet before them by ſuch as receive them. And likewiſe they ought not to execute thoſe Precepts by *ſimple* Meſſengers or Sub-Beadles, but in their own Perſons, becauſe ſuch *Apparitors* are ſworn to execute all Matters belonging to their Office with Fidelity; and ſo cannot execute them by others †. But ſometimes a Mandate is committed to them, which they may execute either by others, or elſe in their own Perſons: And in this Caſe 'tis ſufficient for them to execute the ſame by others; provided it be done according to the Rules of Law and Juſtice, otherwiſe their Principals have no Plea of Excuſe. So likewiſe it is provided by the aforeſaid Canon

‡ Lib. 3. Tit. 22. Cap. 3.

* VI. 1. 16. 6.

† X. 1. 29. 43. 3.

Canon of King *James*, that *Apparitors* ſhall by themſelves faithfully execute their Offices, and ſhall not by any Colour or Pretence whatever ſuffer or cauſe their Mandates to be executed by any Meſſengers or Subſtitutes without good Cauſe, to be firſt allow'd and approv'd by the Ordinary of the Place: And ſo the Law ſtands at preſent. And moreover by the ſaid Provincial Conſtitution it is enacted, That ſuch *Beadles* or *Apparitors* as ſhall act contrary thereunto, and be found Burthenſome and Injurious to Perſons under their Maſters Juriſdiction, ſhall be firſt and principally puniſh'd by their Maſters, the Deans or Archdeacons. And if they ſhall not puniſh them, then their Superiours the Biſhops or their Officials may do it, not only in Caſe of Negligence, but (according to the Doctors *) by way of ſimple *Querela* or Complaint: And, moreover, they ſhall be obliged *ipſo Jure*, or by a Declatory Sentence, to reſtore Twofold to the Parties. But, by the above-mentioned Canon of King *James*, the Abuſes and Grievances pretended to be committed by ſuch *Summoners* or *Apparitors*, are beſt redreſs'd, as being moſt in Uſe.

* in cap. 11. X. 1. 31.

And as it is provided by another Provincial Conſtitution in *Lindwood* †, That no *Suffragan* Biſhop ſhall have more than one riding *Apparitor* in his Dioceſs, and that Archdeacons in their Archdeaconries ſhall not have ſo much as one riding *Apparitor*, but only a Foot-Meſſenger; ſo it is decreed and ordain'd by the aforeſaid Canon enacted for reſtraining the Number and Multitude of *Apparitors*, That no Biſhop or Archdeacon, or their Vicars, Officials or their inferiour Ordinaries ſhall depute or have more *Apparitors* to ſerve their reſpective Juriſdictions than either they or their Predeceſſors had or were accuſtom'd to have thirty Years before the publiſhing of theſe Canons or Eccleſiaſtical Conſtitutions. But tho a Biſhop could not have more than one riding *Apparitor*, yet he might have ſeveral Foot-Officers, according to the Doctors ‡, eſpecially if there was a Concurrency of Juriſdiction between him and the Archdeacon: But an Archdeacon ought not to exceed his Biſhop in the Number of *Apparitors*. Biſhops, deputing more *Apparitors* than they ought to have, ought to be firſt admoniſh'd by their Superiour to diſmiſs them; and if they ſhall then refuſe to diſcharge the exceeding Number, they ſhall according to this Conſtitution be ſuſpended *ab Officio & Beneficio*, till they remove the ſaid Number from their Employment. But neither the Number nor the Diſtinction of riding or walking *Apparitors* is now much regarded, but as the Conveniency of ſerving the Proceſs requires. By this Conſtitution theſe *Apparitors* could not ſtay longer than one Night and a Day with the Rector or Vicar of any Church in any one Quarter of the Year, at the Charge of ſuch Rector or Vicar, unleſs they were ſpecially invited thereunto by ſuch Rector or Vicar.

† Lib. 3. Tit. 22. Cap. 7.

‡ Dd. in l. 11. X. 1. 31.

The *Civilians* have ſo low an Opinion of a *Beadle* or an *Apparitor*, that they call him *Animal tantum rationale*; by which it may be inferr'd that he is of a meaner Capacity than a Sheriffs Officer: And, therefore, ſince he is ſuch an Incomprehenſible, 'tis fit the Court ſhould not be troubled with many of them, which they uſually employ'd till the Number was reſtrain'd by the aforeſaid Canon. Nor are the Beadles in the two Univerſities of much ſuperior Character to theſe Two-legg'd Animals, tho' they are for the ſake of large Fees and other Perquiſites of their Place uſually choſen out of the Students of thoſe two Bodies: For they are generally ſpeaking ſuch idle Perſons as have acquir'd an Intereſt among the Maſters of Art by Drinking, and other looſe Ways of Converſation; and ſhould they not be choſen hereunto,

being fit for nothing elſe but to carry a ſilver Staff before the Vice-Chancellor and others in thoſe Places of Learning; they muſt live and dye Drones in their Colleges. Therefore, the State of Learning in thoſe Bodies is much to be lamented, when Men are ſuffer'd to continue in thoſe Societies for no other End and Purpoſe than for the Exerciſe of ſo mean and ſervile an Employment; and what is more to be deteſted, is, that theſe idle and debauch'd Wretches ſhould be permitted to hold their Fellowſhips with ſuch low Services, and under ſuch Circumſtances as ſcandalize a good Education.

*Lib. 5. Tit. 17. cap. 4.

By a third Conſtitution in *Lindwood* *, all *Beadles* and *Apparitors*, belonging to Deans and Archdeacons, are forbidden under any Pretence of their Office in their own Perſons to pronounce any Sentence of Excommunication, Suſpenſion or Interdict *ore proprio*; or to denounce and publiſh any ſuch Sentence pronounc'd by Deans and Archdeacons without the ſpecial Mandate or Letters Denunciatory of their Maſters. And if they ſhall preſume to act contrary hereunto, Sentences thus pronounc'd ſhall be null and void *ipſo Jure* in ſuch a manner, that they need no Exception thereunto; nor ſhall they be obſerv'd by thoſe againſt whom they are pronounc'd, ſince in Truth they do not bind, as being pronounc'd by Perſons, that have not the Power of Excommunication, and the like. And ſuch *Beadles* or *Apparitors* as ſhall offend herein, and be found Injurious and Burthenſome to their Maſters Subjects herein ſhall be greatly puniſh'd according to the Quality of their Offence, and be oblig'd to reſtore Two-fold to the Perſons aggriev'd hereby.

But tho' an *Apparitor* be an Eccleſiaſtical Officer, and is, therefore, uſually puniſh'd according to the Laws of the Church; yet he may be puniſh'd by the Temporal Courts for any Falſhood in the Execution of his Office; and of this I ſhall give ſome Inſtances. An *Apparitor* came to the Church, and inform'd the Parſon, That he muſt pay the Tenths to ſuch a Man, and at ſuch a Place, which was four Miles diſtant from his Church; and the Biſhop certify'd the Eccleſiaſtical Court under his Seal on the Non-payment of them, that he refus'd to pay them according to the Statute of the 26th of *H.* 8. chap. 3. And thereupon another Parſon was admitted and inſtituted into his Living; becauſe by that Statute, where the Tenth is due and demanded by the Biſhop, or ſuch as ſhall be intruſted to collect it; or by his Miniſters, Servants or Officers; and, being not paid then, on ſuch Certificate, the Incumbent is *ipſo facto* depriv'd. But it was reſolv'd, that the Demand was not made according to the Statute, and the Summons to pay them not in Purſuance thereof: For the Demand ought to have been made by one, who has an Authority to receive them, which an *Apparitor* had not; And they held the Demand not good, tho' the Biſhop certify'd it to be duly made †. And in the Caſe between the Queen and *Blanch* it was reſolv'd, That the Biſhop's Certificate on the Incumbent's Refuſal to pay his Tenths, is not Peremptory but Traverſable; and that the Demand of the Tenths muſt be made at the Incumbent's Houſe, and the Refuſal muſt be there ‡.

† Mor. Rep. p. 541.

‡ Mor. Rep. p. 1225.

If a Monition be awarded to an *Apparitor* to ſummon a Man to pay ſuch Expences of Suit, as are tax'd and aſſeſſed by the Court; and he, upon the Return of the Monition, avers, That he had ſummon'd him, when (in Truth) he had not; and the Defendant be thereupon excommunicated, an Action on the Caſe at Common Law will lye againſt ſuch *Apparitor* for the Falſhood committed by him in his Office *, beſides the Puniſhment inflicted on him by the Eccleſiaſtical Court for ſuch Breach of Truſt. So if an *Apparitor* does falſly and maliciouſly *Colore Officii*,

* Rolls Abr. p. 92. Crok. 2d Rep. 351.

Officii, cite a Man into the Conſiſtory Court upon a Fame of Incontinency; and the Party is diſcharg'd upon his Anſwer given to the ſaid Charge: The Perſon cited ſhall have the like Action, becauſe it ſhall be intended, that he did it without a legal Proceſs *. And this Puniſhment by Action ſeems more proper than what was inflicted on the Archbiſhop's *Apparitor* by *Bogo de Clare* in the Eighteenth Year of K. *Edward* the Firſt, who having had a Citation ſerv'd on him in Parliament Time, ſome of his Family made the poor *Apparitor* eat both the Citation and the Wax,

* Rolls Abr. pt. 1ſt. p. 93. Crok. 3. Rep. 291.

And as the Temporal Courts may puniſh an *Apparitor*, ſo they may likewiſe take Notice of his Fees: For if he ſhould libel in the Spiritual Court for his uſual Fees, a Prohibition will lye upon a Suggeſtion, That the Fees which he claims are not due by Cuſtom or Preſcription. And, therefore, the ſafeſt way to ſue for ſuch Fees in the Eccleſiaſtical Court is to libel upon the Canon, which eſtabliſhes thoſe Fees, leaſt the Temporal Courts ſhould impeach their Proceedings.

Apparitors are ſo called, *quia faciunt Reos apparere in conſpectu Judicum:* And theſe Perſons are mention'd in ſeveral Places of the *Juſtinian Code*, as may be ſeen from the Laws quoted here in the Margin †. But tho' an *Apparitor* imports the ſame Thing as a *Miniſter*; yet every *Miniſter* is not an *Apparitor:* So that there is this Difference between an *Apparitor* and a *Miniſter*, *viz.* An *Apparitor* is he that adminiſters a Publick Office in the executing *Judicial* Proceſſes: But a *Miniſter* may be a Private Perſon ſent to execute any Orders; and is often the ſame as a Private Servant ‡. Tho' the Word *Miniſter* ſometimes denotes an Office, as that of a Prieſt or Deacon *; and ſometimes it is put for a Rector of a Pariſh †.

† C. 1. 3. 33. 5. C. 10. 1. 5.

‡ VI. 1. 16. 9.
* 24 Diſt. c. 3.
† VI. 1. 16. 9. v. *Miniſter.*

Of Appeals, their Effects and Incidents belonging to them.

IN treating of *Appeals* I ſhall here in the firſt Place enquire, what an *Appeals* is; and by what Law it was invented and introduc'd. *Secondly*, I ſhall conſider the Effects and Force of an *Appeal*; and explain what the Office of the Judge *ad Quem* is. *Thirdly*, I ſhall ſhew, what is to be done, if there be not a *local* Judge of an *Appeal*. *Fourthly*, I ſhall conſider to whom the Rector of every Univerſity, Corporation or Body Politick ought to appeal. *Fifthly*, I ſhall enquire, whether the Party aggriev'd may (omitting an *Appeal*) have an Action *ad Intereſſe* againſt the Judge, on the Account of the Iniquity of his Sentence; and whether the Judge be oblig'd in *Foro Conſcientiæ* to render Satisfaction for the Injury done.

Now in reſpect of an *Appeal* from a Definitive Sentence, an *Appeal* is commonly defin'd to be a *Judicial* Right, whereby the former Sentence is for a while extinguiſh'd; and the Cognizance of the Cauſe devolv'd to the Superiour Judge, in other Terms called a Judge *ad Quem*. But this Definition in my Opinion does not well explain the Nature of a *Judicial*

Judicial Appeal: Wherefore I ſhall define ſuch an *Appeal* to be a *Provocation* from an Inferiour to a Superiour Judge, whereby the Juriſdiction of the Inferiour Judge is for a while ſuſpended in reſpect of the Cauſe, wherein it is appealed; the Cognizance of the Cauſe being devolv'd to the Superiour Judge †. In this Definition the Term *Provocation* is made uſe of as a *Genus*, becauſe the Word *Provocation* is a more comprehenſive Term than the Word *Appeal*. For a *Provocation* is every Act, whereby the Office of the Judge or his Aſſiſtance is ask'd and implor'd: A *Provocation* including both a *Judicial* and an *Extra-judicial Appeal*. But an *Appeal* according to the proper Signification thereof contains only a *Judicial*, and not an *Extra-judicial Appeal* *. So that an *Appeal* (you ſee) is Two-fold, *viz.* *Judicial* and *Extra-Judicial*. That is ſtiled a *Judicial Appeal*, which is made from a Sentence pronounc'd in a *Judicial* Manner, or in a Court of Judicature: And that is called an *Extra-judicial Appeal*, which is not made and interpos'd from a *Judicial* Sentence, but from ſome *Extra-judicial* Acts or Decrees or other †. And it may be defin'd to be a *Provocation* from an Inferiour to a Superiour Judge on the Account of ſome preſent or future probable Grievance not inflicted in a Court of Judicature ‡. And this kind of an *Appeal*, as well as the other, if the Grievance be likely and probable, transfers the Cognizance of the Cauſe to the Superiour Judge: So that (pending the *Appeal*) nothing can be attempted in Prejudice of the *Appellant*: And, therefore, in the foregoing Definition (I think) theſe Words ought to be added, *viz.* *In regard of ſome Grievance already inflicted or likely to be inflicted*; For the immediate Cauſe of an *Appeal* is ſome unjuſt Grievance or the like, which is inflicted on the *Appellant* by the Judge *a Quo*. Therefore, in this Definition, I ſay, from *an Inferiour* to *a Superiour Judge*; becauſe it is of the Nature of an *Appeal*, that it ſhould be made from an Inferiour to a Superiour Judge †. For it is not reaſonable, that an Inferiour Judge ſhould correct the Error and Miſtake of a Superiour Judge, but rather on the contrary: And Cuſtom cannot introduce this Method, *viz.* That an *Appeal* ſhould be made to an Inferiour or Equal Judge from a Superiour *. And, *laſtly*, it rightly follows on this Definition, That an *Appeal* be made in regard and by reaſon of ſome Grievance already inflicted or likely to be ſo: Becauſe a Perſon may not only appeal from a Grievance, but even from a future Grievance, if ſuch a Grievance will probably accrue †, as I ſhall ſhew by and by, when I proceed to declare when ſuch an *Appeal* has Room.

† Bart. in l. 25. D. 26. 7.

* Abb. in c. 5. X 2. 28. & in cap. 3. X. 2. 17.

† D. 49. 4. 1. 3.

‡ X. 2. 28. 51.

† D. 49. 1. 1. 3.

*Phil. in Rub. de App.

† Dd. in c. 59.

The efficient Cauſe of an *Appeal* is the Law of Nations ‡; a *Judicial* Proceſs itſelf being entirely ſaid to have its Original from the Law of Nations: And thus an *Appeal* was invented, and by very ancient Uſage introduc'd as a Remedy to relieve Perſons from Grievances inflicted on them by *Judicial* Officers, leſt that Men ſhould have their Rights injuriouſly taken from them by an unjuſt Judgment or Sentence pronounc'd againſt them either thro' the Malice or Unskilfulneſs of the Judge *. And by this Means every Perſon *Judicially* aggriev'd by the Judge, is by the Law of Nations permitted to appeal, and is in no wiſe prohibited, whether the Party condemn'd be the principal Litigant or not; provided it be his Intereſt to have ſuch unjuſt Sentence revers'd †: As a Proctor or any other Perſon that acts by the Commiſſion or Warrant of another. Hence it appears, That a Tutor, Legatary, *Fidejuſſor*, and Vendor, who is liable to an Eviction, are not prohibited the Benefit of an *Appeal* ‡. But it has been a Queſtion, Whether a third Perſon *pro intereſſe ſuo* may appeal from a Sentence pronounc'd *inter alios?*

‡ X. 2. 28. 59. Dd in l. 5. D. 1. 1.

* D. 49. 1. 1.

† 2 Q. 6. 30.

‡ D. 1. 4. & 27.

For

For the Solution of which Queſtion we are to diſtinguiſh in theſe three Caſes. *Firſt*, Whether he be willing to proſecute the *Appeal*, which is interpos'd by another; and, if he will, then he ſhall be admitted to the Proſecution thereof, tho' he has not appealed himſelf *: Becauſe the *Appeal* of the principal Party before the Execution of Sentence is already ſuſpended, and a Way laid open for all Perſons aggriev'd thereby to relieve themſelves; ſo that it is not neceſſary for them to make another *Appeal* †. In the ſecond Caſe, if the Party will adhere to the *Appeal* of another Perſon *pro intereſſe ſuo*, he may do it; provided he does within ten Days ratify and approve the *Appeal* thus interpos'd by another Perſon: For tho' the Party intervening *pro intereſſe ſuo* be not oblig'd to appeal within ten Days; yet he is bound to adhere to the *Appeal* of another Party within ten Days, and to ratify the Appeal thus interpos'd ‡. In the third Caſe, if the Party intervening *pro intereſſe ſuo*, principally appeals from the Sentence pronounc'd againſt the principal Party in the Cauſe, he may do it: But here he ought not only to interpoſe his Appeal within ten Days, but he ought alſo in apt and proper Terms to expreſs the Cauſes of his Appeal, and the Grievances inflicted on him *.

* D. 49. 1. 5. 2. X. 1. 29. 23.

† Faid. in l. 6. C. 7. 62. Sect. *Hodie.*

‡ 2 Q. 5. 30. vi. 1. 6. 4.

* 2 Q. 6. 30. x. 1. 29. 23.

It has been ſaid, That a third Perſon may appeal *pro intereſſe ſuo*, if his Intereſt be concern'd and injur'd by a Sentence †: And tho' the Sentence ſhall be confirm'd in reſpect of the Defendant's being caſt thereby, if he does not *docere de ſuo Jure*; yet it ſhall be revers'd in regard of a third Perſon making a juſt and reaſonable Appeal. In a Cauſe between the Biſhop of *A.* on the one Part, and the Monaſtery of *B.* on the other Part, divers Sentences were given, touching the State of the Monaſtery, for the Biſhop. It was hereupon appeal'd to the Pope: Whereupon the Biſhop of *C.* by his Meſſengers ſaid, That the Church of *D.* was grievouſly injur'd and prejudic'd by thoſe Sentences, to which Church the ſaid Monaſtery did belong; whereupon the ſaid Sentence ought not to be demanded to Execution for the Biſhop of *A.* Hereupon ſeveral Things were alledg'd before the Pope; but on the Part of the Monaſtery Reaſon was ſhewn why the ſaid Sentence pronounc'd for the Biſhop ſhould be annull'd. And, therefore, as to the Monaſtery the Pope confirm'd the Sentence, with an Order to the Judges, commanding, That if the Appeal for the Church of *D.* did appear to be well-grounded, and if the Biſhop's Meſſengers would proſecute the ſame within a legal Time, they ſhould defer the Execution of the Sentence, that the Church of *D.* might not be injur'd in reſpect of its Eſtate. And thus an Appeal principally operates two Effects, *viz.* a Suſpenſion of the Sentence, and a Devolution of the Cauſe †; which brings me to the ſecond Head propos'd here to be treated of, *viz.* To declare the Effects and Force of an Appeal.

† D. 49. 1. 4. 2.

† Abb. in c. 1. x. 2. 28. n. 4.

And here I muſt obſerve, That the firſt Effect is threefold, foraſmuch as it ſuſpends the *Sentence* and *Juriſdiction* of the Judge as to that Cauſe wherein it is appeal'd; and likewiſe tolls the *Preſumption*, which was in Favour of the Sentence pronounc'd. Indeed, it has been ſaid, That an Appeal extinguiſhes the Force of a Sentence *; but this can only be underſtood to be intended for the preſent Time: Becauſe if it did *ſimply* extinguiſh a Sentence, ſuch a Sentence would not re-aſſume its Strength and Force again by the Appellant's not proſecuting his Appeal. For the Law ſays, that a Sentence ſhall remain firm and valid, if the Appellant does not proſecute his Appeal. But an Appeal does not always operate theſe Effects. As for Example-ſake, if an Appeal be ſubſequent to a Sentence of Excommunication, the Excommunication is not ſuſpended †. But then the Appeal operates the Effect of a Devolution; becauſe it devolves

* D. 48. 16. 1. Gloſſ. in C. 19. x. 2. 24.

† Abb. in cap ut ſupra. n 5.

volves the Cauſe to a Superiour Judge, and tolls the Preſumption in Favour of a Sentence. And 'tis the ſame Thing, when it is appeal'd from the Nullity of a Sentence. For ſuch an Appeal does not ſuſpend the Force of the Matter pronounc'd, ſince it does not ſubſiſt *ſuis viribus:* But then it only operates the Effect of a Devolution, it devolving the Cauſe to the Superiour Judge; and in this reſpect it may be appeal'd from a Sentence, that carries a Nullity along with it.

But an Appeal does not ſuſpend the Juriſdiction of a Judge *a Quo*, unleſs it be in that Cauſe, wherein an Appeal has been interpos'd *. For ſuch a Judge may proceed in all other Cauſes, and I may be conven'd before him in another Cauſe (notwithſtanding my Appeal) unleſs I recuſe him as a ſuſpected Judge: And this eſpecially holds true, if he be an *ordinary* Judge. *Titius* appeal'd in a certain Cauſe, and (pending the Appeal) he was conven'd and impeach'd of ſome other Criminal Matter than that on which he appeal'd. And the Queſtion was, Whether he was oblig'd to continue under that Judge (pending the Appeal) from whom he had appeal'd? To which it was anſwer'd, That unleſs he recus'd him as a ſuſpected Judge, he ought to remain under his Juriſdiction and Cognizance, eſpecially if he be an *ordinary* Judge, as aforeſaid. For, as I have already obſerv'd, an Appeal only ſuſpends the Juriſdiction of the Judge in that ſame Cauſe alone, wherein it is appeal'd; and has no Regard to any other Cauſe, which is entirely diſtinct and ſeparate thereunto, even in reſpect of the ſame Perſon. And the true Reaſon of this Deciſion, was, that the Grievance was the immediate Cauſe of the Appeal, which Grievance might not happen in reſpect of other Cauſes: And, therefore, it ought not to ſuſpend the Juriſdiction of the Judge in other Cauſes †.

* Abb. in c. 6. x. 2. 28. n. 1

† Abb. ut ſup.

It has been ſaid, That an Appeal devolves the Cauſe to the Superiour Judge, and the Judge from whom it is appeal'd, commonly called the Judge *a Quo*, remains as a Private Man in that Cauſe. For, in reſpect to the Superiour Magiſtrate, the Cauſe is hereby carry'd to him within the Space of ten Days, according to the *Civil-Law*; but by a Statue * of the Realm here in *England*, within fifteen Days after pronouncing the firſt Sentence, for a ſecond Hearing thereof. So that it appears from hence, That an Appeal is a receding from an Inferiour Judge by the Invocation of a Superiour †, under the Pretence of ſome Nullity, Injuſtice or Iniquity in the former Sentence; and hereby Litigants are reliev'd in a Judicial Manner from ſuch unjuſt Sentence, and the like. And, moreover, it is here to be noted, That an Appeal prevents and hinders the Effect of a *Res Judicata*, ſince a Sentence paſſes in *Rem Judicatam*, if it be not appeal'd from thence.

* 24 H. 8. c. 12.

† D. 4. 4. 17.

Appeals may happen to be made on various Accounts, and for ſeveral good Reaſons; becauſe whenever any one is aggriev'd and afflicted by a Judge, or elſe thinks himſelf ſo, there is Room for an Appeal. And a *Judicial* Appeal is ſometimes made before a Sentence pronounc'd ‡, and ſometimes afterwards. If it be made before a Sentence, it is either made from a Grievance or an *Interlocutory* Decree: And if it be appeal'd from a Grievance, it is either appeal'd from a Commination of the Judge, or elſe from ſome Nullity and Irregularity in the Proceeding, which cannot be repair'd by a Sentence. Now that a *Judicial* Appeal made before Sentence pronounc'd ſhould be valid, ten Things are requir'd thereunto, *viz.* *Firſt*, The Cauſe of the Grievance inflicted or threaten'd ought to have a juſt Being. *Secondly*, The Cauſe

‡ Abb. in c. 12. x. 2. 28. n. 1.

Cauſe of the Grievance ought to be a lawful Cauſe to ground an Appeal on. *Thirdly*, It ought to be a true Cauſe. *Fourthly*, This Cauſe ought to be expreſs'd in the Appeal itſelf. *Fifthly*, It ought to be alledg'd therein, That ſome Petition or Exception made by the Appellant has not been admitted. *Sixthly*, That it is, therefore, appeal'd, becauſe ſuch Petition or Exception was not admitted. *Seventhly*, The Appeal ought to be in Writing. *Eighthly*, *Apoſtles* or *Letters Dimiſſory* ought to be demanded within 30 Days *. *Ninthly*, The *Appellant* ought to come prepar'd and inſtructed, if the Party ſhall demand it. And the *Tenth* Thing requir'd, is, That ſuch an Appeal be made within ten Days according to the *Civil* † and *Canon-Law*, or within fifteen, according to our *Statute-Law* ‡, after the Grievance inflicted or threaten'd. For he, that relies upon the Appeal, ought to prove two Things, *viz. Firſt*, That it is appeal'd. And, *Secondly*, That he has appeal'd the Cauſe within due Time. For when the Appeal is interpos'd *coram Judice*, the Judge does not enquire, whether it was appeal'd within due Time or not, ſince that Act chiefly concerns and reſpects the adverſe Party, againſt whom the Appeal is deduc'd: And the Judge, leaving that to be oppos'd and objected to by the Party *Appellate*, does *ſimply* and *abſolutely* admit the Appeal.

* 2. Q. 6. 31.

† C. 7. 62. 6. Sect. *Hodie.*

‡ ut ſupra.

An *Appellatory* Libel ought to contain four Things, *viz. Firſt*, The Name of the Party *Appellant*. *Secondly*, The Name of the Judge or him from whoſe Sentence it is appeal'd; and uſually the Name or Stile of him to whom it is appeal'd tho' this be not entirely neceſſary (as I ſhall ſhew by and by.) *Thirdly*, From what Sentence it is appeal'd, and likewiſe the Day of the Sentence pronounc'd, and of the Appeal interpos'd. And, *Fourthly*, The Name of the Party *Appellate* or Perſon againſt whom the Appeal is lodg'd or interpos'd *; and alſo the Cauſe why it is appeal'd, and the Demand or Petition for *Apoſtles*; and whether the Party appeals in his own, or in the Name of another Perſon. As to the Subſtance of an Appeal, it is not neceſſary to expreſs or uſe the Word *Appello*, but it is ſufficient to ſay or do any Thing equivalent to this Word; for it is more to expreſs a Thing by ſome Act or Deed, than by any Word or Term of Art. Thus an Appeal may be made by Equivalent Terms; As *I ſubmit my ſelf to your Protection* †; or *I ſubmit my ſelf and my Cauſe to the Protection of a Superiour Judge* *, and the like; provided, the other Requiſites of an Appeal be obſerv'd. So that the Word *Appello* is not neceſſary (as aforeſaid) if there be any Word or Words equivalent thereunto †. By the *Civil-Law* a general Appeal is valid, but by the *Canon-Law* it is otherwiſe ‡: As for Inſtance, *I do appeal unto a competent Judge* *: This and Appeals of the like Nature being ſtiled general Appeals.

* D. 49. 1. 1. fin.

† Bald. in l. 1. C. 7. 62.

* X. 2. 23. 34.

‡ D. 45. 1. 122. 5.

‡ X. 2. 28. 2.

* D. 45. 1. 122. 5.

Altho' a Cuſtom introduc'd againſt the *Subſtantials* of an Appeal be not valid: As for Example-ſake, That it ſhould not be appeal'd to a Superiour, but to an Equal or an Inferiour Judge; yet a Cuſtom may be introduc'd againſt the *Accidentals* of an Appeal. And among the *Accidentals* of an Appeal this is one, *viz.* That tho' by the *Civil-Law* an Appeal ought to be made *gradatim* †, yet by Cuſtom it is valid, if it be made *omiſſo medio*; and ſo it is by the *Canon-Law*, paſſing by the next Superiour Judge. An Appeal (*alternatively*) made may be tollerated by the *Civil-Law* as valid, as *I appeal to ſuch a one or ſuch a one*: But ſuch an Appeal is not valid by the *Canon-Law*, ſince by the *Canon-Law* an Appeal may be made *omiſſo medio*; and by this Means an *alternative* Appeal would produce an Uncertainty and ſome Obſcurity of Juriſdiction, which it cannot do by the *Civil-Law*, becauſe by the *Civil-Law*

† D. 49. 1. 21. x. 2. 28. 66.

Law the Judge is certain, and may or may not be ſpecify'd. An Appeal cannot be made from the Vicar-General to the Biſhop himſelf, becauſe the Conſiſtory and Tribunal of the Biſhop and his Vicar-General are the ſame Seat of Judgment *. And this holds good in Matters wherein the Vicar-General has Juriſdiction.

* Abb. in c. 14 x. 1. 6. n. 1.

Appeals are Matters which are favour'd in Law, and ought not to be reſtrain'd; a juſt Appeal being a Defence of Innocence †: And a Defence is a Matter of Natural Right, which ought not to be deny'd to any Man, provided the ſame be not made uſe of for the ſuppreſſing of Juſtice, but only for reſtraining the Iniquity of an unjuſt Judge, or for correcting his Ignorance or want of Skill in the Law; or, *laſtly*, That a Perſon overtaken by his own Ignorance in the *firſt* Inſtance, might be reliev'd in the *ſecond*. For in all Appeals this vulgar Saying or Maxim has Place, *viz. Non probatum probabo & non oppoſitum opponam* *. Wherefore, tho' there be no Iniquity or Unskilfulneſs in the Judge, yet it may be appeal'd on this laſt Account: And for theſe three principal Cauſes or Ends an Appeal was firſt invented and introduc'd. And thus it may be appeal'd in every Cauſe, and from every Grievance, unleſs it be in a ſuch a Caſe, wherein the Law itſelf prohibits an Appeal. But tho' this Advantage of an Appeal does of *Common Right* ariſe unto Men, and every Law and Ordinance that excludes the ſame is odious and ought to be reſtrain'd †: Yet it cannot be deny'd, but that an Appeal, and the Right of appealing may be taken away in ſome Caſes by Human Laws, and by the Prerogative of the Prince. Thus by the *Civil-Law* a Perſon convict, or confeſſing his own Crime cannot appeal: Nor can an Appeal according to this Law be interpos'd from an *Interlocutory* Sentence in certain Caſes. In *Germany* an Appeal has not any Room in Criminal Cauſes *, by a particular Ordinance, tho' 'tis of *Common Right* †.

† X. 2 28. 3.

* C. 7. 63. 4.

† X. 1. 17. cap. 1 & 2.

* Gail. lib. 1. obſ. 1. n. 28.

†C. 7. 62. 29.

'Tho' this Clauſe of *Appellatione remotâ* takes away every Appeal which is not expreſly indulg'd: Yet if a Perſon be unjuſtly aggriev'd, ſuch Grievance may be amended by the Superiour Judge ‡. For the barring and excluding of an Appeal does not in all Caſes entirely take away the Power of appealing: And from hence the Superiour Judge may receive an Appeal, and correct a Grievance. Indeed ſome ſay, that ſuch a Grievance ought to be corrected *per viam Querelæ*: But I think the other Explanation and Underſtanding is more agreeable to the Text. Both by the *Civil* and *Canon-Law* this Clauſe of *Appellatione remotâ* may be inſerted in the Emperors or Popes Commiſſion by the one in Matters relating to Temporal *, and by the other in Matters relating to Eccleſiaſtical Juriſdiction. Tho' the Prince or Sovereign Power alone can only bar and exclude the Benefit of an Appeal from a *Definitive* Sentence as being the laſt Reſort; yet in reſpect of an *Interlocutory*, an Inferiour Judge may do this by delegating or committing the Cauſe to another: And it may be done by all Perſons, who do not *de Jure* or *de Facto* acknowledge a Superiour †. But *Bartolus* reſtrains this to a *Fruſtatory* Appeal; concluding, That an Inferiour Judge cannot take away a lawful Appeal from an *Interlocutory*, becauſe this would be to take away not only an Appeal from an *Interlocutory*; but this would take away the Power of the Superiour, to whom it is appeal'd. Wherefore when a Law or Statute takes away an Appeal from a Sentence, it is only meant from a *Definitive* and not from an *Interlocutory* Sentence; becauſe an Appeal from a Sentence is only meant of a *Definitive* Sentence ‡. But 'tis otherwiſe, if it be *ſimply* provided by a Statute, That

‡ Abb. in cap. 3. x. 2. 28.

* D. 49. 2. 1.

† In l. 16. C. 7. 45.

‡ X. 2. 20. 34. x. 2. 24. 19.

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a Man ſhall not appeal from the Judge or Power ſet over him: For it is then underſtood touching every Sentence or Precept *.

* D. 1. 11. 1. 1.

By the *Canon-Law* a *Legate de Latere* cannot bar and take away an Appeal, nor can he uſe this Clauſe of *Appellatione remotâ*, which at this Day has many Effects and Operations in Law. For, *Firſt*, When it is proceeded in a Cauſe (*Appellatione remotâ*) the Judge *a Quo* is not obliged to ſubmit to the Appeal, as in other Caſes he is; and, conſequently, ſuch an Appeal does not ſuſpend the Juriſdiction of the Judge *a Quo:* And, therefore, he may demand his Sentence to Execution, before the Superiour Judge has receiv'd the Appeal, but not afterwards †. The *Second* Effect of ſuch a Cauſe is, That a Judge not ſubmitting to ſuch an Appeal (how probable ſoever it be) ſhall not be puniſh'd; becauſe it is not expreſly indulg'd by Law; and, doing this *Authoritatively*, he commits no Offence. The *Third* Effect reſpects the revoking of *Attentates* committed after an Appeal. For in ſuch a Caſe an *Attentate* ſhall not be revoked by way of an *Attentate*; that is to ſay, by way of a Nullity. For the Juriſdiction of the Judge not being ſuſpended by ſuch an Appeal, what is done in Judgment is valid, tho' it may be revoked by the Superiour Judge rather *per viam Querelæ* than *per viam Nullitatis*.

† X. 1. 29. 28. Sect. *prater*.

Tho' an Appeal does not lye in ſuch Caſes as are left to the Conſcience of any Perſon; yet if a Perſon be unjuſtly aggriev'd thereby, he may have Recourſe to the Prince, not that the Judge *a Quo* is bound to ſubmit to the Appeal, but the Prince or Sovereign Judge may review and examine the ſame, if he be apply'd to: For when a Cauſe is delegated (*Appellatione remotâ*) every Superiour Judge may be apply'd to *per viam Querelæ*, who is bound *ex debito Juſtitiæ* to revoke the Grievance, elſe it may be appeal'd from him. As for Example, In a Cauſe of Hereſy by the *Canon-Law* every Judge proceeds, *Appellatione remotâ:* But if the Perſon condemn'd of Hereſy may (on a Pretence of an unjuſt Sentence) appeal from the Sentence of the Biſhop, who is the Ordinary in this Caſe, unto the Archbiſhop: Such Archbiſhop may examine the Matter, and ſee whether the Sentence of Hereſy be unjuſt or not. Yet this Appeal does not ſuſpend the Juriſdiction of the Judge *a Quo*, unleſs it be from the Time that the Judge *ad Quem* receiv'd the Appeal, and ſent his *Inhibition* to the Judge *a Quo*.

As Appeals are much favour'd in Law, and ought to be extended to Penal Poſitions; ſo a Judge ought always, even in a doubtful Caſe, to receive and admit of an Appeal *: And if he does not, he may be puniſh'd for his Raſhneſs and Contempt of the Law; ſince every Appeal is preſum'd to be allow'd, unleſs it be ſpecially prohibited by ſome Law. But an Appeal, which cheriſhes any Injuſtice or Iniquity, ought not to be admitted; becauſe an Appeal ought not to have any Operation beyond its own Nature, which is to relieve a Perſon from a Grievance inflicted on him, and not to pervert Juſtice. Certain Perſons appeal'd in a certain Cauſe; and (pending ſuch Appeal) they committed certain grievous Offences; and being conven'd touching their Offences, they would willingly defend themſelves by their Appeal, ſo that their Exceſſes ſhould not be puniſh'd by an Eccleſiaſtical Cenſure. Hereupon the Pope being conſulted, gave for Anſwer, That their Appeal ought not to be their Defence and Protection: For that an *Appellant* may be puniſh'd by the Ordinary himſelf for an Offence commited by him after ſuch an Appeal, if he be afterwards charg'd with any Crimes.

* Spec. Tit. de Appell. Sect. *nunc dicamus*, n. 5.

Now an Appeal ought to be admitted by the Judge *a Quo*, that is to
*C. 7.62.24. say, by the Judge from whom it is appeal'd *; becauſe the Judge *ad Quem* and not the Judge *a Quo* ought to have Cognizance, whether an Appeal ought to be ſubmitted to or not. And if the Judge *a Quo* has once admitted and yielded Obedience unto an Appeal, he cannot afterwards proceed in that Cauſe without a Remitter, tho' he admitted the Appeal with this or the like Clauſe, *viz. Niſi ſi & in quantum, &c.* And it matters not, whether the Judge *a Quo* admits and grants an Appeal *ſimply* or *conditionally*: For by the Appeal the Judges Office is at an end in that Cauſe, unleſs the ſame be remitted to him by the Judge *ad Quem*. If a Judge *ſimply* admits of an Appeal, the Cauſe of ſuch an Appeal ought to be inſerted by the Judge *a Quo* in the *Apoſtles* or *Letters Dimiſſory*: And, moreover, 'tis to be noted, That the Judge *a Quo* is bound to cauſe all Acts of Court relating to the Cauſe to be gi-
†C. 7.62.15. ven to the *Appellant* by compelling his Actuary to deliver the ſame †. And in all Appeals there ought to be expreſs'd a true and juſt Cauſe thereof; and if it be appeal'd from a Grievance, ſuch Grievance ought to be ſpecially deduc'd therein. Tho' regularly no Appeal lies from a future Grievance in Judgment, yet if a Grievance *de præſenti* be inflicted and expreſs'd thereby, by which Means we fear ſome further Grievance hereafter, an Appeal lies: Otherwiſe it is ſufficient to appeal on the account of a Grievance only dreaded hereafter upon probable Grounds. If a Grievance be inflicted by a Judge on a Perſon, he may appeal *incontinently* by expreſſing ſuch a Grievance, and it is not neceſſary for the Party to pray a Revocation of ſuch a Grievance. If a Grievance *de præſenti* be inflicted on a Perſon, he may appeal (I ſay) *incontinently*, that is to ſay, at the Acts of Court, for fear of a future Grievance which he may probably ſuſtain: Yet ſomething ought to be expreſs'd in the Appeal, whereby the Grievance *de præſenti* may appear.

It is to be obſerv'd, That a Judge ſometimes grants and ſubmits himſelf to an Appeal *ab Reverentiam Superioris*; and ſometimes out of a
‡C. 7. 62.24. Neceſſity of Law ‡; and ſometimes out of his own Urbanity †. But it is
†D. 4. 4. 39. the Duty of the Judge *a Quo* to receive an Appeal with Reverence, and to ſubmit thereunto, if it be interpos'd on a true and lawful account: For an Appeal interpos'd on a falſe Bottom and Foundation does
*X. 2. 28. not ſo bind up the Judge *a Quo*, but that he may proceed *ad ulteriora* *.
10. 2. And if the Judge *a Quo* ſhall receive and admit an Appeal any otherwiſe than as abovementioned, he ſhall (according to the *Civil-Law*) be puniſh'd in the Sum of Thirty Pounds of Gold, and ſo ſhall his Officers in
†C. 7. 62.21. like manner: † But (according to the *Canon-Law*) he ought to be depos'd from his Office, and ſent to the Apoſtolick See, to be puniſh'd ac-
†X. 2. 28.31. cording to his Demerits ‡. But if an Appeal be of ſuch a Nature as the Judge ought not to admit it, he ſhall not be hurt or prejudic'd by not admitting the ſame. By the *Canon-Law*, a Perſon who raſhly appeals, is not to be puniſh'd with any external Puniſhment; but by the *Civil-Law* it is otherwiſe: For, by the *Civil-Law*, if any one ſhall make an Appeal thro' Malice or Calumny, he ſhall be fin'd in fifty Pounds of Sil-
*C. 7.65. 5. ver, or be render'd infamous *: But by the *Canon-Law* he ſhall be re-
C. 7. 62.19. mitted to the Judge *a Quo*, and ſhall not be puniſh'd beyond the ſimple Expence of the Suit or (at leaſt) only in treble Coſts, whereas formerly
†X. 2. 28.26. he was condemn'd in Quadruple Expences †: And if the Perſon guilty of Calumny and the like, be an Inſolvent Perſon, he ſhall then by the *Civil-Law* receive Corporal Puniſhment. And this is a wholeſome Doctrine in Favour of *Appellates* againſt raſh *Appellants*, who are often wont to make malicious Appeals from any pretended Grievance or *Interlocutory* Decree,

Decree, with a Deſign to protract and draw out the Principal Cauſe *in infinitum*, and to weary *Appellates* with immenſe Expences. The Judge who admits a vain and frivolous Appeal ought as well as the *Appellant* to be puniſh'd in Twenty Pounds of Silver. Tho' by admitting an Appeal the Judge *a Quo* abdicates and foregoes his Juriſdiction *; yet in the *Imperial* Chamber an Inhibition is granted on the Parties Motion. * VI. 2. 15. 5.

Where Appeals have been from *Interlocutory* Decrees upon a Pretence of ſome Grievance inflicted, the Judge may not (according to *Mynſinger* †) proceed in the Principal Cauſe on the Petition of the Party *Appellate*; and pronounce a Definitive Sentence therein (leaving or omitting the Article of Appeal) if the *Appellant* diſallows or contradicts the ſame. But others ſay, that the Judge may do ſo, becauſe the *Appellate* is only favour'd in that which is at firſt taken Cognizance of *ſuper Articulo Appellationis*: And if he renounces this Favour, the *Appellant* cannot complain; and, conſequently, the whole Cauſe is devolv'd to the Judge of the Appeal. For if the Judge pronounces according to the *Appellant*'s Petition, *viz. Benè appellatum & male judicatum*, he does not remit the Cauſe, but then begins to take Cognizance of the Principal Cauſe *. Therefore if the *Appellate* renounces what is in Favour of him, and the *Appellant* avers his Appeal to be lawfully interpos'd, the Judge ſhall pronounce in the principal Cauſe, contrary to the *Appellant*'s Will, *omiſſo Appellationis Articulo*; nor can the *Appellant* alledge Pendency of Suit before the Judge *a Quo*, ſince by appealing he declines his Juriſdiction†. It is therefore a good Caution for *Appellates* to renounce the Article of Appeal before the Judge thereof, praying, That the Party Appellant may be compelled to proceed in the Principal Cauſe, *omiſſo puncto Appellationis*, which was made from the *Interlocutory*. And the Judge *ad Quem* ought to give way to ſuch a Petition, it being according to Law and Equity; eſpecially, if he conſiders and animadverts on the Tergiverſation of the Party *Appellant* ‡. † Cent. 3. obſ. 7. * X. 2. 28 59. † VI. 2. 15. 10. ‡ Gail. ut ſupra n. 3.

It is not lawful for any one to appeal from the Prince's Sentence, becauſe he is the Supream and Sovereign Judge over all, and has the ultimate Juriſdiction veſted in him: But the Perſon condemn'd may pray a Review of the Prince's Sentence, as ſhall be ſhewn hereafter *. Nor yet is a Perſon allow'd to appeal from a Sentence, which he has once approv'd of; as when he accepts of the Time aſſign'd him for the Payment of the Sum adjudg'd, or in which he is condemn'd. Nor is he admitted to appeal who has once renounc'd the Benefit of an Appeal: But an Appeal may be lodg'd and interpos'd againſt a Judge, if he offers any contumelious Language or Behaviour towards the Party. Tho' a Perſon cannot appeal from a Puniſhment inflicted on him by the Law; yet he may appeal from the Sentence of the Judge, declaring him to have incurr'd the Penalty of the Law: Becauſe a Sentence or Declaration of this Kind is the Sentence of Man, and not the Sentence of the Law; and then if he does not appeal, the Judge in Spiritual Cauſes ought to proceed to a Denunciation of Excommunication, and not before. An Appeal may be made from an *Extra-judicial* Precept or Monition, if the Party be injur'd by ſuch Precept or Monition: And tho' an Appeal made from a null Sentence be valid, yet an Appeal is not preſum'd to be made from a Nullity of Proceſs, unleſs ſuch Nullity be prov'd. * Dd. in c. 4. x. 41.

A Man may appeal from certain Heads of a Sentence; and as to other Heads in the ſame Sentence he may acquieſce: For there are ſo many Sentences as there are Heads. And, therefore, 'tis ſaid, That a Party condemn'd or depriv'd may appeal from one Head, and conſent to another in the ſame Sentence. Nor ſhall ſuch an Appeal thus ſeverally inter- * Prax. Pap. Tit. 21. Gloſſ. 3.

interpos'd be any Advantage to the adverſe Party in reſpect to the Heads of a Sentence not contain'd in ſuch Appeal, but only as to the Heads of a Sentence contain'd therein: But he ſhall reap an Advantage in reſpect to the Heads of a Sentence connected to an Appeal, ſo that he may proſecute that Part of the Appeal. For if one of the Litigants has appeal'd from certain Heads of a Sentence, the other Litigant may make Uſe of and have the Benefit of that Part of his Appeal, propounding a Grievance on the ſame Heads; but not on other Heads in no wiſe mention'd and ſpecify'd in ſuch an Appeal. Both Parties may appeal from the ſame Sentence, if both Parties are thereby aggriev'd: But if each of theſe Parties do appeal different ways, the one to the Superiour and the other to the Inferiour Judge, that Appeal which is made to a Superiour Judge ſhall prevail and defeat that which is made to an Inferiour Judge; provided, an Exception be made hereof before the Inferiour Judge, or be otherwiſe intimated to him. If a Man appeals *ex pluribus Cauſis copulativè deductis*, he ſhall not be onerated and obliged to prove all the Cauſes aſſign'd and deduc'd in his Appeal, but it is enough to prove any one of them (provided the Appeal be lawfully founded thereon) unleſs one of theſe Cauſes accrues as a Quality to the others. A Man that takes an Oath *de præſtando & parendo Juri & Mandatis Curiæ* is not prohibited to appeal, if he has a lawful Cauſe to do the ſame: But it is otherwiſe in a frivolous Cauſe.

The Term for lodging and interpoſing an Appeal according to the *Civil* * and *Canon-Law* † is ten Days: But according to an Act of Parliament ‡ here in *England*, fifteen Days are allow'd and indulg'd for this End: Which Term is current, that is to ſay, it commences from the Day on which the Sentence was pronounc'd, and is reckon'd *a momento ad momentum* *; ſo that the Day on which the Sentence was pronounc'd is number'd within this Term of ten or fifteen Days. But as to the Introduction of an Appeal, which is a diſtinct Act and Term from that of interpoſing an Appeal, this Term is not now in Uſe. For if the Appeal was not introduc'd within the Term prefix'd and appointed according to the Stile of Courts, and intimated unto the Party *Appellate*, the Judge might formerly demand Sentence to Execution, and the Appeal was deem'd as deſerted. But ſtill Reſtitution was granted againſt ſuch a Term, if there was any lawful Impediment appearing, why an Appeal could not be introduc'd: But (notwithſtanding) 'tis to be obſerv'd, That in *Criminal* and *Capital* Cauſes that Term of ten Days, which was granted in *Civil* Cauſes before the Judge *a Quo* could proceed to execute his Sentence, was not obſerv'd when the Defendant was *Capitally* condemn'd or adjudg'd to undergo the *Rack* or *Queſtion*, as we call it. And if a Judge *a Quo* will execute his Sentence (pending an Appeal) he may *de facto* be reſiſted after Application has been made to him by way of Petition, to act contrary hereunto. The Time of Appealing never runs on or is current, when a Grievance is continu'd in Succeſſion: As when a Perſon is detained in Priſon without Intermiſſion *.

* C. 1. 62. 6. Sect. *ſed hodie.*
† X. 2. 27. 15.
‡ 24 H. 8. c. 12.
* X. 2. 27. 15. C. 7. 62. 6. Sect. *ſed hodie.*
* Gail. lib. 1. obſ. 139. n. 13.

If the *Appellant* neglects or refuſes to proſecute his Appeal within the Time aſſign'd him by the Judge *a Quo*, or appointed by himſelf, he is preſum'd to have acquieſc'd under the firſt Sentence from which he has appeal'd; and the Judge *a Quo* re-aſſuming his Juriſdiction, may compel the *Appellant* to abide by that Sentence or Determination, and may likewiſe condemn him in Expences to the Party *Appellate* proſecuting the ſame. But the Party *Appellant* may appoint a ſhorter Term than that appointed by Law for the Proſecution of his Appeal. But if the *Appellant*

pellant appoints a Term too prolix or none at all, the Judge may then aſſign a competent Term, within which he ought to proſecute his Appeal under Pain of having the ſame declared for deſerted. And tho' the Law gives a Year for an *Appellant* to proſecute and finiſh his Appeal *; yet the *Appellant* may in Prejudice of himſelf abridge and ſhorten the Term of Law given for the Proſecution thereof: And tho' the Judge may do the ſame, yet he is not bound to do it. But tho' the Judge *a Quo* may prefix and aſſign a ſhorter Term than the Term prefix'd by Law for the Proſecution of an Appeal, yet he may not abridge the Term prefix'd and aſſign'd by Law for the Determination of an Appeal, ſince the Judge *a Quo* cannot appoint and aſſign a Term to finiſh an Appeal †. For if he ſhould aſſign ſuch a Term, he is only underſtood to aſſign a Time *ad ſe præſentandum*‡. And the Reaſon is, becauſe the prefixing of a Term to finiſh an Appeal will be deem'd an impoſing of a Law on his Superiour. Now that ſhall be adjudg'd a *competent* Term, which is agreeable to the Diſtance of the Places, the Length and Badneſs of the Ways, and the Quality of the Cauſe *.

* X. 2. 28. 5.

† X. 2. 28. 50.

‡ Eod. cap.

* X. 2. 28. 5.

As an Appeal may be deſerted by the *Appellant*'s lapſing the Term of Law, ſo it may alſo be deſerted by a Lapſe of the Term of Man: For the Term of Man, or the Judge, which is the ſame Thing, ſucceeds in the Place of a Term of Law. And after an Appeal is deſerted, the Judge *a Quo* may proceed to demand the Sentence pronounc'd by him to Execution without any Citation. On the Deſertion of an Appeal the Judge *ad Quem* cannot pronounce touching the Principal Cauſe, nor take Cognizance of it, yea tho' he ſhould have the Conſent of the Parties, becauſe the Juriſdiction does *ipſo Jure* revolve to the Judge *a Quo* †. Therefore, when the Juriſdiction ceaſes, the Office of the Judge ceaſes alſo, and the ſecond Sentence is not valid thro' a Defect of Juriſdiction, as being pronounc'd by an incompetent Judge, on the Account of ſuch Deſertion. Therefore, the Judge of an Appeal ought by Virtue of his Office to pronounce on a Deſertion, if the Party does not oppoſe it, or object thereunto ‡. But this Obſervation is particularly limited; ſo that it does not proceed and take Place, if the Sentence, from whence it is appeal'd, ought to be confirm'd: As when it appears from the Acts of Court, from whence it is appeal'd, (ſtiled the *former Acts*) that the *Appellant* has made an unjuſt Appeal, and that no Deſertion is alledg'd by the Adverſe Party; in which Caſe the Judge of the Appeal may, if he pleaſes, pronounce in the Principal Cauſe, and confirm the Sentence *a Quâ* without any Regard had to the Deſertion *. And the Reaſon is, becauſe that after a Sentence has paſs'd in *Rem Judicatam* on the Account of a Deſertion, the Judge *ad Quem* does not do ill by confirming the Sentence now already confirm'd *ipſo Jure*, even from the Time of the Deſertion. Yea, 'tis expedient and neceſſary for the *Appellate*, if he will have the Benefit of *Reſtitution*, that it ſhould be pronounc'd in the Principal Cauſe. For the *Appellant* after a Deſertion may implore the Office of the Judge; and, on the Score of a lawful Impediment, may pray a *Reſtitution* againſt the Lapſe of the *Fatalia* of an Appeal; and by this Means may prevent and delay the Execution of the Principal Sentence. For tho' the Juriſdiction of the Cauſe does revert to the Judge *a* † *Quo* upon the Deſertion of an Appeal; yet the Office of the Judge *ad Quem* does remain and continue in Point of granting *Reſtitution*: For he may take Cognizance and pronounce *de Reſtitutione Fatalium* ‡. A ſecond Limitation of the former Obſervation reſpects the Sentence of Deſertion and Condemnation of the Party in Expences; becauſe the Judge *ad Quem* has a Juriſdiction in taking Cognizance, *Whether he has*

† C. 7. 63. 2. C. 7. 62. 6. Clem. 2. 12. 6.

‡ Clem. 2. 12. 6.

* Rotæ Decis 14. de Appel.

† Clem. 2. 12. 6.

‡ D. 4. 4. 24

Cognizance, and *whether the Appeal be deserted or not*: And it is the same Thing *Super Expensis Litis Liberationis* *, as we in *Latin* call them. Nor is it any Objection to say, That the Instance of the Cause of Appeal is perempted by the Desertion of an Appeal: Because the Office of the Judge continues in respect of condemning the Party in Expences, even after such Instance is perempted †. And the Judge in his Condemnation ought to consider and tax all such Expences as have been made, from the Day of interposing the Appeal, by the Party *Appellate*; because the *Appellant* does from that Time begin to retard and delay the Process. Therefore, upon the Desertion of an Appeal, he ought to be entirely condemn'd in Expences as a contumacious Person, according to an express Text of Law ‡. For the Deserter of an Appeal is said to be a contumacious Person in respect of his Non-appearance to prosecute his Appeal; and a contumacious Person is always to be condemn'd in Expences *. And this Condemnation of Expences may sometimes be made by the Judge *a Quo* when the *Appellant* does not prosecute the Appeal interpos'd †: But after the Appeal is introduc'd before the Judge *ad Quem*, this Condemnation of Expences ought to be made by the Judge *ad Quem*. But if the Judge in a Sentence of Desertion shall omit this same Condemnation, it cannot be made *ex Intervallo* at the Instance of the Adverse Party; because, after Sentence pronounc'd, the Office of the Judge expires even in respect of Expences ‡. But some hold the contrary to be true as to the Expences of a Desertion: For they may be demanded a long Time after Sentence pronounc'd, since they do not accrue and come by the Office of the Judge, but by the Right of Action *. The Party *Appellate* is excus'd from the Payment of Expences, whenever the *Appellant* obtains a Sentence from new Matter produc'd in the Appeal, because without such new Matter produc'd the *Appellate* had not a just Cause of Litigating. And thus it is also in the Case of the Party *Appellant*, if he shall from new Acts and Matters produc'd, get the better in the Appeal. Wherefore, if from new Acts and Matters produc'd a Sentence be either confirm'd or revers'd, a Compensation of Expences ought to be made, that is to say in *English*, the Expences ought to be lump'd together and divided.

* X. 2. 28. 28.

† D. l. in loca sup. allegat.

‡ X. 2. 28. 26.

* C. 3. 1. 13. 2.

† VI. 2. 15. 1.

‡ C. 7. 51. 3

* Gail. obs. 137. n. 6.

An *Appellant* may be heard, even after Ten Years, if he could not prosecute his Appeal before that Time: For the lapse of two Years does not prejudice an *Appellant*, but that he shall be heard (at least) by the Benefit of Restitution *in integrum*. Certain Clerks appeal'd from a Sentence pronounc'd against them; and upon a just Account they did not prosecute this Appeal within two Years: Whereupon the Pope was desired, that they should be still admitted to prosecute their Appeal, since they could not prosecute the same within two Years. The Pope order'd the Judges, That if they found the Prosecution of the Appeal to have been omitted *propter impotentiam*, they should not for this Reason be prejudic'd or aggriev'd thereby ‡. Some will have it, that the Time of one or two Years for this Prosecution begins and runs from the Day of the Sentence, but this is wrong: For the Words *a die Sententiæ* in the Text do not relate to the Word *Biennium*, but to the Interposition of an Appeal *. And, therefore, a Day assign'd for the Prosecution of an Appeal runs from the Day that the Appeal was interpos'd, and not from the Day of the Sentence, according to these Times. In the *Imperial* Chamber the Term for the Prosecution of an Appeal is not circumscrib'd by the Term of one or two Years, as the Law elsewhere requires in the Empire, this being the Dernier Resort and Supream Court of Judicature. But the Possessors of Things in Controversy knowing this, they

‡ X. 2. 28. 8.

* C. 7. 65. 2.

they do often abuſe and pervert the wholeſome Remedy of an Appeal, which was invented as a Defence for Men's Properties, and not to ſerve vile and evil Purpoſes, by vexing and aggrieving the adverſe Party by a multitude of Expences, and with a Procraſtination and ſpinning out of Suits *in infinitum*. But if a Term *Peremptory*, which is too ſhort, be granted and aſſign'd, when there is no neceſſity for ſo ſhort an Aſſignation, the Party aggriev'd thereby may lawfully appeal from thence. The Judge may aſſign unto the *Appellant* a Term *ad proſequendum* as well in an Appeal from an *Interlocutory* on the Score of a Grievance, as from a *definitive* Sentence: And tho' the Party *Appellant* himſelf may prefix this Term, yet the Party *Appellate* cannot do it.

A Perſon that does any Act incompatible or contrary to his Appeal, does thereby renounce and wave his Appeal. As for Inſtance, when the *Appellant* after the Interpoſition of an Appeal ſtill litigates in the ſame Cauſe before the Judge *a Quo*: In this Caſe (I ſay) he is deem'd to have renounc'd and deſerted his Appeal *. But this ought only to be underſtood, when he litigates after the Interpoſition of an Appeal, and not before, as within the Time appealing. But if the *Appellant* does any Act before the Judge *a Quo*, tending to a greater Corroboration of his Appeal, as when the *Appellant*'s Proctor requeſts him not to proceed to Execution, and the like, he ſhall not then be deem'd to have renounc'd his Appeal. The Judge *a Quo* ought in an Appeal to ſupercede the Proceedings in the whole Cauſe, tho' the Appeal be only interpos'd on ſome certain Article alone; which is undoubtedly true, if the Principal Cauſe be ſo connected with that Article, that it cannot be decided without it. And, moreover, it is to be noted, That an Appeal in a Cauſe of Convention does not impeach and hinder the Execution of a Sentence in a Cauſe of Re-convention, and ſo *vice verſâ* †.

* Joh. And. in c. 10. VI. 2. 15.

† Abb. in cap. 5. X. 2. 12.

It is a Maxim in Law, That it is the ſame Thing not to appeal at all as to make a vain and frivolous Appeal: But an Appeal is well enough juſtify'd, if the Party appealing offers himſelf ready to prove and juſtify his Exception, or the Merits of his Appeal. And the Defendant may lawfully appeal if he be not heard upon an Exception propounded againſt the Plaintiff's Proctor, who acts without a ſufficient Proxy or Mandate in the Cauſe; or upon an Exception, that he was cited before by ſuch Letters, whereof no mention is in the ſecond Citation *. It has been ſaid before, That an Appeal from an *Interlocutory* ought always to be made in Writing, and with an expreſſing the Cauſes of Grievance, otherwiſe the Appeal is not valid ‡: But an Appeal from a *Definitive* Sentence may be made quite contrary to the 'foregoing Practice *; becauſe if it be appeal'd immediately at the Time of pronouncing Sentence, it may be appeal'd *vivâ voce*, and without the Grievances: But if it be afterwards appeal'd, it ought to be appeal'd within ten or fifteen Days in Writing. If a Judge does not admit an Appeal from an *Interlocutory*, but proceeds *ad ulteriora*, he cannot prefix a Term for the *Appellant*'s Proſecution of his Appeal. If an *Appellant* be diſturb'd or moleſted in the Poſſeſſion of that, touching which it has been appeal'd, the Judge *a Quo* may give that Poſſeſſion to the *Appellant*; the Appeal remaining in its proper State †. And whatſoever Things have not been deduc'd and prov'd in the firſt Inſtance, may be deduc'd and prov'd upon an Appeal ‡; and if it be not appeal'd from a Sentence, be it never ſo unjuſt and full of Iniquity, ſuch Sentence ſhall from an an unjuſt Sentence in Point of Law become a juſt one.

* X. 2. 28. 48.

‡ VI. 2. 12. 5.

* X. 2. 28. 59.

† X. 2. 28. 16.

‡ C. 7. 63. 4.

By the 24*th* of *H.* 8. *ch.* 12. for avoiding all Delays occaſion'd by Appeals on Account of Teſtamentary or Matrimonial Cauſes, or Cauſes of

of Tithes, &c. which concern the King or any other Perſon whatſoever, the ſame ſhall be finally determin'd within the King's Juriſdiction, notwithſtanding any Papal Excommunication whatſoever; and all Spiritual Prelates ought to perform their Duties herein. And whoſoever ſhall procure from the See of *Rome*, or any other Court, any Appeals, Proceſs, Sentences, and the like, ſhall incur a *Præmunire* provided by the Statute of *Richard* the Second*. Appeals in Caſes Eccleſiaſtical ſhall be ſued from the Archdeacon or his Official to the Biſhop of the Dioceſs: And whenever the Cauſe is commenc'd before the Biſhop or his Chancellor, Commiſſary, and the like, an Appeal may be made within fifteen Days after Sentence from thence to the reſpective Archbiſhop of the Province, to be Definitively adjudg'd. But if a Cauſe is commenc'd before any Archdeacon of any Archbiſhop or his Commiſſary, the Appeal may be made within fifteen Days after Sentence to the Court of Arches or Audience of the ſame Archbiſhop; and from the Arches or Audience to the Archbiſhop himſelf, to be finally determin'd without further Appeal, unleſs it be to the King in his Court of *Chancery*. And when the Cauſe is commenc'd before the Archbiſhop himſelf, it ſhall there be determin'd without any further Appeal, unleſs it be to the Archbiſhop and Church of *Canterbury* in Virtue of a Prerogative heretofore uſed. And the Cauſe or Suit concerns the King, the Party griev'd may within fifteen Days appeal from any of the ſaid Courts to the Prelates aſſembled (by the King's Writ) in Convocation then next in being or enſuing in the Province, where the Suit was begun, and there it ſhall be finally determin'd. See the Act itſelf. By the Thirtieth Apoſtolical Canon, and alſo by the Fifth Canon of the Council of *Nice* Appeals were to be made to a Provincial Synod; that is (ſays the Council of *Nice*) to the Synod of the Biſhops of every Province, to the end that it might be enquir'd, whether any Perſons were excommunicated by too great a Severity or Raſhneſs of the Biſhop.

* 16 Rich. 2. ch. 5

An excommunicated Perſon (pending the Cognizance of an Appeal) may be abſolv'd from his Excommunication *ad Cutelam*: And if it has been lawfully appeal'd, he ſhall not be puniſh'd for being preſent at the Celebration of Divine Service, during the Time of his Appeal; for if an excommunicated Perſon, being a Clergyman, celebrates Divine Service after an Appeal, he ſhall not thereby incur any Irregularity, nor ſhall he be puniſh'd for the ſame, if his Appeal appears to be lawful.

Altho' it be not neceſſary to appeal, when the Judge exceeds the Meaſure of the Puniſhment inflicted, or the *Modus procedendi* in the Execution of a Sentence, ſuch an Act being null and void *ipſo Jure*: Yet 'tis of great Advantage to the Perſon thus aggriev'd to appeal in order to avoid a *Gravamen Facti*; becauſe an Execution may be made *de Facto*, which the Judge (notwithſtanding) omits upon an Appeal. If an Execution of a Sentence be made without obſerving the Order and Method of Law, as when an *Executor* begins to meddle with the immoveable Eſtate, before he has ſeiz'd on the moveable Goods, it may be then appeal'd from the Execution of Sentence: For ſuch *Executor* is ſaid to exceed the Method of Proceeding, if he diſturbs and inverts the Order of Execution; every Execution being firſt made on a Man's moveable Effects. *Secondly*, An Execution is made upon a Man's Lands and Tenements, if the Perſon has no moveable Goods. And, *Thirdly*, It is made on Rights and Things in Action by the *Civil-Law* called *Nomina Debitorum*: Such as the Debtor's Shop-Book, Book of Accounts, the Writings of his Eſtate, and other Specialties and Obligations, whereby Perſons ſtand indebted to him; and alſo Things of the like Nature.

Of

Of Apoſtacy, and the ſeveral Kinds thereof.

THE *Canon-Law* defines *Apoſtacy* to be a raſh and wilful Departure from that State of Faith, Obedience or Religion, which any Perſon has profeſs'd himſelf to hold and maintain in the Chriſtian Church: And, according to this Definition, there is a Threefold *Species* of *Apoſtacy*, *viz.* An *Apoſtacy* of *Faith*, an *Apoſtacy* of *Diſobedience*, and an *Apoſtacy* of *Irregularity* or Religion. The firſt is, when any one revolts or departs from the *Chriſtian* Faith, and betakes himſelf to *Judaiſm* or any other Sect of Infidelity; after he has been baptiz'd into the *Chriſtian* Religion *. And ſuch a Perſon is worſe than a Heretick, becauſe he departs entirely from the *Chriſtian* Faith; tho' according to the common Opinion of the *Canoniſts*, he may upon his Return be receiv'd into the Church as a Heretick. But 'tis to be obſerv'd, that tho' a Perſon apoſtatizing from the Faith be deem'd worſe than a Heretick, ſince a Heretick only deviates in ſome particular Point from the Faith; yet an *Apoſtate* may be admitted to Pennance, and become a *Chriſtian* again after that. The ſecond Kind of Apoſtacy is when any Perſon does wilfully and of his own accord tranſgreſs the Precept and Command of his Superiour in the Church, or does not obey the Rules and Conſtitutions of the Fathers †: And this, in the Books of the Papal *Canon-Law*, is ſaid particularly to happen, when a *Religious* is render'd a Vagabond by not obſerving the Rules of his Religious Order, tho' he does retain his Habit. But this is not, even according to that Law, properly called *Apoſtacy*. And the third Kind is, when any Perſon in the *Romiſh* Church foregoes his Orders, or recedes from that Religious Order which he has aſſum'd in the Church ‡. The two laſt *Species* have only a Relation to the *Romiſh* Church, and are rather fram'd to frighten ſilly People into an Obedience and Subjection to the Clergy than to ſerve Religion itſelf. Clergymen that are impeach'd or defam'd of this laſt Kind of *Apoſtacy* in the *Romiſh* Communion, and have laid aſide the Habit of Clerks, ought not to be tollerated in a Secular Habit; but ought according to the *Canon-Law* to be impriſon'd upon full Proof thereof, till ſuch Time as they repent themſelves of the Evil of their Preſumption, and re-aſſume the Habit they have laid aſide.

* X. 5. 9. 4. Alciat. conſ. 478.

† X. 1. 32. 2 & 5. 2 Q. 7. 23.

‡ X. 5. 9. 1.

Apoſtates in Point of Faith, are, according to the *Civil-Law*, ſubject unto all Puniſhments ordain'd againſt Hereticks, they loſe all Privileges granted unto *Chriſtians* of *Common Right*, they forfeit their Eſtates to the Government * (unleſs they have Children and Kinder'd) are render'd Infamous themſelves, and may be accus'd without any Obſervation of Judicial Proceſs even after Death; nor ſhall ſuch Accuſation be taken away by any Lapſe of Time, till five Years after the Death of ſuch *Apoſtates:* And according to the Laws and Statutes made againſt the *Manicheans* †, they were exterminated and driven out of the very Borders of the *Roman* Empire. And herein *Apoſtates* were

* C. 1. 7. 1.

† C. 1. 7. 6.

dealt with more Severity than Hereticks, becauſe their Crime accord-
* C. 1. 7. 3. ing to the *Civil-Law* was not pardon'd and aboliſh'd by Pennance *, as the Crime of Hereſy was by a Decree of the Church. For the Law affords Relief and Compaſſion to ſuch as fall by way of Error, but loſt *Apoſtates* are not reliev'd by any Remedy of Pennance according to the *Civil-Law*. Moreover, an Accuſation againſt *Apoſtates* is publick and perpetual during their Life-time †, and may be extended and carry'd
† C. 1. 7. 4. ‡ C. 1. 7. 2. on (as aforeſaid) till five Years after their Death ‡. And from the very Day of their Departure from the *Chriſtian* Faith they become incapable of Succeſſion; and the Succeſſion of the Inheritance is given to the next of Kin, being Orthodox in his Faith. Nor can they make a laſt Will and Teſtament; nor paſs any Deed of Gift: Ahd if they make a Sale of their Eſtate in Fraud of this Law, ſuch Sale is not valid. Nor can they become Witneſſes, or give Evidence in any Cauſe. And, beſides the loſs of their Eſtates, *Apoſtates* were puniſh'd with Death if they ſeduc'd or perverted others from the *Chriſtian* Faith, or from the Worſhip of the *Chriſtian* Religion, unto their wicked Sectaries and abomina-
* C. 1 7. 5. ble Opinions *.

The *Canon-Law* not only reckons *Apoſtates* among infamous Perſons, but even commands them to be bound with the Bonds of Excommunication, and inflicts other Puniſhments: For, according to *Panormitan* the Puniſhments ſhall be diverſify'd according to the Diverſity of the Apoſtacy
† Abb. inc. 1. X. 5. 9. committed †.

Of Appropriations and Impropriations.

THOSE Churches, which the Monaſteries and other Religious Houſes had procur'd to be annex'd to themſelves, were call'd *Appropriations* from the *French* Word *Approprier*, to fit and accommodate; and in the Law of *England* it ſignifies a Severing of an Eccleſiaſtical Benefice, which is Originally and in its own Nature (according to the *Canon-Law*) in the Patrimony of no one, to the perpetual and proper Uſe of ſome Religious Houſe, Biſhop or College, Dean and Chapter, *&c.* And the Reaſon of the Name may be this, *viz.* Becauſe that ordinarily ſpeaking, the Parſons of Pariſhes are not in Law accounted *Proprietors*, but only *Uſufructuaries*, as having no Right of Fee-Simple veſted in them: But theſe *Appropriators*, by reaſon of their Perpetuities, are accounted Owners of the Fee-Simple; and, therefore, are called *Proprietors*. Before *Richard* the Second's Time it was lawful to appropriate the whole Fruits of a Benefice to any Abbey or Priory whatſoever, the Houſe finding one to ſerve the Cure. But that King wiſely redreſs'd that horrid Evil by
* 15 Ric. 2. ch. 6. a Law *, ordaining, That in every Licenſe of Appropriation made in Chancery, it ſhould be expreſly contain'd, That the Dioceſan of the Place ſhould allot a convenient Sum of Money to be yearly paid out of the Fruits of ſuch Living, towards the Relief of the Pariſh-Poor; and that the Vicaridge be well and ſufficiently endow'd. And as the Canons of

of the Church as well as the Papal Decrees do greatly endeavour to prevent the Alienation of Eccleſiaſtical Eſtates, it was, therefore, in former Times in Imitation of theſe Canons and Decrees forbidden unto Biſhops by a *Legatine* Conſtitution * here in *England* to confer or aſſign any Church, which was ſubject to them, by Right of Appropriation unto any other Biſhop, Monaſtery or Priory, unleſs the Perſon to whom ſuch Church was appropriated, was preſs'd in ſuch a manner with evident Poverty, that ſuch Appropriation was not deem'd ſo much contrary to the Common Law, as it was agreeable to Piety; or unleſs there was ſome other ſufficient Cauſe for ſo doing. As when a Biſhop for ſome Cauſe or other had erected a new Church: For then he might by a Grant add the Rights of the Mother-Church to it, *viz.* Tithes, Obventions, Funerals, and the like †. And if any Appropriation of this Kind was otherwiſe made, it was invalid *ipſo Jure*; and being of no Weight or Moment, it might be entirely revok'd either by the Biſhop, who granted it, or elſe by his Superiour as a Grant made only *de facto*: For where the Law makes an Act to be invalid from the Perſon of him, that does it, he himſelf may revoke ſuch Act, tho' it is otherwiſe when it is done *ratione partis recipientis*. Moreover, it was enacted by this Conſtitution, That all Perſons whatſoever, Exempt or not Exempt, who had Churches *in proprios Uſus*, or (as we ſay) appropriated Churches, if no Vicars were placed therein, were obliged within ſix Months to preſent Vicars unto the Dioceſan for their Inſtitution; and to allow them a ſufficient Portion for their Maintenance, which was generally ſpeaking little enough even in thoſe Times: And upon the Neglect or Refuſal of ſuch Perſons, the Dioceſan might do it. And ſuch Perſons as had Churches appropriated to them were to build Parſonage-Houſes in their Pariſhes, and to repair ſuch as were already built for the decent Reception of their Viſitors: And all theſe Things even Biſhops themſelves were to obſerve.

* Othob. Tit. 22.

† 12 Q. 2. 74. Inn. & Hoſt. in c. 1. x. 3. 13.

Touching the firſt Inſtitution, and other Things worth knowing in relation to Appropriations, ſee *Plowden*'s Comment in *Grendon*'s Caſe *. To an Appropriation, after the King's Licenſe obtain'd in *Chancery*, the Conſent of the Dioceſan, Patron and Incumbent were neceſſary, if the Church was full; but if it was void, then the Patron and Dioceſan might conclude it †. To diſſolve an Appropriation it was enough for the Religious Houſe to preſent a Clerk to the Biſhop, and for the Biſhop to give him Inſtitution, and the Archdeacon to give him Induction: For, that once done, the Benefice did return to its former State and Nature, ſee *Kennet*'s Parochial Antiquities ‡. Where he treats of the Method of Appropriation, and the Abuſe of robbing the Church and Clergy by this Means.

* Plowd. com. 49. b. & ſequent.

†Plowd. ut ſupra.

‡ Pag. 433. Fitch. N. B. Fol. 35. Cok. 7. Rep.

But how theſe Annexations of Benefices firſt came into the Church, whether by the Prince's Authority, or the Pope's Licence, is a very great Diſpute, and there are Reaſons on both ſides to ſhew the ſame. For *Ingulphus* Abbot of *Crowland* reports, That there were eight Churches, beſides the Patronage of ſome others, annexed and appropriated to the ſaid Abbey by ſundry *Saxon* Kings. But it does not appear, by ought I can find, whether they were thus appropriated by the Sovereign Authority of the Kings alone, in Imitation of what was done by *Martel*, who made all *Chriſtian* Kings to err in this Point, or whether it was done by any other Eccleſiaſtical Authority, ſince there is nothing extant for the Allowance hereof, except the ſeveral Charters of thoſe ancient Kings only: And that I am the more induc'd to believe that it was done by the Authority of thoſe ancient Kings alone; becauſe

becauſe I find *William the Conqueror*, immediately on the great Victory he got over this Kingdom to have appropriated three Pariſh Churches to *Battle-Abbey* in *Suſſex*, which he built in Memory of his Conqueſt. And whereas his Son *William* had ruin'd and deſtroy'd ſeveral Churches in the new Foreſt, *Henry* his Brother, by Letters Patents gave the Tithes thereof to the Cathedral Church of *Sarum*, and annex'd thereunto twenty other Churches in one Day, if the Copy of that Record, which concerns Appropriations, be true. Yea, the Matter went ſo far in thoſe Days, that even Noble Perſons, and other meaner Men, order'd Corrodies and Penſions to their Chaplains and Servants out of Churches; and this could not be redreſs'd till ſuch Time as a Statute was made to reform the Abuſe hereof *.

* 1 Edw. 3. ch. 13.

But tho' Appropriations here in *England* were uſually made by the King's Licence and Authority, yet I take them to be a cunning Device of the Pope; becauſe I find, that every one of the Religious Orders of Men was confirm'd by one Pope or other; and as they confirm'd them 'tis likely they made an eſpecial Proviſion for them this way, and that, chiefly after the Laws of Amortiſation were deviſed and put in Uſe by Princes †. And hence it is that we find divers Sorts of Annexations made by Popes, and Biſhops under them, every one in their reſpective Dioceſs: And as ſome were made only ſo far as it concern'd the Patronage of the Church, in which caſe the Monks had only the Preſentation thereunto; ſo others were made *pleno Jure*, and then the Monks might both give Inſtitution, and cauſe Deprivation without the Biſhop, and turn all the Profits thereof to their own Uſe, reſerving only a Portion to him that ſhould ſerve the Cure therein. Some other Churches they granted *ſimply* to them, without any Addition of *full Right*, or otherwiſe: And then if the Church was of their own Foundation, they might chuſe (the Incumbent being once dead) whether they would put any other therein or not, unleſs (perhaps) the ſaid Church had People belonging to it; for then they muſt of Neceſſity ſtill maintain a Curate there. And of this Sort were their Granges and Priories: But if it was of another Man's Foundation, then it was otherwiſe. To this I may alſo add, That the Pope every where in his *Decretals* arrogates this Right to himſelf as a Prerogative of the Apoſtolick See, namely, to grant theſe Privileges to Religious Orders, to take and receive Benefices at Laymens Hands by the Mediation of the Dioceſan, whoſe Office it was to be a Mean between the Religious and the Incumbent, for an indifferent Rate, that neither of them ſhould preſs too much the one upon the other. And, therefore, in the Beginning the uſual Rate which they ſet down between the Benefic'd Man and the Religious Perſon, was one Moiety of the Benefice; becauſe it was not thought that the Pope would charge a Church above that Rate. But afterwards by the Covetouſneſs of the Monks and Friars themſelves, and the Remiſsneſs of Biſhops who had the Management of this Affair under the Apoſtolick See, the Incumbent's Part came to ſo ſmall a Portion, that Pope *Urban* the Fifth by his Legate *Othobon* here in *England* *, was obliged to make the aforeſad *Legatine* Conſtitution; and becauſe this Conſtitution had not the Effect wiſh'd for, it occaſion'd the two Statutes already quoted under this Title, and here referr'd to in the Margin, both for a ſuitable Endowment of the Vicar there to do Divine Service, to inform the People, and to keep Hoſpitality among them.

† Lindw. lib. 3. Tit. 9. c. 3. Gloſſ. in v. *aſſerunt non ligati.*

* A D. 1262.

But tho' moſt of theſe Appropriations were in the Hands of the Monks and Friars, and ſuch other Religious Perſons; yet Biſhops and Cathedral Churches were not entirely free from Plunder, as I have already ſhewn in

in the Cathedral Church of *Salisbury*, to which *Henry* the First appropriated near twenty Churches in one Day: And the See of *Winchester* had two Benefices anciently annex'd to the Bishop's Table for good Eating and Drinking, *viz.* the Parsonage of *Eastmean*, and the Parsonage of *Hambleden* in *Hampshire*. Nor do I make any Question but the same was done in respect of other Bishop's Sees, and other Cathedral Churches, if the Matter was thoroughly enquir'd into.

Tho' Appropriations at first did not imply an Exemption from the Jurisdiction of the Ordinary, it being expresly provided in the *Canon-Law**, that no Person should be put into such Churches without Institution from the Bishop, to whom the Incumbents were to be accountable in all Spiritual Matters, as they were in Temporals to the Abbots; and in the oldest Appropriations, which I have met with, there is a *Saving of the Bishop's Right in all Things*, which Words are inconsistent with an Exemption: Yet afterwards the Forms of Appropriations were different. For tho' none could be made without the Bishop's Consent, yet that Consent was expres'd different Ways, and had different Effects. If the Bishop only confirm'd the Lay Patrons Gift, then nothing but the Right of Patronage pass'd, and the Bishop's Jurisdiction still remain'd: But if the Bishop join'd in the Donation in these Words, *viz. Concedimus vobis talem Ecclesiam*, then he passed away his Temporal Rights to that Church †. If the Bishop granted the Church *pleno Jure*, then, according to the *Canonists*, he pas'd away his Diocesan Right, consisting in Rights which the Bishop had distinct from his Episcopal Jurisdiction, which it was thought he could not part with by any Act of his, since that would be to divest himself of his Order. Indeed, when the Pope's Power was grown Exorbitant in the Church, Appropriations confirm'd by his Authority were allow'd to carry with them Exemptions from the ordinary Jurisdiction: And, therefore, the Monasteries, which could bear the Charge, thought not themselves free from their Ordinaries, till they had obtain'd Bulls for that end; and then they took themselves to be free in their Conventual Churches as in their Chapels and Oratories on their own Lands. But now all Papal Exemptions are taken away by an Act of Parliament ‡, and the Churches so Exempt are put under the Jurisdiction of the Ordinary of the Dioceſs, or such Commissioners, as the King shall appoint. So that now no Papal Exemptions can be pleaded as to Appropriated Churches, how clear and full soever the Charters of Exemption were *. Wherefore, no Persons enjoying Estates belonging to Monasteries can now plead an Exemption from the Jurisdiction of the Ordinary by Virtue of the Papal Authority.

* 16 Q. 2. 6.

† X. 3. 24. 7.

‡ 31 Hen. 8. ch. 13.

* vid. Sect. 23. d. Stat.

An Appropriation can only be made to a Body Politick, or Corporate Spiritual, that has Succession; and thereby that Ecclesiastical Body is made perpetual Incumbent of the Benefice appropriated, and for ever shall enjoy all the Glebe, Tithes and other Profits belonging thereunto, and has therewith the Charge of the Souls belonging to the Parish where the Church appropriated is: Upon which Account it is, that an Appropriation regularly ought only to belong to a Spiritual Person, or (at most) to aggregate Bodies Spiritual that consist of Priests; because there is no Difference between a Church Appropriate and not Appropriate, saving that a Church appropriated is annex'd to the Corporation or Person to whom it is appropriated, and to his or their Successors for ever; but a Church not appropriated is had only for the Life of the Incumbent thereof: And, therefore, those that have Appropriations can no more grant their Title of Appropriation to others, whereby to make the Grantees become perpetual Incumbents of them

as Appropriations, than Incumbents of Churches Preſentable can by their ſole Act grant their Incumbencies to others; but both may equally make Leaſes of the Profits thereof.

An Impropriation, of which there are in *England* Three thouſand eight hundred and forty five, is properly ſo called, when it is in the Hands of a Layman: And an Appropriation is, when it is in the Hands of a Biſhop, College, Religious Houſe, and the like, as aforeſaid; tho' ſometimes theſe Terms are confounded and uſed promiſcuouſly. By a *4 H. 4. c. 12. Statute * in *Henry* the Fourth's Reign, no Religious Perſon could in any wiſe be made a Vicar of a Church ſo appropriated, or to be appropriated, but thenceforth in every Church ſo appropriated, or to be appropriated, a Secular Perſon was to be appointed Vicar perpetual, and to be continually inſtituted and inducted thereinto.

Of Archbiſhops, their Riſe, Power and Juriſdiction, &c.

ARCHBISHOPS, according to the Report of the *Roman* Church, were by St. *Peter* ſet over thoſe Cities, over which (in reſpect of *Pagan* Superſtition and Idolatry) the *Arch-Flamens* heretofore preſided *: But this ſeems to me to be an idle Invention of the *Papiſts*, on purpoſe to prop up and ſupport the Antiquity of Biſhops and Archbiſhops in the Church. And, according to the Opinion of *Wolphgang. Lazzus* in his Commen- † Lib. 2. c. 2. de Repub. Rom. taries †, Biſhops were made Metropolitans in *France* aud *Germany* in thoſe Sees, where there were formerly Rectors of Provinces, Pro-Conſuls, and Pro-Conſular Legates. An Archbiſhop in his Province is the Head and Chief of all the Biſhops; and, for this Reaſon, he is in the *Greek* Tongue ſtiled *Archi-Epiſcopus*, which ſignifies the ſame as *Summus Epiſcoporum* among the *Latins* ‡. But tho' an Archbiſhop be Superiour to all the Biſhops of his Province; yet, according to the *Canon-Law*, he is Inferiour to a Primate. *Sidonius Apollinarius* deſcribing the Epitaph of Biſhop *Claudian*, writes, that Archbiſhops or Metropolitans in *France* are immediately ſubject to the Pope's Juriſdiction; and that, in other Places they are immediately ſubject to the Patriarchal Sees. For an Archbiſhop is frequently ſtiled by the Title of *Metropoli-* * 9 Q. 3. 1. 2. 3. 4. 5. 6. &c *tan* both in the Books of the *Civil* and *Canon-Law* *; and, according to *Rebuffus*, theſe Words have not different Significations: So that † VI. 1. 16. 5. X. 1. 30. 1. X. 1. 43. a Metropolitical Right is that which accrues unto Archbiſhops †.

Iſidore ſuppoſes, That *Archbiſhops* were called *Metropolitans* from the Number of the Cities, which they had in their Care; becauſe Pope *Pelagius* writes, That as there ought to be one Metropolitan to preſide over every Province, ſo in every Province there ought to be (at leaſt) ‡ 21 Diſt. c. 1. eleven or twelve Cities; and as many Biſhops ‡. And (perhaps) *Pelagius* at that Time thought ſuch a Diſtinction of Provinces and Dioceſſes very neceſſary and convenient for the Government of the Church: But this Diviſion or Diſtinction did not always continue; for the Will of Princes

Princes and the Courſe of Time have now changed the Form of Provinces *. *Budæus* will have the *Metropolis* or Mother City to be that out of which Colonies or other Towns proceeded; that is to ſay, from whence the *Coloni* and the *Incolæ* were deriv'd and tranſlated to ſome other Place †: And thus a *Metropolis* or Metropolitical City is in reſpect to a Colony, what a Mother is to a Daughter; and, according to *Suidas*, it is called a *Metropolis* or Mother City, from the two *Greek* Words μητηρ and πόλις. And according to this Senſe a *Metropolitan* Biſhop is he, who has his See in that City from whence Colonies were drawn and deriv'd. But this Interpretation does not truly quadrate with an Archbiſhop, nor are Archbiſhopricks deem'd Colonies, which were tranſlated from ſuch a City; becauſe Colonies were ſuch Draughts of People as were tranſlated and ſent to diſtant Kingdoms and Nations, ſuch as the *Romans* ſent to *Noricum*, the *Upper Hungary*, *Chartres*, and the like, and in Midland Countries to the Rivers *Save* and *Drave*. The Colonies of the *Goths*, *Vandals*, and other Nations, being propagated and diſpers'd into ſeveral diſtant Parts, could not be ſubject to one Archbiſhop. But the Cities of Archbiſhopricks may in a metaphorical Senſe be ſtiled *Metropolitical* Cities; which as Mothers do take care of their Children, ſo do theſe Cities, or the Biſhops thereof, take care of ſuch Churches as are ſubject to them, and placed in the ſame Province, as may be inferr'd from a Law of *Theodoſius*, by which Law he gave to the City of *Berytus* in the Province of *Phænicia*, the Name of a *Metropolis* *.

* Rhenan. Not. utriuſq; Imp.

† Bud. in l. 4. D. t. 16.

* C. 11. 21. 1.

An Archbiſhop, according to the ancient *Canon-Law*, was elected by Provincial Biſhops meeting together in the *Metropolitan* Church, by and with the Conſent of the Clergy and all the Citizens †; and by a Decree of Pope *Anicetus* it is enacted, that an Archbiſhop ſhould be ordain'd by all the Suffragan Biſhops ‡. See his Epiſtle to the Biſhops of *France*. But by the *Papal* or *Modern* Law the Right of electing an Archbiſhop does not belong to the Suffragan Biſhops of the Province, but to the Canons only of the Cathedral Church itſelf, whereunto ſuch Archbiſhop is to be choſen. And from hence I infer, That *Suffragan* Biſhops ought not of *Common Right*, according to this late Law, to be preſent at ſuch Election even with the *Canons*, unleſs there be a a Cuſtom for them to elect together with the *Canons*. The *Ruſſian* or *Muſcovite* Archbiſhops had their Authority from the Patriarch of *Conſtantinople*, which were ſometimes choſen in a Convention or Convocation of all the Archbiſhops, Biſhops, Abbots, and Priors of Monaſteries, by finding out a Perſon of a Holy Life and Converſation in their Monaſteries and Religious Houſes, if poſſible: But now they ſay, that the Czar or Prince of the Country is wont to convene before him certain Perſons, and out of their Number to chuſe an Archbiſhop, according to his own Judgment, Will and Pleaſure *. In *England* the King has the Nomination of an Archbiſhop; and, after ſuch Nomination, he ſends a *Conge d' Eſlire* to the Dean and Chapter, to elect the Perſon thus named by him, under the Pain of a *Præmunire* on their Refuſal or Diſobedience.

† 63 Diſt. c. 19.

‡ 66 Diſt. c. 1.

* Sigiſm. lib. Bar. in comm. rer. Muſcov.

After an Archbiſhop is elected, he is confirm'd by the Primate or Patriarch, where there is ſuch Perſon exiſting and preſiding over the Province: But if the Archbiſhop be exempt from his Juriſdiction, then he ſhall, according to the *Papal-Law*, be confirm'd by the Pope †, whether the Election be made of *Common Right*, or according to the King's Nomination in *France*. After this an Archbiſhop ought to be conſecrated and anointed, if he has not undergone this Ceremony before; and after Con-

† X. 1. 6. 36. & 44.

Conſecration, he ſhall have the *Pall* ſent him, which he ought not to
‡ Gloſſ. in c. 4. & 28. x. 1. 6. delay ſuing for above three Months after Conſecration ‡: But before
he has receiv'd the *Pall*, he cannot exerciſe the Office and Rights of
* 10c Dist. c. 1. & 6. Gloſſ. ib. his Epiſcopal Order or Function *, nor conſecrate Virgins, nor hold a
Synod. See *Bertachin.* Treatiſe of Biſhops, *Tit.* 3. and *Chap.* the laſt.
For theſe Things are only lawful after Conſecration, and obtaining
of the *Pall*, and not before, tho' Confirmation has been made. Tho'
a Biſhop may be conſecrated by three Biſhops without the Help and Pre-
ſence of more, at the command of the Metropolitan; yet an Arch-
biſhop ought to be ordain'd and conſecrated by all his Provincial
† Can. Apoſt. 20. Glem. lib. 3. X. 1. 11. 6. Suffragans †.

The Power and Authority of Archbiſhops is chiefly over ſuch Biſhops
as are plac'd under them, and ſtiled their *Suffragans*; who are by the
Synod of *Antioch* commanded to ſhew a particular Reſpect unto the Me-
tropolitans, and to attempt no Innovations in their Dioceſſes without the
‡ 9 Q. 3. 1. Metropolitan's Privity and Advice ‡; nor ought Metropolitans to at-
tempt any Thing without the Advice of their *Suffragan* Biſhops, accord-
ing to an ancient Law made in *France* by *Charlemagne*. See the firſt Book
* Cap. 8. of the Laws of *France* touching *Suffragan* Biſhops *. For tho' an Arch-
biſhop has a proper and peculiar Dioceſs ſubject to him, and is veſted with
ordinary Juriſdiction as every Biſhop is; yet he exerciſes an extraordi-
nary Power over his *Suffragans*, as being the Perſon who is entruſted
† 9 Q. 3. 2. with the care of the whole Province †; and in reſpect of this extraor-
† X. 1. 30. 1. dinary or further Power his *Suffragans* pay him Procurations ‡. He has
X. 2. 26. 16. Cognizance of every Diſpute and Controverſy, which a Clergyman has
* 11 Q. 1. 46. with any of his *Suffragans*, if they be aggriev'd by them *; and, in
Supply of the Biſhop's Negligence, he may do that which a Biſhop ought
† 9 Q. 3. 3. to do according to his Duty and Paſtoral Office †. Wherefore, he may
go thro' his Dioceſs by way of Viſitation; and, by Inquiſition, correct
the wicked Lives and Actions of his Subjects: And whilſt he is thus in
‡ X. 3. 39. 14. his Viſitation, he may demand Procurations ‡, make uſe of the Ponti-
fical Enſigns; and, according to the *Papal-Law*, command the *Croſs*
* X. 2. 16. 1. X. 5. 33. 23. to be carried before him *. But this laſt Foppery is not practis'd here in
England.

Tho' an Archbiſhop be the Ordinary Judge of his *Suffragans*, and
may call them to an Account for their ill Behaviour; yet this does not
always hold true, according to the *Papal-Law*: For if an Archbiſhop
ſhould proceed to the Depoſition of one of his *Suffragans* for Crimes
committed by him, he cannot take Cognizance thereof according to that
Law, no, nor even in a Provincial Council itſelf; becauſe the Depoſition
of a Biſhop by that Law belongs to the Pope alone. But this is not
Law with us here in *England*; ſince an Archbiſhop, as well as a Pro-
vincial Council, may depoſe a Biſhop: And ſuch was the Caſe of the
Biſhop of St. *Davids* lately, who was depriv'd by the Archbiſhop of
Canterbury; and the Deprivation well juſtify'd herein. But an Arch-
biſhop may even by the *Papal-Law* as well as by the *Canons* of the
† 12 Dist. c. 13. Church, not only excommunicate and interdict his *Suffragans* †, but
his Vicar-General may alſo do the ſame. And tho' an Archbiſhop has
this Juriſdiction over his own *Suffragans*; yet he has not Juriſdiction
over the Perſons and Eſtates of Men dwelling and exiſting in the Dio-
‡ X. 1. 31. 11. Gloſſ. ibid. ceſs of his *Suffragan* Biſhop, unleſs it be in ſome particular Caſes ‡, *viz.*
When the *Suffragan* is negligent, as aforeſaid, after three Admonitions.
And a *Suffragan* is ſaid to be negligent, when, thro' Sloth, and with-
out any reaſonable Impediment to excuſe himſelf by, he does not con-
ſider thoſe Things which he ought to do; and in this Caſe (it ſeems)
that

that Negligence differs but little from Contempt. Again, an Archbiſhop may, by Virtue of an Appeal made to him, compel his *Suffragan* Biſhop to the Adminiſtration of Juſtice, if he be negligent therein, or denies the ſame to any Perſon: And tho' the Cauſe does not by this Means, according to ſome Men's Opinion properly devolve to the Archbiſhop, yet (I think) the other to be the better Opinion, *viz.* That by the Negligence of a Man's own proper Biſhop, the Cauſe devolves to the *Metropolitan*. *Hoſtienſis* reckons up One and twenty Caſes, wherein the Metropolitan may exerciſe Juriſdiction over the Subjects of his *Suffragans*: But ſee the Statute of the Realm touching this Matter *.

* 23 H.8.c.9.

It has been hinted, that an Archbiſhop is the chief Biſhop and Preſident of the Church in every Province, where ſuch Archbiſhop is: For there was a Diviſion of Provinces a long time before the coming of our Saviour *Chriſt*, tho' (perhaps) not the ſame as it is at preſent; and this Diviſion, according to the ill-grounded Fancy of ſome Perſons, is ſaid to have been afterwards reviv'd by the Apoſtles, and their immediate Succeſſors. And, therefore, ſay they, where Secular Primates were heretofore given, the Eccleſiaſtical Laws have order'd Patriarchs and Eccleſiaſtical Primates to be placed: But in the Metropolitical Cities, which had Inferiour Judges, thoſe Perſons are at preſent ſet over them in Church-Affairs, which are now diſtinguiſh'd by the Names and Titles of Archbiſhops and Metropolitans, as aforeſaid. To theſe, therefore, it belongs to take Cognizance of Church-Matters among their own *Suffragans*. And if the *Suffragans* ſhall receive any Hardſhips from their Archbiſhops, they may appeal (according to the *Canon-Law*) to their Primates, or to the Apoſtolick See; but here in *England* to the King in his Court of *Chancery*, or to the Upper Houſe of Convocation†. For an Archbiſhop ought not to make any Canon or Decree in the Dioceſs or Province of his Suffragan, or receive any ſuch contrary to or without his Suffragan's Conſent *: Nor ought he to meddle in ſuch Matters as are common to both without the Conſent of the Biſhop.

† 24 H.8.c.12.

* X. 5. 31. 8.

When the Archbiſhop viſits his Inferiour Biſhop, and inhibits him during ſuch Viſitation, ſuch Inferiour Biſhop cannot collate to a Benefice within his Dioceſs, by reaſon of a Lapſe during the Time of ſuch Viſitation; but he ought to preſent the Perſon to the Archbiſhop for his Inſtitution, becauſe that during the Inhibition his Power of Juriſdiction is ſuſpended †. This was a Point on a Special Verdict in the County of *Lincoln*; and the *Civilians*, who argu'd thereon, ſeem'd to agree herein. But the Caſe was argu'd on another Point, and that was not reſolved. As by the *Canon-Law* the Pope cannot be puniſh'd by a General Council, as being the Head of ſuch Council; ſo by the ſame Law an Archbiſhop or Metropolitan cannot be puniſh'd by a Provincial Chapter or Council for the like Reaſon: But this was only calculated for giving the Pope a greater Licenſe of doing Evil, and for enlarging his Power over the Church; ſince ſurely by the Law of right Reaſon both the Pope and an Archbiſhop may be thus puniſh'd; and ſo they have often found by Experience. And an Archbiſhop, in his Travels or going out of his Province, becomes Subject to the Archbiſhop of the Province where he has his Abode and Commorancy ‡. An Archbiſhop cannot divide his Province into two; nor can there be two Archbiſhops in one and the ſame Province *, any more than there can be two Suns (ſay the *Canoniſts*) in the ſame Firmament.

† Trin. 13. Car. B. R.

‡ X. 1. 9. 9.

* 101 Diſt. cap. 1.

When the Power of the Church was firſt eſtabliſh'd here in *England*, it was ſettled under the Archbiſhops of *Canterbury* and *York*, who had then no Preheminence or Juriſdiction one over the other, the former

being Primate over the Southern, as the latter was over the Northern Parts of the Kingdom of *England*. But as the *Chriſtian* Religion in *England* firſt took Root in the See of *Canterbury*, once the Royal City of the Kings of *Kent*, this See was given to *Auſtin* the Monk, and his Succeſſors for ever, by King *Ethelbert* on his Converſion; and the Archbiſhop is now ſtiled Primate and Metropolitan of all *England*, and has Precedency not only before all the Clergy of the Realm of *England*, but alſo as the firſt Peer (next and immediately after the *Royal Blood*) before all the Nobility of the Kingdom. In the College of Biſhops he has the Biſhop of *London* for his Dean, the Biſhop of *Wincheſter* for his Chancellor, the Biſhop of *Lincoln* for his Vice-chancellor, the Biſhop of *Salisbury* for his Præ-centor, the Biſhop of *Worceſter* for his Chaplain, and the Biſhop of *Rocheſter* (Time was) for his Croſs-bearer *. The Archbiſhop of *Canterbury*, as he has the Precedency of all the Nobility, ſo likewiſe of all the Great Officers of State: He writes himſelf *Divinâ Providentia*, whereas other Biſhops only uſe *Divinâ Permiſſione*, for the Kingly Stile of *Dei Gratiâ* is now thro' great Modeſty omitted.

* Lindw. lib. 5. Tit. 15. c. 1. Gloſſ. ib. v. *tanquam*.

The Coronation of the Kings of *Great Britain* belongs to the Archbiſhop of *Canterbury*, if he be able to perform the ſame; and it has been formerly reſolved, that whereſoever the Court was, the King and Queen were *Speciales & Domeſtici Parochiani Domini Archiepiſcopi*. He had alſo heretofore this Privilege of Special Remark, *viz.* That ſuch, as held Lands of him, were liable for Wardſhips to him, and were to compound with him for the ſame, tho' they held other Lands *in Chief* of our Sovereign Lord the King †. All the Biſhopricks in *England* (except *Dureſme*, *Carliſle*, *Cheſter*, and the *Iſle of Man*, which are of the Province of *York*) are within the Province of *Canterbury* ‡. The Archbiſhop whereof has alſo a peculiar Juriſdiction in thirteen Pariſhes within the City of *London*, and in other Dioceſſes, *&c.* Having alſo an ancient Privilege, That wherever any Mannors or Advowſons belong to his See, they forthwith become Exempt from the Ordinary, and are reputed *Peculiars*, and of the Dioceſs of *Canterbury*. If you conſider *Canterbury* as the Seat of the *Metropolitan*, it has under it One and twenty Suffragan Biſhops, whereof Seventeen are in *England*, and four in *Wales*: But if you conſider it as the Seat of a *Dioceſan*, it only comprehends ſome Part of *Kent*, *viz.* Two hundred fifty ſeven Pariſhes (the Reſidue of this County being in the Dioceſs of *Rocheſter*) together with ſome other Pariſhes in a diſpers'd manner lying in ſeveral Dioceſſes, where the Archbiſhop has any Mannors or Advowſons, as aforeſaid.

† Heylin's Help to Hiſt. v. *Canterbury*.

‡ Cok. Inſt. 4. cap. 74.

The *Metropolitan* See of *York* had its Original at the firſt Reception of the Goſpel in *England* (according to ſome) when King *Lucius* eſtabliſh'd *Sampſon* the firſt Archbiſhop thereof, which ſeems to me an idle Story, becauſe 'tis much doubted whether we ever had ſuch a King or not: But, ſoon after the Converſion of the *Saxons*, *Paulinus* was by Pope *Gregory*'s Appointment made Archbiſhop thereof *. Indeed long before Pope *Gregory*'s Time we have an Account (if it may be rely'd on) that there were at the Beginning of the fourth Century three *Engliſh* Biſhops at the Council of *Arles*, *viz.* thoſe of *London*, *York* and *Caerleon*; and *Sulpicius Severus* tells us, that their Biſhopricks were ſo mean that they lived there at the Charge of the Publick. This Province of *York* anciently claim'd and had a *Metropolitan* Juriſdiction over all the Biſhops of *Scotland*, from whom they had their Conſecration, and to whom they ſwore *Canonical* Obedience, till Pope *Sixtus* the Fourth created

* A. D. 622.

created the Biſhop of St. *Andrews* Archbiſhop and Metropolitan of all *Scotland* *. The Archbiſhop of *York* ſtiles himſelf *Primate* and *Metropolitan* of *England*, as the Archbiſhop of *Canterbury* does *Primate* and *Metropolitan* of *all England*, by the way of Preheminence thro' the Grace and Favour of King *Ethelbert* (as 'tis ſaid) to *Auſtin* the Monk, who was the firſt Archbiſhop of this See. About Two hundred and fifty Years ſince †, when *George Nevil* was Archbiſhop of *York*, the Biſhops of *Scotland* withdrew themſelves from their Obedience to him; and had Archbiſhops of their own, till the Time that Epiſcopacy was aboliſh'd in *Scotland*. The Archbiſhop of *York* has Precedency of all the Dukes not being of the *Blood Royal*, as alſo before all the Great Officers of State, except the Lord Chancellor. The Dioceſs belonging to this See of *York* contains the two Counties of *York* and *Nottingham*, and in them Two hundred eighty one Pariſhes, whereof Three hundred thirty ſix are Impropriations.

* Heylin ut ſupra. v York.

† A. D. 1466.

The Archbiſhop of *Canterbury*, as he is *Primate* over *all England* and *Metropolitan*, has a Super-eminency and even ſome Power over the Archbiſhop of *York*: For (under the King) he has Power to ſummon him to a National Synod; and the Archbiſhop of *York* ought to come with his Biſhops (ſays the Law) *ad nutum ejus Canonicis ut Diſpoſitionibus obediens exiſtat*. The Archbiſhop of *York* was alſo *Legatus natus* (according to ſome Accounts) as well as the Archbiſhop of *Canterbury*; and had the *Legatine* Office and Authority equally annex'd to his Archbiſhoprick: But upon abrogating the Pope's Power here in *England* by *Henry* the Eighth, in the ſeventh Year of his Reign, it was concluded, that the Archbiſhop of *Canterbury* ſhould no more be ſtiled the Pope's *Legate*, but *Primate* and *Metropolitan* of *all England*. And as the Archbiſhop of *Canterbury* has the Honour to crown the King; ſo has the Archbiſhop of *York* the Honour of crowning the Queen, whenever it happens; and is her perpetual Chaplain.

Of an Archdeacon, and his Office in the Church.

THE Care of the Paſtoral Office being a Matter of weighty Concern, as well as of great Difficulty and of a large Extent: The Law has, therefore, rightly provided, that there ſhould be ſome Perſons in the Church, who, together with the Biſhop, ſhould bear this Burthen; and who ſhould aid and aſſiſt the Biſhop in his Paſtoral Care and Office *. And ſuch a Perſon is an Archdeacon, who of *Common Right* within his own Precinct is the next great Perſon in Point of Dignity, after the Biſhop † and his Chancellor; ſaving the Right of the Dean, which belongs to him in the Cathedral Church: And, therefore, as the Law ſtiles him, the Biſhop's *Vicar* or *Vicegerent* ‡, becauſe in many Caſes he ſupplies the Biſhop's Place and Office in ſuch Matters as do belong to the Epiſcopal Function, he ought to be in Prieſts Orders, and always on the Watch, to ſee that ſuch as are in lower Offices do diſcharge their Truſt with Diligence. And, as he is the Biſhop's Vicar, he has his Power from the Biſhop

* X. 1. 23. 7.

† X. 1. 23. 1.

‡ X. 1. 23. 1.

Biſhop; and ought to exerciſe the ſame with that Vigilance and Sagacity in the Houſe of GOD, that he may deſervedly be called *Oculus Epiſcopi*, which he often is in our Law-Books. But tho' Archdeacons are the Biſhops Vicars, yet they are plac'd in a certain Station of Dignity: And, therefore, they cannot be remov'd at the Biſhop's Beck or Pleaſure, nor can the Biſhops exerciſe their Office ‡.

‡ Abb. in c. 1. X. 1. 23. 1.

An Archdeacon in a large Senſe of the Archdiaconal Dignity is ſaid (at leaſt) to have a Cure in reſpect of that Part of his Office, which concerns the Clergy of the whole Dioceſs, or his own Diſtrict *: For an Archdeacon ought to take Care of the Clergy ſo far as it may regard the Converſation and Honour of the Clergy. And he is ſtiled an Archdeacon *quaſi Princeps Miniſterii*, it being his Duty to do all thoſe Things which do belong to the Miniſterial Office, as I ſhall ſhew by and by. And as ſimple Deacons are in Subjection to Presbyters, according to the *Canon-Law* †; ſo are alſo Presbyters and Arch-Presbyters in Subjection to theſe Archdeacons. They are ſtiled the firſt of the Deacons according to the Senſe of the Word, unto whom a Dignity does of *Common Right* belong; and as ſuch, in the *Romiſh* Church, they are Superiour to Abbots and Priors themſelves. The Miniſterial Office of an Archdeacon is to read the Goſpel, whenever he pleaſes, in the Church, or elſe to command ſome one of the Deacons to do it in his ſtead; to examine ſuch Perſons as are to be promoted to Holy Orders, and to be inſtituted into Eccleſiaſtical Benefices, and to preſent Perſons examin'd and approv'd of unto the Biſhop for Impoſition of Hands, and Canonical Inſtitution, and the like ‡. And, moreover, in the *Romiſh* Communion it is his Duty, according to the *Papal-Law*, when the Biſhop ſings Maſs, to order all the Inferiour Clergy to appear in their proper Habits *; and to ſee that all the Offices of the Church be rightly perform'd; to ordain the Acolothiſt, to keep the Sacred Veſſels, *&c.* †

♦ X 1. 23. 1.

† 93 Diſt. c. 24.

‡ X. 1. 23. 7.

* X. 1. 23. 12.

† X. 1. 23. 3.

Pope *Clement* the Fifth in an Epiſtle of his gives an Archdeacon the Name and Title of *Oculus Epiſcopi*, ſaying, That he is in the Biſhop's Place to correct and amend all ſuch Matters as ought to be corrected and amended by the Biſhop himſef, unleſs they be of ſuch an arduous Nature, as that they cannot be determin'd without the Preſence of his Superiour the Biſhop. But the Queſtion is, What theſe Matters are, which are of ſuch an arduous Nature, that the Archdeacon cannot do of himſelf? To which I anſwer, That regularly he cannot inflict any Puniſhment, but can only proceed by Precepts and Admonitions: For tho' he be a Cenſor and Corrector of the Manners of the Clergy within his Archdeaconry, as now practis'd; yet Originally he could only enquire into the Behaviour of the Clergy, hear the Cauſes of Perſons ſubject to the Biſhop, by way of Complaint, and was oblig'd to refer all Matters of greater Conſequence to the Cognizance of the Biſhop ‡. But in Proceſs of Time from being a *ſimple* Scrutator, an Archdeacon became to have Juriſdiction in a more ample Manner by the Grant of the Biſhop at firſt, and then at length by immemorial Cuſtom and the *Canon-Law* itſelf. And hence it was that Archdeacons began to have the Power of Viſitation veſted in them of *Right*, which was formerly only delegated to them by the Biſhop himſelf, in Caſe he was any wiſe hinder'd from viſiting his Dioceſs. For the Biſhop ought to viſit his Dioceſs every Year in his own Perſon, unleſs he thinks fit to omit the ſame, becauſe he would not burthen and aggrieve his Churches; and then in ſuch a Caſe he ought to ſend his Archdeacon, which was the Original of the Archdeacons Viſitation. But *Hoſtienſis* ſays, That the Biſhop may ſend whom he pleaſes, and the Archdeacon may viſit (not-

‡ Abb. in c. 7. X. 1. 23.

(notwithstanding) if the Archdeacons Right of Visitation be founded on Custom; because one Visitation does not prevent and hinder another. An Archdeacon may visit every Year, and oftener too if it be expedient; but he is not oblig'd by any Necessity of Law to visit oftener than *de Triennio in Triennium* *: He ought to go in Person then to the Place to be visited, and not to send another Person to this End and Purpose; for if he does, he shall not have the Procuration in Money due in respect of his Visitation. But 'tis otherwise in respect of him, whom he sends in his own Name: For he shall have and receive for himself and his Attendants his full Procurations in Victuals. Some will have it, that an Archdeacon does of *Common Right* execute this Visitatorial Power in his Archdeaconry: But others seem to hold the contrary Opinion, saying, That an Archdeacon has a Visitatorial Power only of *Common Right per modum simplicis Scrutinii*, as being the Bishop's Vicar, according to what I have before hinted; and this is good Law with us here in *England*, unless such Archdeacon has a contentious and coercive Jurisdiction given him, either by some Grant of the Bishop, or else by Prescription or by immemorial Custom, which last cannot happen with us here in *England*.

* X. 1. 23. 1.

For in the *Norman* Times we read, That Archdeacons in *England* were then first taken into a Part of the Jurisdiction under the Bishop; and only visited those Years that the Bishop did not: For we meet with no Archdeacons vested with any kind of Jurisdiction in the *Saxon* Times. We read indeed sometimes of Archdeacons, but they had then nothing to do in the Dioceses, but only attended the Bishop at Ordinations, and other Publick Services in the Cathedral Church. *Lanfrank* was the first that made an Archdeacon with Power of Jurisdiction in his See here in *England* †; and *Thomas*, the first Archbishop of *York* after the Conquest, was the first that divided his Dioceses into Archdeaconries; and thus did *Remigius* Bishop of *Lincoln* divide his large Dioceses into seven Archdeaconries ‡. So that Archdeacons with us could not have this Power of *Common Right*, nor by immemorial Custom.

† Angl. Sacr. Vol. 1. p. 150.

‡ H. Hunting. Angl. Sacr.

But as Abbots in the Church of *Rome* may by Privilege and Custom prescribe to take Cognizance in Matrimonial and other Causes of the Church, so likewise by Custom and Privilege Archdeacons may prescribe to have Cognizance in such Causes: Which yet they cannot have of *Common Right*, because of *Common Right* it only belongs to the Bishop. Archdeacons ought by their *Officials* and other Ministers, to whom Credit is given in Notorious Cases, to enquire *Simpliciter & de plano* (says the Law) by the Means of a General Inquisition in the Parish-Church, wherein they exercise the Power of Visitation, whether there be any Thing that wants Correction and Amendment either in Persons or Things belonging to such Church; as Things under an ill State and Management, or in bad Custody. And, by a Provincial Constitution in *Lindwood* *, Archdeacons and their Officials are enjoin'd, That in all their Visitations they make of Churches, they do shew special Regard in their Inquiries touching the Structure and Fabrick of them, which consists in the Walls, Windows, Coverings, and the like, thereunto belonging; and particularly in respect of the Chancel, if (perchance) they want Repair. And if they find any Defects of this Kind in them, they ought to appoint and prefix a certain Space of Time *sub Pœnâ* for the Repairs and Amendment thereof. Under the Appellation of *Things* abovemention'd, I mean all the Rights that do any wise appertain and belong to the Church; and under the Appellation of *Persons*, I do here

* Lib. 1. Tit. 9. cap. 4.

comprehend Laymen as well as Clergymen: For an Archdeacon in Matters belonging to his Viſitation has Juriſdiction (at leaſt) by Cuſtom even over Laymen; and ſo it is ſettled in *England*.

An Archdeacon ought to be a Man of Prudence and ſound Learning in the Church, and of an upright Conſcience and Converſation in the World *, tho' he has not regularly ſpeaking a Cure of Souls, ſince he has only that from the Biſhop, as being the Biſhop's Vicar deputed by Law: And hence it is, that he cannot grant the Cure of Souls to another without the Biſhop's Licenſe †. But tho' an Archdeacon regularly has not the Cure of Souls; and conſequently, cannot commit the ſame to another: Yet by Cuſtom in ſome Places, the Archdeacon has under him a diſtinct Pariſh, wherein he may exerciſe the Cure of Souls.

* 60 Diſt. c. 3.

† X. 1. 23. 4.

My Lord *Coke* indeed ſays, That Archdeaconries are Benefices with Cure of Souls ‡: But even ſome of our common Lawyers have put a *Quære* on this great Man's Aſſertion. For, notwithſtanding what my Lord *Coke* has ſaid, ſome of our common Lawyers hold, That an Archdeaconry is not a Benefice with Cure of Souls, nor is it comprehended under the Name of a Benefice within the Statute of the 21*ſt* of *H.* 8. *ch.* 13. againſt Pluralities, tho' the *Proviſo* had been omitted: For there is no ſuch Exception out of the Statute * of Queen *Elizabeth* concerning the reading of the Thirty nine Articles; and if an Archdeacon reads not the Thirty nine Articles within the Time limitted by the 13*th* of *Elizabeth*, his Preferment is not void by that Statute, becauſe it is not a Benefice with Cure of Souls. So that an Archdeaconry is a Dignity, and not a Benefice with Cure of Souls, according to the Senſe of the Common Law: For by a Dignity †, we underſtand that Promotion or Preferment, to which any Juriſdiction is annex'd. And thus in the Year-Books of *Edward* the Third ‡, an Archdeacon is ſtiled a Dignitary; and ſo likewiſe he is in *Latche*'s Reports of Law *: And, therefore, an Archdeaconry is not incompatible with a Benefice having the Cure of Souls. For if any Perſon having a Benefice with Cure of Souls takes an Archdeaconry, his Cure is not void by Ceſſion †. But by the *Canon-Law* if one having a Benefice with Cure of Souls accepts of an Archdeaconry, the Archdeaconry is void.

‡ Inſt. pt. 3d. ch. 71.

* 13 Eliz. c. 12.

† 7 H. 6. 27.

‡ 5 Ed. 3. 9.

* Pag. 236.

† Dav. Rep. 68. 1. Leon. Rep. p. 316.

By the *Canon-Law* no one is qualified to be an Archdeacon, unleſs he be a Deacon *, ſince he is ſtiled the firſt of the Deacons by that Law, unto whom this Dignity does of *Common Right* belong; and as ſuch, he is Superiour to Priors and Abbots in the *Romiſh* Church. And as an Archdeacon ought to be in Deacons Orders (at leaſt) no one ought to be preferr'd to an Archdeaconry till ſuch Time as he is Twenty four Years of Age compleat, or Twenty five Years of Age *anno currante* ‡: And according to the twelfth *Canon* of the Council of *Trent*, Seſſion the eighth, an Archdeacon ought to be a *Licentiate* either in Divinity, or elſe in ſome one of the Laws; ſince an Archdeacon is a Dignity in the Church. By a Statute of the Realm * in King *Charles* the Second's Time, he that accepts of an Archdeaconry is oblig'd within two Months after he ſhall be in actual Poſſeſſion of ſuch Eccleſiaſtical Promotion, without ſome lawful Impediment to be allow'd and approv'd by the Ordinary of the Place, and then within one Month after ſuch Impediment remov'd; and on the Lord's-Day, openly, publickly and ſolemnly to read the Morning and Evening Prayers appointed to be read; and according to the Book of Common Prayer before the Congregation there aſſembled, openly and publickly to declare his unfeign'd Aſſent and Conſent unto all Things therein contain'd and preſcrib'd according to the Form of the Words, and no other.

* 60 Diſt. 1. & 2.

‡ 60 Diſt. c. 2.

* 14 Car. 2. c. 4.

An

An Archdeacon is by Cuſtom a greater Perſon in his Diſtrict than the Dean of a Cathedral Church, and (particularly) in thoſe Things, which do of *Common Right* or by Cuſtom belong to his Office: For an Archdeacon is greater than a Dean in Point of Juriſdiction, and out of the Cathedral Church; becauſe in all ſuch Matters a Dean ought to be Subject to him; but in the Cathedral Church, and in the Celebration of Divine Service, an Archdeacon ought to be Subject to the Dean. But in all theſe Things the Cuſtom of Churches ought to be regarded; according to which a Dean *ſimply* ſpeaking is inferiour to an Archdeacon. An Archdeacon exerciſes Juriſdiction according to the Cuſtom of the Place, where he is Archdeacon *: And, therefore, it ſeems, that he may do all ſuch Things as are neceſſary to ſupport his Juriſdiction. So that in whatever he has the Cognizance of a Cauſe he may therein pronounce a Sentence. Hence it is that an Archdeacon may puniſh Laymen for not repairing their Church, and according to the *Canon-Law* enjoin them Pennance.

* Dd. in c. 5. X. 1. 23.

By a Book of Canons made for the Government and Diſcipline of the Church of *England*, and publiſh'd in the Year 1571. every Archdeacon ought to have a good an ſufficient Study of Books at his own Houſe, and (particularly) thoſe which are entitled the *Monuments* or *Book of Martyrs*. And by the ſame Canons an Archdeacon who has the Power of viſiting his Archdeaconry either of *Common Right* or by Preſcription, is enjoin'd to viſit the ſame (at leaſt) once every Year; forbidding him to ſubſtitute any Perſon to himſelf as an Official, unleſs he be one that has his Education in the Univerſity, has apply'd himſelf to the *Civil-Law*, and is Twenty four Years of Age compleat; but a ſucceeding Canon will have him to be Twenty ſix †: And he ought not only to be endu'd with ſound Knowledge and Learning, but alſo with Gravity and Modeſty fit for the undertaking of this Office. Moreover, 'tis enacted by the ſaid Canons, That Archdeacons and their Officials or Subſtitutes ſhall in their Viſitations call the Clergy to an Account, and examine what Proficiency each of them have made in the Study of the Scriptures, and propoſe ſome Part of the New Teſtament to be learn'd by Heart by ſuch of them as have not taken a Maſter of Arts Degree in one of the Univerſities, and oblige them to repeat the ſame at the next Synod; and denounce ſuch of them as are negligent and contumacious herein to the Biſhop. The Archdeacon likewiſe, at the end of his Viſitation, ought to preſent to the Biſhop all ſuch Perſons as he ſhall find in every Deanary qualify'd in Point of Doctrine and Judgment for Preaching, and inſtructing the People. And out of theſe the Biſhop may chuſe whom he pleaſes for his Rural Deans. Laſtly, Archdeacons by Virtue of the Canons ought to take Care, that the Acts of their Courts be ſafely and faithfully kept; and once every Year they ought to bring or tranſmit to their Biſhops the Originals of all Wills which have been proved before them in the 'foregoing Year, that they may be laid up in the Biſhop's Regiſtry; taking Copies of ſuch Wills, if they pleaſe, to their own uſe.

† Can. Reg. Jac. 127.

If an Archdeaconry be in the Gift of a Layman, the Patron preſents to the Biſhop, who gives Inſtitution in like manner as to another Benefice; and then the *Dean* and *Chapter* inducts him, that is to ſay, after ſome Ceremonies places him in a Stall in the Cathedral Church to which he belongs, whereby he is ſaid to have *locum in Choro*: And tho' a Perſon may have a Prebend in one Church, and a Prebend in another; yet a Man cannot have an Archdeaconry in two Churches at one and the ſame Time ‡.

‡ X. 3. 5. 14.

Of

Of Attentates, or Attempts on Appeals.

ATTENTATES, in *Latin* called *Attentata*, are not only ſaid to be ſuch Proceedings as are made in a Court of Judicature, (pending Suit) and after an Inhibition is decreed and gone out; but, according to *Oldradus* *, thoſe Things which are done after an Extrajudicial Appeal, may likewiſe be ſtiled *Attentates*; where 'tis ſaid, That the Pendency of a Suit, and the Prohibition of a Superiour Judge is the Cauſe of an *Attentate*. And, according to *Federicus de Senis* †, thoſe Things which are done after a Sentence pronounc'd even before an Appeal made, may in like manner be term'd *Attentates*, as well as thoſe Things which are done after an Appeal in Point of Time, and an Inhibition decreed by the Judge *ad Quem*: And thoſe Things which are done after an Appeal from an *Interlocutory* are called *Attentates*, if they are done after an Inhibition decreed and iſſued forth ‡: And 'tis the ſame Thing, if any Thing be done and attempted after the Judge *a Quo* has admitted and ſubmitted himſelf to an Appeal from an *Interlocutory*; ſince the Inferiour Judge cannot proceed in any Step of the Cauſe, whilſt an Appeal is depending thereon *. But, if an Appeal ſhall be found to be notoriouſly null, then there ſhall be no Room in Law for *Attentates*; and the Proceſs made by the Judge *a Quo* is valid; nor ſhall *Attentates* have any Place in Law, when an Appeal is not notify'd to the Inferiour Judge. See *Ancharanus* as quoted in the Margin †.

* Conſ. 119. & 206.

† Conf. 126. per tot.

‡ Alex. Conſ. 89. lib. 1. n. 6.

* Tuſch. Conc. 376.

Tho' *Attentates* (pending an Appeal) ought to be revok'd in the firſt Place, and before any other Proceeding in an Appeal ‡; yet if they require a deeper Search, and a more narrow Enquiry, and cannot incontinently be prov'd, the Principal Cauſe ſhall not be ſuſpended and deferr'd upon the Account of the *Attentates*, but both Cauſes ſhall be proſecuted together *. In the *Imperial* Chamber a Libel of *Attentates* is exhibited, and Suit is conteſted thereupon, tho' otherwiſe, when *Attentates* are notorious, a Libel or Conteſtation is not neceſſary; but the Judge may on the Party's Requeſt made to him for his *mercenary Office* proceed *de plano*, and immediately revoke all *Attentates* †. Wherefore in a notorious Caſe the Appellant ought to take care and ſee, that on the ſuſpending of the principal Cauſe all *Attentates* be firſt revok'd ‡. Yea, the Judge may, *ex Officio*, without any Report or Petition made to him by the Party, revoke all ſuch *Attentates*, becauſe the Judge is more offended by them than the Party griev'd; and the Law, which forbids any Thing to be innovated or attempted, (pending an Appeal) is by Contempt ſet at naught.

† Conf. 158. n. 19.

‡ VI. 2. 15. 7.

* C. 3. 39. 4.

† Gail. lib. 1. Obſ. 146. n. 3.

‡ VI. 2. 8. 1.

In puniſhing *Attentates* it ought to be conſider'd, whether the Appellant or the Appellate made the *Attentate*: For if the Appellant did it, he is deem'd to have wav'd his Appeal, and to have made himſelf unworthy of the Benefit thereof; and therefore the Sentence, from which he has appeal'd, ſhall immediately paſs in *Rem Judicatam*; and the Judge *a Quo* may proceed to Execution, as if it had never been appeal'd *.

* Bald. in c. 14. X. 2. 28.

Of

Of the Banns of Matrimony.

THE *Banns* of Matrimony, or Matrimonial *Banns*, may be defin'd to be ſuch publick Edicts, Intimations, or Proclamations, as are ſolemnly denounc'd and propounded in the Church, or in ſome other lawful Congregation of Men, in order to the Solemnization of Matrimony *. And the Publication of theſe *Banns* is ſaid to be ſolemnly made, when it is made on three ſeveral ſolemn Days, and according to the approv'd Cuſtom of the Country, which ought to be obſerv'd in this Reſpect †; eſpecially, if there be any Canon or Synodical Conſtitution enacted touching it. And as publick *Banns* ought to be previous unto the Solemnization of *Carnal* Matrimony; ſo, according to the Papal *Canon* Law, they ought to be previous to a Contract of *ſpiritual* Matrimony ‖: But herein there lies a Difference, *viz.* Becauſe in the one Confirmation is not binding, if theſe Banns or publick Edicts do not go before the Contract; but in the other it is binding and valid, becauſe (ſay the *Papiſts*) the Pope has not ſo great a Power in diſſolving *Carnal*, as he has in diſſolving *ſpiritual* Matrimony *.

* X. 4. 3. 3.

† Hoſt. in c. 3. X. 4. 3. v. *competenti.*

‖ vi. 1. 6. 47.

* X. 3. 32. 7.

Now the Publication of the *Banns* of Matrimony ought to be propounded in all the Churches of that Place, where the Perſons willing to contract Marriage, do reſide and dwell, or (at leaſt) in ſeveral of thoſe Churches; and this ought to be principally regarded and obſerv'd, when the ſaid Parties are of different Pariſhes †. But, according to ſome Writers, this is little taken notice of and obſerv'd in ſome Places; yea, for the moſt part beyond Sea, the Publication of *matrimonial Banns* is made in one Church only, which is a foul Practice too much follow'd and encouraged here in *England:* And, according to theſe Men, it is ſufficient, if it be made in ſo publick a Manner, that all Perſons may thereby become acquainted with it ‖. 'Tis ſaid, That theſe *Banns* ought to be publiſh'd in the ſeveral Churches whereunto the Parties do belong: but according to ſome Lawyers, it is well enough, if theſe *Banns* are publiſh'd out of the ſaid Churches; provided, this be done in competent Places, as in Places where Sermons are preach'd, or divine Service publickly perform'd; and in ſome Countries, in the Market and the like. It is therefore ſaid, That theſe *Banns* ought to be publiſh'd in Churches, becauſe Men do for the moſt part aſſemble and come together there, and may there beſt underſtand what paſſes in the World. If the Perſons, who ſhall contract Matrimony, live in one Place, and they were born and their Parents do live in another, the *Banns* of Matrimony ought in Regard of them and their Parents to be publiſh'd in the reſpective Churches likewiſe, where their Parents dwell and inhabit; becauſe the Truth, touching their Birth and Parentage, may be beſt known from their Parents themſelves, if they have any living: And as an enquiry ought to be made, where the Truth may be beſt diſcover'd, ſo it is the ſafeſt way to make this Publication in both Places. For 'tis expedient that it ſhould be done in the Place of the Parents Habitation, becauſe it may come to the Parents Knowledge, whoſe Conſent is ſometimes requiſite; and in the Place of the Parties, becauſe we ſhall there have a more certain Account, whether they have already contracted themſelves with others in Wedlock or not.

† Innoc. in d. cap. X. 4. 3.

‖ X. 1. 37. 1.

Though it be well enough for the *Banns* of Matrimony to be publiſh'd on each of the Days, when three Holidays ſucceſſively come together, as it happens in *Chriſtmas*, *Eaſter*, and *Whitſon-Week*; yet the Publication thereof, ought not to be ſo haſten'd and diſpatch'd, as to have them proclaim'd the ſecond or third time in one and the ſame Day. In the Gloſs, on a *legatine* Conſtitution of Cardinal *Otho*, in *Linwood*'s Provincial *, a Perſon contracting Matrimony without Publication of theſe ſolemn *Banns*, ſhall not be heard on his Prayer, to have his Wife reſtor'd to him on her *Elopement* or Departure. Yea, he ought in the firſt Place to prove theſe three Things, *viz.* a Publication of *Banns*, a carnal Copulation had with her, and a matrimonial Contract ſolemniz'd. The Inſtitution of this ſolemn Denunciation of matrimonial *Banns*, was wiſely contriv'd to come at the Knowledge of ſuch Impediments as are legal Obſtructions to the Solemnization of Marriage; ſuch as Conſanguinity, Affinity, Præ-contract, Want of Conſent of Parents or Guardians, and other lawful Cauſes ſufficient to hinder Marriage: But this is now ſhamefully eluded by Licences and Faculties obtain'd for Money.

* Tit. 14. v. *clandeſtinc.*

Of Baptiſm, and the Effects thereof, &c.

BAPTISM is the firſt of the Two Sacraments in the Church of *England*, (for our Church rejects the five pretended Sacraments of *Pennance*, *Matrimony*, *Confirmation*, *Orders*, and *Extreme Unction*, retain'd in the *Romiſh* Communion) and is as the Gate or Entrance into Chriſtianity itſelf, whereby we are born again unto God, and take upon us a new Life †; and without which, in the Opinion of ſome Men (at leaſt) we cannot obtain everlaſting Salvation, according to St. *Matthew*'s Goſpel ‖, nor can we receive the other Sacrament of the Lord's-Supper without Baptiſm. For it is only by Baptiſm, that the Perſon baptiz'd becomes a Member of Chriſt's Church: And therefore, according to the Diſtinction of the *Romiſh* Church, both *original* and *venial* Sin is taken away and deſtroy'd by Baptiſm; and thus we are made worthy Partakers of that holy Myſtery.

† Ch. 3. v. 5.

‖ Ch. 28. v. 19.

In treating therefore, of *Baptiſm*, I ſhall here, *firſt*, conſider what it is. *2dly*, I ſhall explain the Effect of *Baptiſm*. *3dly*, I ſhall declare, who may baptize, and who ought to be baptiz'd. *4thly*, I ſhall conſider whether this Sacrament may be reiterated or repeated. And, laſtly, I ſhall ſhew what ought to be *extrinſecally* obſerv'd in this Sacrament. Now *Baptiſm*, according to the common Definition of it, is an external Ablution or Waſhing of the Body in Water, which, by applying a certain Form of Words, operates and denotes an internal Ablution or Waſhing of the Soul from *original* Sin. For as Circumciſion was inſtituted among God's own People, the *Jews*, as a Token of Faith, and a Sign of Juſtice, and was made to ſignify a Purgation of *original* Sin, in reſpect of Infants; ſo does Baptiſm alſo now ſignify a Regeneration or Renewal of the old Man: And thus *Baptiſm* ſucceeded in the Place of *Circumciſion*. According to the Doctrines of the *Papiſts*, there are five Things of the Subſtance of *Baptiſm*, *viz.* *1ſt*, The Intention of the Perſon baptizing, whether ſuch Intention be general or ſpecial only: *2dly*,

2*dly*, The Faith of the Perſon to be baptized, if he be an adult Perſon, otherwiſe he ſhall be baptized in the Faith of his Parents: And in adult Perſons, according to the *Canon* Law, Catechiſm ought to be previous unto Baptiſm*; becauſe the Salvation of Baptiſm is made by virtue of Faith. And, therefore, in Baptiſm, 'tis neceſſary that thoſe Things ſhould be exacted, which are neceſſary to Faith; and theſe are three, *viz.* a Suſception of Faith, a Profeſſion of Faith, and an Obſervation of Faith: And to theſe, the Perſon being of an adult Age, ought to anſwer in his own proper Perſon†; but Infants ought to anſwer by their *Sponſors*, or Sureties, who do not anſwer in their own Perſon, but in the Perſon of the Infant. 3*dly*, The Form of Words inſtituted by Chriſt himſelf in Baptiſm ought to be expreſs'd, as, *I baptize thee in the Name of the Father, Son and Holy Ghoſt*. Biſhop *Beveridge* ſhews, that in the cloſe of the ſecond Century, *Praxeas*, and others, baptiz'd only into one Perſon of the Trinity, *viz.* that of *Chriſt* who died for us: And, therefore, againſt theſe Hereticks, probably the Forty-ſecond Apoſtolical Canon was made; whereby it is enacted, that every Biſhop or Prieſt, who did not perform three Ablutions in *Baptiſm*, ſhould be depoſed: For *Chriſt* did not ſay, *Baptize into my Death*, but *in the Name of the Father, Son, and Holy Ghoſt*. 4*thly*, An *elementary* Ablution is held neceſſary: And, therefore, *Baptiſm* ought to be made in ſome Veſſel, ſo that the Perſon to be baptized may be dipped in Water; and ſuch an Immerſion or Dipping ought to be made thrice, according to the aforeſaid Canon, unleſs Cuſtom has made one Dipping alone ſufficient‖. But yet, I think, according to the *Canon* Law itſelf, *Immerſion* is not ſtrictly neceſſary unto *Baptiſm*; but that it may be perform'd even by *Effuſion* or *Sprinkling*. And this is particularly true, when either the Cuſtom of the Church ſuffers it, as it does here in *England*; or elſe when Neceſſity requires it on the ſcore of ſome Defect, or thro' danger of the Child's Death, who is to be baptized; or, laſtly, when the Prieſt is ſo weak, that he is not able to ſupport the Infant in order to dip it. For, in theſe, and the like Caſes, it is ſufficient to ſprinkle or pour Water on the Child's Face, or only to dip the more principal Part of the Infant in Water. But 'tis to be obſerv'd, that tho' *Baptiſm* may be well enough perform'd by ſprinkling or Effuſion of Water, where the Cuſtom is ſuch; yet by the *Canon* Law, the better Cuſtom is to dip the Perſon thrice, becauſe it denotes our Faith of the Trinity, and the three Days of Chriſt's being in the Grave, according to *Johannes*'s Annotations on the *Summa Confeſſionum**. The laſt thing of the Subſtance of *Baptiſm*, according to the Papal Law, is, that this Ablution and the Pronouncing of the Words, ought to be contemporary Acts: But as this Practice draws no abſurdity along with it, it may be well enough obſerv'd in our Church.

* Con. 4. Diſt. c. 54.

† Con. 4. Diſt. c. 77.

‖ Con. 4. Diſt. c. 80.

* Lib. 3. cap. 24.

The Doctrine of the Schools is, That a Sacrament requires *Matter*, *Form*, and *Intention*: And as Water is the Matter of this Sacrament, ſo is the expreſſing of the Act, *in the Name of the Father, Son, and Holy Ghoſt*, the Form thereof: but I am at a loſs to know, what the Intention of a Sacrament is, unleſs it be what the Church requires to be done therein, according to the Council of *Florence*. But thoſe, that underſtand Antiquity, know very well, that this was not the Opinion of Pope *Stephen*, in whoſe Time the Diſtinction of *Matter*, *Form*, and *Intention*, was not heard of; tho' the *Roman* Church ſays, that this Doctrine was receiv'd by Apoſtolical Tradition, eſtabliſh'd long before that Pope's Time. In reſpect of the *Matter* of *Baptiſm*, it is rather made by Water than by any other Liquor; *Firſt*, Becauſe as Water cleanſes our Cloaths, and waſhes off the Filth of our Body, ſo *Baptiſm* waſhes away the Spots and

Filth

Filth of the Soul. And another Reaſon is, becauſe a ſcarcity thereof ſhould not be a Plea of Excuſe unto any one, which it may be, if it were to be perform'd by Wine, Oil, or any other Liquor; ſince many Perſons are in want of theſe, and ſuch things are dearer than Water. A third Reaſon is, becauſe the *Matter* of baptizing ſhould be common to all Men. And a fourth Reaſon is, becauſe the Water which came out of our Saviour's Side, on piercing thereof, was a Sign of this Sacrament, according to the Archdeacon, on the third Part of the *Decrees* †. But others ſay, that Baptiſm was rather made by Water than other Liquor, becauſe as Man did by the Sin of our firſt Parent incur Uncleanneſs, Ignorance, and Concupiſcence; ſo by *Baptiſm* we are freed from theſe three Evils: And this is noted in the Properties of Water, *viz.* in its Purity, Perſpicuity and Frigidity. For Baptiſmal Water, by its Purity, cleanſes us; by its Perſpicuity, it illuminates us; and by its Frigidity, it tempers us from the Heat of Concupiſcence. As to the Form of this Sacrament in the vulgar Tongue, it conſiſts not only in Signs, but alſo in the Order of the Words themſelves, wherein it was inſtituted: And theſe Words may be pronounc'd either in *Engliſh*, *Latin*, *French*, or in any other Language, provided the Words are apt and proper to the Occaſion: But a Tranſpoſition of the Order of the Sacramental Words, does, in ſome Mens Opinion, vitiate Baptiſm.

† Con. 4. 1.

As to the Effects of Baptiſm, the Perſon is, *Firſt*, deliver'd from the Power and Tyranny of the Devil, according to the *Canon* Law ||. *Secondly*, He has by Baptiſm, a full Pardon and Remiſſion of all his Sins *. *Thirdly*, He is endued with the Grace of the Holy Ghoſt, and with true Innocence †. And, *Fourthly*, Perſons baptiz'd, are incorporated into the Communion of Chriſt's Holy Church, and made Members thereof by this Holy Myſtery ||; and being hereby redeem'd from *original* Sin, they have Life, Light and Salvation, in and thro' *Jeſus* Chriſt; and are made Children and Heirs of the Kingdom of Heaven, and have the Benefit of Chriſtian Burial at the time of their Death.

|| Con. Diſt. cap. 1.
* Con. Diſt. 4. cap. 6.
† Con. Diſt. cap. 4 & 9.
|| Con. Diſt. 4. cap. 131. & 143.

In reſpect of the Perſon that adminiſters Baptiſm, he ought, according to the *Canon* Law, either to be a Biſhop or a Prieſt *, unleſs it be in caſe of extreme Neceſſity; for by the *Canon* Law, Deacons ought not to baptize without the command of the Biſhop or Prieſt, unleſs a Biſhop or Prieſt ſhould happen to be at a great Diſtance, or extreme Neceſſity ſhould require it †: for in caſe of Neceſſity, in the abſence of a Prieſt or Biſhop, a Deacon may, *ſuo Jure*, baptize and adminiſter the Euchariſt unto Perſons ſick and weak; but if a Prieſt be preſent in the Church, he cannot do it ||, tho' Neceſſity ſhould require it, unleſs he be commanded thereunto by the Prieſt, as when there are many Perſons to be baptiz'd, or to receive the Euchariſt, and one Presbyter is not ſufficient for them all. But in caſe of Sickneſs, not only a Deacon, but even a Layman and a Woman may baptize, as well as hear Confeſſions in the *Romiſh* Church *, tho' none but a Prieſt can give true Abſolution †. The Perſons to be baptiz'd ought either to be Infants, or elſe Perſons of an adult Age on their Converſion to Chriſtianity, of which by and by.

* Con. Diſt. 4. cap. 19.
† Con. 4. 19.
|| 93. Diſt. cap. 16.
93. Diſt. c. 18. Dd. in c. 13.
* Pœn. Diſt. 1. cap. 88.
† Dd. in cap. 1. X. 1. 1. 4.

In the Primitive Church, it was a great Controverſy, whether Perſons baptiz'd by Hereticks out of the Church, ought to be baptiz'd again by the Orthodox, after they came into the Church: And tho' this was reſolv'd and decreed by the Biſhops in the Council of *Carthage*, held under St. *Cyprian*, as he himſelf relates the Matter in his Epiſtles ||; yet this Opinion was (notwithſtanding) afterwards diſallow'd of by others, and not received in the Church *. *Sozomen* in his Church-Hiſtory gives us this Account of Baptiſm, *viz.* That ſome Children of *Alexandria*, being at

|| Epiſt. 1.
* Calvin. Inſt. ch. 15.

at Play by the Sea-ſide, did, in a jeſting Manner, imitate the Acts of the Church uſed in Baptiſm; and *Athanaſius* being created Biſhop of the Play, baptized ſome Children that had not been baptized: but *Alexander* Biſhop of *Alexandria* being advertis'd hereof, was much troubled; who calling for the Children, ask'd them, what their Biſhop had done and ſaid to them? And underſtanding that all the Rites of the Church were obſerv'd therein, he did, by the Advice of other Prieſts, approve of their Baptiſm, and would not ſuffer them to be re-baptiz'd. And by a Provincial Conſtitution in *Lindwood**, a Prieſt was heretofore prohibited the Re-baptizing of Perſons that had been baptized even by Laymen; and ſuch Prieſts as queſtion'd the Validity of Lay-Baptiſm, and rebaptiz'd ſuch Perſons again, were, by that Conſtitution, look'd upon as fooliſh and ignorant Men.

* Lib. 3. Tit. 24. c. 2.

The uſual Times of baptizing of adult Perſons, were at *Eaſter* and *Whitſontide* in the *Romiſh* Communion, according to the *Canon* Law †; and twenty Days before their Baptiſm they were to be catechiz'd, and undergo an Exorciſm of Purgation, to drive the Devil out of the Perſon to be baptiz'd ‖. And by another Provincial Conſtitution following *, it was ordain'd, That if Children were born within eight Days before *Eaſter* or *Whitſontide*, they ought to be reſerv'd unto the time of a general Baptiſm, if that might be done without any danger of Death to the Perſons then born; and by the Papal *Canon* Law, this Space of Time was extended to eight Months in reſpect of *Jews* to be baptiz'd, that they might prove themſelves to be true Converts to Chriſtianity †. But theſe Conſtitutions are out of uſe at preſent with us; and that Part of the *Canon* Law we never receiv'd in *England*.

† Con. 4. 12.

‖ Con. 4. 55.

* Eod. lib. & Tit. cap. 3.

† Con. 4. 93.

By the Moſaical Diſpenſation, Circumciſion was a Fœderal Admiſſion to the *Jewiſh* Religion; and, that being taken away, *Baptiſm* was inſtituted in its ſtead: which though in Circumſtances not agreeable to Circumciſion, yet both are alike in this Reſpect, *viz.* That both of them were the reſpective Rites of their Admiſſion into the ſeveral Covenants, and the Covenantees became thereby entitled to the reſpective Privileges which were annex'd to them, and in both Caſes they were obliged to obſerve the whole Law, to which they were reſpectively initiated. It has been ſaid, that *Baptiſm* in the Chriſtian Church is a neceſſary means to Salvation; but if it be ſo, ſurely a Suſpenſion for three Months, according to King *James*'s Canons ‖, inflicted on ſuch Miniſters as refuſe to baptize, is a very ſlender Puniſhment, where the Child dies unbaptized thro' his Negligence or Omiſſion.

‖ Can. 69.

As Names were in the old Law impos'd and given to Perſons circumciſed at the Time of their Circumciſion; ſo are they now, at this day, impos'd and given to ſuch Perſons as are baptized *: And this, becauſe in Baptiſm the Perſon baptiz'd, according to *Hoſtienſis*, and the Archdeacon, in their Notes on this Chapter quoted in the Margin, deſerves to have his Name written in the Book of Life; and ſo ſays the Law in another Place †. But here 'tis to be obſerv'd, that it does not belong to the Prieſt's Office to impoſe this Name in Baptiſm, but rather to the Parents or the Godfathers: But yet the Prieſt may refuſe to pronounce the ſame, if the Parents or Godfathers do impoſe and give them ludicrous, filthy, or ill-ſounding Names. To ſupport the Child at the Font, there ought to be three Perſons (at leaſt) according to the aforeſaid *Lindwood* ‖, *viz.* in the Baptiſm of a Male there ought to be two Males and one Woman, and in the Baptiſm of a Female Child, two Women and one Man; and theſe are called Sponſors or Sureties for their Education in the true Chriſtian Faith, and the like *.

* Con. Diſt. 4. cap. 18.

† Con. Diſt. 2. cap. 36.

‖ Lib. 3. Tit. 24. c. 1.

* Con. 4. 105.

By the antient Canons, it was Simony to take any thing for the Sacraments of the Church, becauſe they ought to be adminiſtred freely †; but the *Canoniſts* themſelves taught the Clergy to evade their own Laws: For they told them, That tho' they ought not to take any thing for *Baptiſm*; yet they might ſell the Water to the Parents, before it was conſecrated ‖. Which is one of the worſt of their Evaſions, ſince Water is an Element free and in common to all Mankind for their neceſſary Uſe and Conveniency. So that a Miniſter ought not in any caſe to be paid for Baptiſm, it being his Duty to baptize in the Church; tho' if the Child be in danger of Death, he is bound to go to the Houſe, *&c.** But if he baptizes in a private Houſe, when the Child is likely to live, and he is paid for his Journey thither, 'tis as bad as being paid for the Water; becauſe, 'tis contrary to his Duty to baptize in ſuch Caſes. And tho' ſome Miniſters have ſued their Pariſhioners for a Fee due to them on Baptiſm, yet I cannot find any thing due for it by virtue of any Cuſtom or otherwiſe: And, therefore, when the Curate of *Bridlington* in *Yorkſhire* libelled againſt his Pariſhioner for a Shilling, as due to him for baptizing his Child, a Prohibition was granted. 'Tis more laudable, that a Perſon ſhould be baptized as ſoon as poſſible, than that he ſhould expect Baptiſm for any length of Time; eſpecially till he comes to an adult Age: and this for three Reaſons. *Firſt*, by reaſon of the Imbecility of human Nature, according to which the Child may eaſily die: and in this Caſe, according to ſome Men's raſh Opinion, he is damn'd if he dies without Baptiſm. *Secondly*, becauſe (as ſome fancy) the Devil has not ſo great a Power over Children baptized and cleanſed from *original* Sin, as he has over Perſons unbaptized: and this (the *Papiſts* ſay) is in reſpect of bodily Injuries. And, *Thirdly*, becauſe a Perſon in his Infancy is more eaſily induced and accuſtomed to ſuch Things as relate to the Chriſtian Religion, which then ſit ſtronger on his Mind. But 'tis to be obſerv'd, That tho' the Baptiſm of Children ought not to be delay'd, yet Baptiſm ought not to be immediately conferr'd on adult Perſons, as ſoon as they are converted to Chriſtianity, but it ought to be deferr'd for a certain Time on a threefold Account, *viz.* *Firſt*, *Propter cautelam Eccleſiæ*, leſt the Church ſhould be deceiv'd in their Converſion, conferring this Sacrament (perhaps) on ſuch as only pretend to a Converſion. *Secondly*, That before Baptiſm, they may be fully inſtructed touching the Chriſtian Faith. And, *Thirdly*, out of Reverence to the Sacrament, *viz.* when Men are admitted to Baptiſm on the chief and ſolemn Feaſts of the Year, at *Eaſter* and *Whitſontide*. But if ſuch adult Perſons are fully inſtructed in the Faith, and Sickneſs happens, or any other danger of Death, they ought to be baptized without delay.

† Lindw. lib. 5. Tit. 2. cap. 1. v. *Baptiſmus.*

‖ Lindw. ut ſupra.

* Can. Reg. Jac. 79.

Of Baſtards and Baſtardy.

A *Baſtard*, according to the *Civil* and *Canon* Law, is a Perſon born of a Woman out of Wedlock, or not legally marry'd; ſo that, according to Order of Law, his Father is not known: And, therefore, by the Law, he is ſometimes, in *Latin*, ſtiled *Filius nullius*, the Son of no Man; and ſometimes he is term'd *Filius Populi*, the Son of every Man. For ſays the Law, *Cui*

Cui Pater eſt Populus, Pater eſt ſibi nullus & omnis:
Cui Pater eſt Populus, non habet ille Patrem.

And thus Baſtardy is an unlawful State of Birth, which diſables the Baſtard, both according to the Laws of God and Man, from ſucceeding to an Inheritance. And, according to the foregoing Definition of a Baſtard, ſome are born of ſingle Women (among which I reckon Widows) and ſome are begot and born of marry'd Women. Of ſingle Women, ſome are ſuch as a Man may make his Wife, if he himſelf be ſole and unmarry'd; as thoſe that are kept as Concubines in the Place of a Man's Wife: and ſome others are ſuch as a Man cannot make his Wife, though he himſelf be ſole and unmarry'd; becauſe they are already either pre-contracted to ſome other; or elſe they are in ſo near a degree of Affinity or Conſanguinity to each other, that the Law would condemn the Marriage, and render the Iſſue thereof unlawful. Therefore, according to the Definition above-mention'd, and the Rules of Baſtardy founded thereon by the *Civil* Law, ſuch Children as are born of ſingle Women, and begotten of ſingle Men, who are, in Caſe of Iſſue, to marry them if they pleaſe, are by that Law ſtiled by the Name of *Filii Naturales*; becauſe they were from ſuch Women as Men held for their Wives, tho' they were not; and theſe might be legitimated ſeveral ways. But ſuch as were born and begot of a ſingle Woman, through a vagous Luſt, without any Purpoſe of maintaining ſuch as a Concubine, but on a Deſire only of ſatisfying a Man's Senſuality, were called *Spurii**, whether they were begotten by a ſingle or a marry'd Man; and theſe were for the moſt part *Putative* Children, and their Father not otherwiſe known than by the Mother's Confeſſion, who ſometimes owns the Truth, and ſometimes otherwiſe. But where any Children were born of a ſingle or marry'd Woman, that has proſtituted herſelf to every Man's Pleaſure, and publickly profeſs'd herſelf to be a Harlot, the *Civil* Law ſtiles them by the Name of *Manzeres*.† And, laſtly, ſuch as were born of a marry'd Woman in Adultery, who did not make ſuch a publick Profeſſion of her Lewdneſs, were, in that reſpect, call'd *Nothi*‖; becauſe they ſeem'd to be her Children, whom the Marriage ſhews to be ſuch, but are not: And theſe are counted to be Baſtards, if either the Husband has been ſo long abſent from his Wife, as by no poſſibility of Nature the Child can be his; or that the Adulterer and Adultereſs were ſo known to keep Company together, as that, by a juſt Account of Time, it could not fall out to be any other Man's Child but the Adulterer's himſelf. And yet in theſe very Caſes, within this Realm, unleſs the Husband be all the time of the Impoſſibility beyond the Seas, this Rule of Law holds true, *viz. Pater is eſt, quem Nuptiæ demonſtrant.* But the moſt nefarious kind of Baſtards, are they whom the Law ſtiles *Inceſtuous* Baſtards, which are begotten between *Aſcendants* and *Deſcendants*, *in infinitum*; and between Collaterals, as far as the divine Prohibition, and the right Interpretation thereof extends itſelf.

* D. 1. 5. 23.

† Vid. Hoſt.

‖ Nov. 89. c. 15.

The Effects of theſe ſeveral ſorts of *Baſtardy* are diverſe in Law. As, *firſt*, it ſtains the Blood, ſince he that is a Baſtard can neither challenge Honour, nor a Coat of Arms from the Father or Mother, becauſe he was begot and born out of Matrimony, which (according to the *Canon* Law) is the firſt ſtep to Honour: And, therefore, the Apoſtle calls Marriage Honourable. Whereupon it muſt follow, if this be true without any Limitation, that the Oppoſite thereof is Shame, in reſpect to carnal Copulation: For though it is no Sin for a Baſtard to be a Baſtard; yet it is a Defect in him to be ſuch a Perſon, and a thing eaſily ſubject to Reproach.

Secondly,

Secondly, It repels him that is a Baſtard from all Succeſſion deſcending from Father or Mother, whether it be in Goods or Lands, unleſs there be ſome other collateral Proviſion made for the ſame; becauſe all Laws and Statutes, that have been made to any of theſe Purpoſes, were intended for the Benefit of ſuch as are Legitimate and next of kin by lawful Succeſſion, and not by unlawful Copulation. To legitimate him that was a Baſtard, when no Claim could be made to his Birth-Right but by Grace, by the *Civil* Law was made ſundry Ways. As, *firſt*, where the Father of the Baſtard (they being both ſingle Perſons) marry'd the Woman, by whom he begot the Child *. *2dly*, Where the Father did by his Will and Teſtament, or by ſome publick Inſtrument ſubſcrib'd by Witneſſes, name him to be his natural and lawful Son, or *ſimply* his Son, without the Addition of any other Words, as *Baſe* or *Natural*; and therewithal made him his Heir, which could only be in caſe the Father had no other natural and lawful Son then living †. *3dly*, When the Prince by his Reſcript ‖, or the Senate by their Decree, granted any one the Favour of Legitimation, which was done (for the moſt part) in ſuch Caſes only, where either the Child's Father, or the Child himſelf, offer'd his Attendance on the Court or Prince *. In this Realm, none of the ſaid ways of Legitimation take place, as far as I can learn, but only that which is done by Parliament; and that very rarely too: For, beſides thoſe that King *Henry* the VIIIth did, in the variety and mutability of his Mind towards his own Iſſue †, I think, we cannot ſhew many Examples. For as for that, which is wrought by ſubſequent Marriage, being a thing antiently preſſed by the Clergy of this Land, to be admitted in like manner as uſed in other Countries where the *Canon* Law ‖ herein takes Place, it was rejected by the Earls and Barons with one Voice, ſaying, They would not change the Laws of the Realm in that Point, which to that time had been uſed and approv'd by all Men †. All theſe caſes of Baſtardy in other Countries, whether they be ſuch or not, are to be try'd and determin'd according to the Eccleſiaſtical Law: But here, with us, 'tis diſputable, to what Law and how far they do appertain either to the Eccleſiaſtical or Temporal Courts.

* C. 5. 27. 11.

† C. 5. 27. 11. Nov. 117. cap. 2.

‖ Nov. 89. c. 9.

* C. 5. 27. 9.

† 28 H. 8. cap. 7. 1 Mar. 1. Parl. cap. 1.

‖ X. 4. 17. 6.

† 20 H. 3.

As to the Matter of Baſtardy, what it is, both the Eccleſiaſtical and Temporal Courts are pretty well agreed; but they differ in the Proſecution thereof: For the Eccleſiaſtical Law brings it into Judgment two ways; the one *Incidently*, and the other *Principally*; but the common Law makes two ſorts of Baſtardy, *viz. general* and *ſpecial*. I ſhall firſt here treat of the Eccleſiaſtical, and then of the Temporal Diviſion of Baſtardy. Now Baſtardy is ſaid to be *incidently* propounded, when 'tis laid in bar of ſome other thing that is *principally* commenced: As when one ſues for an Inheritance that he pretends is due to him by his Birth, and another impugns him therein by objecting Baſtardy againſt him, on purpoſe to exclude him from his Action in the Inheritance: Here, I ſay, the Bar is in the *Incident*, becauſe it comes excluſively to the Action of Inheritance; but the Action of the Inheritance itſelf was in the *Principal*, becauſe it was begun in conſideration of the Inheritance, and not with an intent to prove himſelf Legitimate; which (perhaps) he never thought of when he firſt entred the Action for the Inheritance. In which caſe, the Perſon charged with Baſtardy, may demand an Admiſſion to prove himſelf Legitimate before the Eccleſiaſtical Judge, and to be pronounced as ſuch a Perſon: *Ad curiam enim Regiam* (ſays *Glanvil**) *non pertinet agnoſcere de Baſtardiâ*, againſt which, the Law of the Land does not oppoſe itſelf, but acknowledges it to be the Right of the Church †. And yet to avoid all ſubtle and ſurreptitious dealing in this Behalf, it has ſet down

* Lib. 7. c. 13.

† 9 H. 6. c. 11.

a

a wary Form of Proceeding, by which the ſame ſhall be brought to the Ordinary; and ſuch as have an Intereſt in the Suit, may have notice thereof, and Time to object in Form of Law againſt the Proofs and Witneſſes of him, that pretends himſelf to be a *Mulier*, if they think fit to be heard: and what ſhall be certify'd herein by the Ordinary, as concerning the Birth of him that is charg'd with Baſtardy, that is to ſay, whether he was born before or after his Parents Marriage, ſhall be ſupply'd in the King's Court, either by judging for or againſt the Inheritance*.

* Glanv. lib. 7. cap. 15.

But Baſtardy is then taken to be *principally* propounded, when either one finding himſelf to be grieved with ſome malicious Speech of his Adverſary, who reproaches him with Baſtardy, or elſe fearing to be impeached in his good Name or Right, takes a Courſe to clear his Nativity, by ſuing him or them by whom he is reproach'd, or fears to be impeach'd in his Right and Credit; and hereby proves himſelf to be Legitimate againſt any Allegation or Objection to the contrary: Therefore, if ſuch malicious Perſon ſhall either not appear, or bring no good Matter againſt his Proof, but that it ſtands ſtill good and effectual in Law to all Intents whatever, tho' (perhaps) hereby he ſhall be able to carry the Inheritance, becauſe it does not belong to the Eccleſiaſtical Law to judge of Lands, Tenements, *&c.* and that the Statute ſets down a preciſe Form how Suits of this Nature ſhall be try'd; yet if no Contradicter appears herein, and the Suit was only commenc'd againſt ſuch as openly reproach'd him, or ſecretly buzzed abroad any Defamation of him in reſpect of his Legitimacy, it will ſurely by Accident be good for the Inheritance itſelf. For where a Man's Legitimation is ſufficiently proved, all things follow thereon, which naturally thereunto belong. But if any Man urges the Form of the Statute †, being intereſted therein, it muſt then neceſſarily be follow'd; becauſe it would otherwiſe be thought, that whatever was done before, as far as it concerns the Inheritance, was done by Colluſion, though it was but in Conſequence. This kind of Proceeding was much more in uſe formerly than at preſent, and never any Oppoſition made againſt it, though now it is impeach'd by a Prohibition at the common Law. And ſo far touching the Eccleſiaſtical Proceedings in this Buſineſs of *Baſtardy*.

† 9 H. 6. ch. 11.

The Temporal Courts divide Baſtardy into what the common Lawyers call *general* and *ſpecial* Baſtardy. The firſt is ſo called, becauſe it comes *Incidently*, and is in groſs objected againſt ſome that ſue in a Matter Principal, in order to diſappoint his Suit: As when a Suit is commenced in a Temporal Court for an Inheritance, and the Defendant pleads in Diſability, that the Plaintiff is a Baſtard. For the Iſſue muſt be join'd upon it, and tranſmitted by the King's Writ to the Ordinary, who is to try it in his Conſiſtory Court, not according to the Canons, but in Purſuance of the Rules of the Common Law, though it be of Eccleſiaſtical Cognizance: For theſe Laws differ in this Matter, *viz.* By the *Canon* Law he is no Baſtard, that is born before Marriage, if the Parents afterwards intermarry; but it is otherwiſe by the Common Law; for ſuch a Child is a Baſtard ||. This is ſent to the Biſhop with certain Additions for the greater perſpicuity of the Inquiry thereinto; as that whether the Perſon charged with Baſtardy was born in lawful Matrimony or not, or whether he was born before his Father and Mother were lawfully contracted together in Marriage, or after *. Which Inquiry the Ordinary is to make by his own Authority; and if he finds the Truth of the Matter upon examination to be this or that, he is, after Sentence in his own Court, to certify the Matter, as it appears to him, under his Seal unto the King's Courts accordingly, which Certificate is concluſive to them; and they are to

|| 20 H. 3. ch. 9.

* Lib. Intrat. fol. 35.

give Judgment as 'tis found before the Ordinary, either for or againſt the Inheritance in Queſtion *.

*9 H. 6. ch. 11.

But where the principal Matter of the Suit is concerning Baſtardy itſelf, as when an Action of Slander is brought for calling the Plaintiff Baſtard, and the Defendant juſtifies that he is a Baſtard, which ſhall be try'd by the Country; and this is call'd *ſpecial* Baſtardy. Others define *ſpecial* Baſtardy to be, where the Marriage is confeſſed, but the Priority or Poſteriority of the Birth of him whoſe Nativity is in Queſtion, is controverted: which, in my Opinion, is nothing elſe but *general* Baſtardy diverſify'd in Terms, but agreeing in Matter and Subſtance with the other. For even theſe Things, which (they pretend) make *ſpecial* Baſtardy, are Parts and Members of *general* Baſtardy, and are either confeſſed or enquired into by virtue of the King's Writ for the ſame. For, *firſt*, in reſpect of Matrimony here mention'd, it is acknowledg'd both by the Plaintiff's Pleading of it, and the Defendant's anſwering thereunto: and, therefore, the Plaintiff's Plea is thus, *Thou art a Baſtard for that thou waſt born before thy Parents were contracted together in Wedlock, or their Marriage ſolemniz'd in the Face of the Church*: To which the Defendant replies, *I am no Baſtard, becauſe I was born in lawful Wedlock, or after my Parents lawful Marriage.* In both which there is a Marriage confeſs'd, and the Queſtion only is touching the Priority or Poſteriority of the Birth of him, that is charged with Baſtardy, whether ſuch Nativity happen'd before or after the Parents Marriage; which, as they hold, is the other Member of *ſpecial* Baſtardy: And yet this Priority or Poſteriority of Birth comes no leſs in enquiry to the Ordinary in the Caſe of *general* Baſtardy, than they make it to be traverſable in *ſpecial* Baſtardy; and, therefore, the Writ to the Ordinary for *general* Baſtardy is conceiv'd in this manner, *viz. Inquiratis utrum prædictus A. pars rea, genitus vel natus fuit ante Matrimonium contractum inter talem Patrem ſuum & talem Matrem ſuam: vel poſt* †. So that they muſt either confeſs there is no ſuch Baſtardy, as is pretended, different from what is try'd before the Eccleſiaſtical Judge, or that they themſelves confound the Members that ſhould divide the ſame, and make them one or the other as they pleaſe: for both *ſimply* they cannot be, unleſs they be diſtinguiſh'd with other Notes and Differences, than hitherto I find they are. But in truth, if theſe Things are well conſider'd, *ſpecial* Baſtardy is nothing elſe but the Definition of the *general*, and the *general* again, is nothing elſe but a Definite of the *ſpecial*. For whoever is born out of, or before lawful Marriage, is a Baſtard; and again he is a Baſtard, that is born before, or out of lawful Matrimony: ſo that theſe Things, to be a Baſtard, and to be born out of lawful Wedlock, are convertible the one with the other; and 'tis hard to make a Divorce between theſe things that are ſo near in Nature to each other, as being convertible Terms; and to try them in different Courts, ſince they have ſo near an Affinity to each other, being the ſame in Subſtance and Nature. Wherefore, I think, they ought to be try'd by the ſame Law, *ne continentiæ cauſarum dividantur*: which is as great an Abſurdity in Law, as it is in other Learning, to deny a general Principle or Maxim of the Profeſſion. And thus far concerning the Reaſons and Arguments that may be brought againſt this *ſpecial* Baſtardy. *Lindwood* in his Catalogue of Cauſes, which he makes to be of Eccleſiaſtical Cognizance in his Time, reckons *Legitimation* or the *Tryal of Baſtardy*, as one among the reſt; becauſe in thoſe Days there was no Diſpute or Practice to the contrary, whereby the Eccleſiaſtical Courts were hindred by the Temporal in their Proceedings touching Baſtardy.

† Lib. Intrat. fol. 35.

Of

Of Eccleſiaſtical Benefices, the Diviſion of them, &c.

IN treating of Eccleſiaſtical Benefices, I ſhall, *Firſt*, conſider after what manner they were inſtituted in the early times of the Chriſtian Religion. *Secondly*, I ſhall enquire, what Nature they were of in the middle Age of the Church. And, *Thirdly*, I ſhall ſhew, what Kind they are of now at preſent. By the early Times of the Chriſtian Religion, I mean the days of the Apoſtles, when all things in the primitive Church were in Common, and when Clergymen could not pretend to any ſuch thing as Property, but were contented to live out of the Common Stock; ſuch Perſons as were converted to the Chriſtian Faith, ſelling their Eſtates, and laying the Price thereof at the Apoſtles Feet. By the middle Age of the Church, I mean that which was ſoon after the Apoſtles; becauſe then they began to purchaſe Lands and Eſtates for the Maintenance of the Clergy; and Biſhops had the Diſpenſation of the Fruits and Profits thereof, by applying them as they thought meet and convenient for the good of the Church: And ſuch of the Clergy as had Eſtates of their own, were, by the Laws then in being, not to partake of that Proviſion which was reſerv'd for the Maintenance of ſuch as liv'd in the Cathedral Churches with their Biſhops in Common, and were poor and indigent: and this was the State of the Clergy after the *Roman* Emperors became Chriſtians. By the third Age of the Church, I mean That when Chriſtians began to ſhew leſs Fervency for Religion, and the Clergy themſelves began to purchaſe large Eſtates of their own out of the Rapine they made from the Blindneſs of Man's Devotion towards them: For as yet, they poſſeſs'd themſelves of their Eſtates, and acquired great Wealth to the Church, without giving much Scandal or Offence to Religion itſelf; which they did, till Popery began to erect itſelf, and lord it over the reſt of Mankind; and when Churches began to be built and endow'd not only for the Indigent, but likewiſe for all Miniſters ſerving the ſame; and otherwiſe, even in thoſe times, Benefices could not be acquired. But this Acquiſition of Benefices, in proceſs of time, introduced Pride and Lazineſs among the Clergy, and gave them to underſtand, that they were rather Rulers of Men, than Servants of God: for as long as they liv'd on the Common Stock, or on the Contributions of the People, they were generally Men of Piety and Humility, and regarded their Flock more than many of them do at preſent. And, from this growing evil of purchaſing Eſtates in the Church, 'tis to be obſerv'd, that Perſons of Wealth and Birth came to have Eccleſiaſtical Benefices; and even ſuch as had large Eſtates of their own, were wont to live on the Revenues of the Church. And thus I have diſtinguiſh'd theſe three *Æra's* of the Church, in reſpect of Eccleſiaſtical Benefices, in order to deſtroy that Contrariety which may otherwiſe ariſe concerning the Laws relating to Church-Benefices.

Now under the Name and Appellation of an *Eccleſiaſtical Benefice*, we may reckon not only a Benefice *with Cure of Souls*, but even a Prebend, Dignity, Parſonage, and all Churches and other Benefices whatever, either

with

with or *without Cure of Souls*, which are acquired *cum Titulo*, and by Canonical Inſtitution *. And, in this Senſe, a Benefice is twofold: For it is either ſaid to be a Benefice *with Cure of Souls*; or otherwiſe in *Latin*, ſaid to be *ſimplex Beneficium*. In the firſt Caſe, if it be annex'd to another Benefice, the Beneficiary is obliged to ſerve the Pariſh-Church in his own proper Perſon, unleſs there be a reaſonable Cuſtom or Conſtitution to the contrary, whereby the Church may be ſerved by a Vicar: But 'tis otherwiſe, if ſuch Cuſtom or Conſtitution be not founded upon Reaſon. As for Example, when the Canon of a Cathedral Church has a Benefice with Cure of Souls *in Titulum*, and his Perſonal Reſidence is neceſſary at the Cathedral Church for his Advice and other Matters; or elſe that he cannot be ſupported from his Prebend: for ſuch a Cauſe as this is founded upon ſufficient Reaſon, that he may, by a Concurrence or Statute, hold both, and ſerve the one by a Vicar. But 'tis otherwiſe, where there is no ſuch Cuſtom or Conſtitution for ſerving the Cure by a Vicar.

* Dd. in c. 27. X. 1. 3. v. *Beneficium.*

But tho' the Words *Beneficium Eccleſiaſticum*, in a large Acceptation thereof, may comprehend all Eccleſiaſtical Livings, whether they be Dignities, or Parochial Cures, as in the Statute of the 13th of *Richard* II. where they are divided into *Elective* and *Donative*; yet, according to a more ſtrict and proper Interpretation thereof, an *Eccleſiaſtical Benefice* may, in *Latin*, be defin'd to be *Res Eccleſiaſtica, quæ Sacerdoti vel Clerico, ob ſacrum Miniſterium utenda in perpetuum concedatur* †; that is to ſay, an Eccleſiaſtical Eſtate, which is granted to ſome Prieſt or Clergyman for Term of Life, to be enjoy'd by him on the Account of his Miniſtry in the Church. It is called *Res*; becauſe it is not the Miniſtry or Office itſelf, but rather the Profit ariſing from thence, which is the Benefice. And it is called *Eccleſiaſtica*, becauſe, according to the *Canoniſts*, ſuch Profit is dedicated to God and his Church. [*Sacerdoti*, &c.] becauſe where an Eccleſiaſtical Thing is granted to Laymen, it is not properly ſaid to be a Benefice in this Senſe. And it is ſaid *ob ſacrum Miniſterium*, becauſe ſuch a thing, as dedicated to God, ought to be for the Uſe of ſuch as wait and ſerve at his Altar. [*Utenda*] becauſe the Perſons receiving the ſame, have only the *Uſu-Fruct* thereof, and not any Fee or Inheritance therein. And it is ſaid to be *in perpetuum*, becauſe the Clerk is to enjoy and receive the ſame for ever during Life; or (as others ſay) becauſe the Thing is annex'd to the Church for ever. So that, according to this Definition, an Eccleſiaſtical Benefice extends itſelf not only to Parochial Churches, and the Cure thereof, but alſo to Dignities and all other Eccleſiaſtical Promotions, as to *Deaneries, Archdeaconries, Prebends*, &c. ||

† Duaren de Ben. lib. 2. cap. 4.

|| Inſt. pt. 3d. cap. 71.

But my Lord *Coke* affirms *, that it appears, in the Books of the Common Law †, That *Deaneries, Archdeaconries, Prebends*, &c. are Benefices with Cure of Souls, tho' they are not comprehended under the Name of *Benefices with Cure of Souls*, within the Statute of 21 *H.* 8. *c.* 13. by Reaſon of a ſpecial *Proviſo* ||; which they had been, if no ſuch *Proviſo* had been added: But, with my Lord *Coke*'s Leave, theſe were never reckon'd as *Benefices with Cure of Souls*, according to the *Canon* Law, or the Law of the Church, as anciently receiv'd here in *England*. *Hobart*, in *Colt* and *Glover*'s Caſe, againſt the Biſhop of *Litchfield* and *Coventry*, ſays, ſpeaking of the Statute of 21 *H.* 8. *c.* 13. That Biſhopricks are not included, within that Law, under the Benefices: ſo that if a Perſon takes a Biſhoprick, it does not avoid by Force of that Law of *Pluralities*, but by the antient Common Law, as it was held in *Henry* the IVth's Time *. The Canoniſts hold, That an Eccleſiaſtical Benefice conſiſts of the ſacred Function, and of the Provinces thereunto belonging †; it being a diſtinct Portion of Eccleſiaſtical Rights join'd to a ſpi-

* 9 E. 3. 22. 10. E. 3. 1.

† 29 E. 3. 44.

|| Reg. fol. 58.

* 11 H. 4. 60.

† 1 Q. 3. 7.

ſpiritual Function: and till it be ſet apart and diſtinguiſh'd from Temporal Intereſts, it is not properly an Eccleſiaſtical Benefice *; and it is term'd a Portion, in that it includes Fruits; for it cannot properly be called a *Benefice* without *Fruits* †.

* X. 3. 8. 10.

† Abb. in c. 28. X. 3. 5.

But all Church-Livings are not ſtiled *Eccleſiaſtical Benefices* after one and the ſame Manner, but by various and ſeveral Appellations; and, therefore, the Perſons in Poſſeſſion of them, are alſo ſtiled by divers Names and Titles, as *Deans*, *Archdeacons*, *Parſons*, *Vicars*, *Prebendaries*, *Biſhops*, and the like: Wherefore, I ſhall here give the Reader the ſeveral Diviſions of theſe *Benefices*; whereof ſome are *properly* ſo called; and others are term'd ſo *improperly*. Of Benefices properly ſo called, ſome are ſtiled *greater*, and others *leſſer* Benefices ||. Among the greater in the *Romiſh* Church, the *Canoniſts* reckon the Papacy or Pontificate, which is even called a Benefice *; and the *Greater* are diſtinguiſh'd from the *Leſſer* by the means of *Collation*: And 'tis certain, that all ſuch as are called *Prelacies*, may be term'd the *greater* Benefices; as that of the Pontificate, a Patriarchſhip, an Archbiſhoprick, Biſhoprick, Abbacy, and the like; but Rectors of Churches do not properly come under the Appellation of *Prelates* †. *Secondly*, There are ſome Benefices which have a *Cure of Souls* annex'd to them; and ſome, which have not ||, as aforeſaid. And this *Cure of Souls* is, according to *Innocentius* *, conſider'd in a threefold manner, *viz. Firſt*, When he that is ſet over the Benefice is oblig'd to adminiſter the Sacraments; and *Secondly*, when he is bound to preach and expound the Word of God unto the Pariſhioners of that Place; and *Thirdly*, to read Divine Service and the like; and in the *Romiſh* Church, to hear Confeſſions: Wherefore, in theſe kind of Benefices, 'tis neceſſary that their Rectors ſhould be in actual Prieſts Orders, or (at leaſt) they ought to be ſo within a Year after they have taken the Benefice on themſelves. And this Year ſhall be computed from the Time that any one has had a quiet Poſſeſſion of his Living or Benefice, or (at leaſt) from the Time that he might have had ſuch, if it be not through his own Default that he had not ſuch. We call theſe benefic'd Men, by the Name of *Rectors*, *Curates*, *Perpetual Vicars*, *Paſtors*, and the like. Again, there are ſome Benefices which are ſaid to be *Benefices with Cure of Souls*, in reſpect of a *Contentious* Juriſdiction, which is annex'd to certain Benefices †: And theſe Beneficiaries have the Power of Viſitation, Inquiſition, receiving of Procurations, Suſpending, Excommunicating and Abſolving; which Things they may ſometimes do without a Benefice ||, as in the caſe of an Archdeacon. Sine-Cures, or Benefices without a Cure of Souls, are ſuch as thoſe, whoſe Rectors are not oblig'd to the Diſcharge of the aforeſaid Duties, but are only bound to attend Divine Service at Canonical Hours *: And theſe are called *ſimple Benefices*, and have always perpetual Vicars annex'd to them for the *Cure of Souls* †.

|| X. 5. 40. 32. X. 3. 5. 8.

* 21 Diſt. c. 1. 3.

† Gloſs. in c. 2. Clem. 3. 7. 5. v. *Prælati.*

|| vi. 3. 4. 32.

* In d. cap.

† Extra. 3. 4.

|| Dd. in c. 4. X. 1. 23.

*X. 3. 7. 2.

† X. 3. 5. 30. vi. 3. 4. 6.

Another Diviſion of *Eccleſiaſtical Benefices*, according to the Canon Law, is, that there are ſome, which are ſtiled *Regular*; and others, which are term'd *Secular* Benefices. The firſt are given to Regulars, or Perſons in Monaſteries; and the ſecond are given to Secular Clerks, who do not profeſs a Monaſtick Life, or any Rule of Living ||. Theſe Qualities do, for the moſt part, accede to Benefices from their Charter or Reſcript of Foundation, *viz.* when ſuch Benefices are given either to Regulars or Seculars thereby. But ſometimes *Regular* Benefices are poſſeſſed by Secular Men, and ſometimes *Secular* Benefices are held by Regulars, by legal Preſcription; *viz.* When a Secular Church has, for Forty Years together, been in the Poſſeſſion of a Regular Clerk, ſo that the Quality being now

|| vi. 3. 4. 3.

adjudg'd to be chang'd hereby, it does from a *Secular* become a *Regular* Church, and may be held by Regulars: And, on the contrary, if a *Regular* Church has been poſſeſs'd by a Secular Clerk for ſo many Years, it becomes a *Secular* Church *. For the Time of Forty Years, according to the Common and Ordinary Law of the Church, is ſufficient in a Preſcription of Eccleſiaſtical Matters relating to Churches †; provided, that there be in ſuch a Poſſeſſion of a Benefice, a concurrent Title, together with the Time of ſuch Preſcription, that is to ſay, a Canonical Inſtitution, and what we call *Bona Fides*: For otherwiſe the Quality of Benefices is not alter'd by Time alone. But from Regular and Secular Benefices, a third *Species* of Benefices may ariſe, which we commonly call *Commendams*; which is, when the Pope does, by virtue of ſome Privilege, grant a Secular Benefice unto a Regular Perſon, or on the contrary, a Regular Benefice unto a Secular Perſon: And from hence, Perſons came to hold two Churches, one by way of Title, and the other *in Commendam* ‖; of which hereafter, under its proper Title.

* Rot. deciſ. 32.

† X. 2. 26. 4. X. 2. 12. 3.

‖ vi. 1. 6. 15.

Some Benefices have Sacred Orders annex'd to them, and Perſons promoted thereunto, are oblig'd to be in Holy Orders, or ſuch Orders (at leaſt) as are requiſite thereunto; becauſe where there are two Things or more annex'd unto each other, if a Perſon accepts of one, he ſeems to have oblig'd himſelf to fulfil the other: as it happens, where a Clergyman takes a Living with *the Cure of Souls*; for then, on his acceptance of the Benefice, he is bound to perform *the Cure of Souls* *. And there are ſome Benefices, which have no Orders annex'd to them; as that of a Canonry: And, in ſuch Benefices as theſe, a Perſon is not bound to ſee himſelf promoted to Holy Orders according to the *Canon* Law, as he is in the other Caſe, unleſs the Advantage or Neceſſity of the Church requires it †. But againſt this *Gloſs* in the Margin, and the Text itſelf, ſome are of an opinion, That if a Benefice has Orders annex'd to it, the Perſon promoted thereunto ought, at the Time of his Promotion, to be veſted with Holy Orders ‖. But this admits of a Diſtinction; for there is one Kind of annexing in reſpect of the Aptitude, and another Kind of annexing in reſpect of the Act it ſelf. In the firſt Caſe 'tis neceſſary, That the Perſon, at the Time of his Promotion, ſhould be of ſuch an Age as is requiſite to ſuch Orders, which the Perſon promoted ought to take: For then 'tis not neceſſary, that he ſhould be actually in ſuch Orders; but 'tis well enough, if he be qualify'd to receive ſuch Orders, being then oblig'd to receive the ſame at the Time of the next Ordination. For though a Dignity or Church *with Cure of Souls*, has Prieſts Orders annex'd to it; yet 'tis not neceſſary that the Perſon promoted thereunto, ſhould be in ſuch Orders at the Time of his Promotion, but 'tis ſufficient for him if he afterwards becomes a Prieſt; becauſe ſince ſuch Annexing is only in reſpect of Aptitude, he ought to be apt and fit for ſuch Orders, and that is enough. But in the ſecond Caſe, when ſuch Annexing is in reſpect of the Act it ſelf; 'tis neceſſary for the Perſon promoted, to be at the Time of his Promotion, veſted with the Orders annex'd to his Benefice. By a Statute of the Realm of *England* *, 'tis required, That all beneficed Perſons, as well as Dignitaries, ſhould be in Orders at the Time of their Admiſſion and Inſtitution thereinto.

* Gloſs. in c. 6. X. 1. 14.

† Gloſs. ut ſupra.

‖ 60 Diſt. c. 1.

* 14 Car. 2. ch. 4.

In the Council of *Lateran* it was decreed, that no one ſhould have ſeveral Dignities, or retain more Pariſhes than one at the ſame time, under the Penalty of loſing the Benefice or Dignity thus accepted; and the Perſon that was collated or preſented thereunto, was to loſe the Right and Power of Collation or Preſentation for that Turn. And becauſe this Decree was ill obſerved, Pope *Innocent* through a deſire of putting a

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ſtop to this kind of Avarice in the Clergy, decreed, that whoever ſhould for the future be admitted to any Benefice *with Cure of Souls* annex'd to it, ſhould be *ipſo Jure* deprived thereof on his taking a ſecond Living, if the firſt had a Cure of Souls annex'd to it *: and if he endeavour'd to hold the ſecond with the firſt, he ſhould ſtand deprived of them both; and he, to whom Preſentation or Collation did belong, might preſent or collate whomſoever he pleaſed; and if he delay'd to preſent or collate thereunto beyond the ſpace of ſix Months, ſuch Preſentation or Collation ſhould devolve unto others, according to a Decree of the *Lateran* Council. By the *Canon* Law, a Perſon, after he has once obtained and been in full Poſſeſſion of a ſecond Benefice, cannot deſert the ſame, and return again to his firſt Living; becauſe ſuch Living is immediately void by his Aſſecution of a ſecond Benefice †. But yet we have another Law ||, which ſeems to oppoſe the Law next immediately quoted; by which the Perſon has his Option given him, to retain which Living he pleaſes. But (I think) this laſt Law here quoted can only have place at this Day, *viz.* when the Biſhop of the *Dioceſe*, where the firſt Living *with Cure of Souls* lies, will not confirm his Tranſlation, or going to a ſecond Church: For if he paſſes to a ſecond Benefice without the Biſhop's Licence or Diſpenſation, the Biſhop may, according to the *Canon* Law, either ratify or not ratify ſuch a Tranſlation; and thus he ſhall in ſuch meaſure have his Option of the firſt or ſecond Benefice. But this Law ſeems to carry much Hardſhip along with it, *viz.* that a Biſhop ſhould thus hinder ſuch a Perſon (perhaps) on the Account of one ſmall Living, which he has under him: And therefore it is not received here in *England*, where the Statute-Law preſcribes what Livings are compatible, and what not *. By the *Canon* Law *Incompatible* Benefices are Dignities, Parſonages, and other Benefices, which do by ſome Statute or approv'd Cuſtom require a Perſonal Reſidence: and hence it comes to paſs, that even Prebends, which do by Statute or Cuſtom require a perſonal Reſidence are deemed *Incompatible* Benefices. And this is true, where any one is *ſtrictly* and *preciſely* obliged to a perſonal Reſidence: But 'tis otherwiſe if he be not bound hereunto *per Subſtractionem Beneficii*, that is to ſay, by a Sequeſtration of the Profits.

When a Diſpute or Controverſy happens between any Perſons touching a Benefice, the Confeſſion of one of the Litigants, that ſuch Benefice belongs to his Adverſary, ſhall not profit and avail the adverſe Party, when the Queſtion is *de Titulo Beneficii*: but ſuch Title ought to be prov'd, whereby it may appear, that he has a Right in the ſaid Benefice †; becauſe no one can be in Poſſeſſion of Eccleſiaſtical Benefices, without Canonical Inſtitution firſt obtained ||. And this Rule of Law proceeds, when a Perſon would *ex toto* infer the Proof of a Title to a Benefice by the Confeſſion of the adverſe Party. But if any one has ſet forth his Title, which is reckoned dubious by Facts and Deeds produced by the adverſe Party; then if ſuch adverſe Party confeſſes his Adverſary to have a better Right than himſelf, the Confeſſion of the adverſe Party ſhall in ſuch a Caſe be for the Advantage of the other Party; ſince a Title is confirm'd by ſuch a Confeſſion *.

Panormitan obſerves of a beneficed Clergyman, that by the *Canon* Law he cannot lay up his Patrimonal Eſtate for his Kindred, and live on the Revenues of the Church, which ought at the time of his Death to come to the Church again; and he that does ſo, (ſays the Abbot) commits a deadly Sin: But then this great Commentator afterwards contradicts himſelf, in quoting the antient Laws of the Church, when all things were in common among Clergymen and Laymen, that were Chriſtians. But in proceſs of time, when Churches began to be endow'd, and a diſtinct Por-

* Abb. Conſ. 38.

† X. 3. 5. 28.
|| X. 3. 5. 7.

* 21 H. 8. ch. 13. Sect. 8, 9, & 10.

† Gloſſ. in c. 2. X. 1. 3.
|| vi. de Reg. Jur. c. 1.

*Boer deciſ. 293. n. 2.

Portion was aſſign'd unto the beneficed Clerks, they might then,(ſays he) lay up the Profits of their Patrimony, and live on the Revenues of the Church, provided they did not do this with a covetous Mind. But, in order to enrich and aggrandize the Church, Prieſts were forbidden to marry: And therefore by the Papal Canons, a Clergyman that has a Wife cannot have
† X. 3.3.3. an Eccleſiaſtical Benefice †; much leſs can a *Bigamiſt* have ſuch a Benefice, according to that Law. But this is otherwiſe among ſuch as are of the Reform'd Religion: and tho' the Puniſhment of Diſability does not take place among the *Proteſtant* Clergy during the Marriage, that is between them and their Wives; yet it were to be wiſhed, that many of them would not haſten ſo much into Wedlock, to gratify a carnal Appetite, before they can well maintain a Wife and Children.

In many Gloſſes the Competency or Sufficiency of an Eccleſiaſtical Benefice, ought to be conſidered not only in reſpect of the Perſon who ſerves the ſame, but even in reſpect of the *Onera* and Charges incumbent on ſuch a Benefice. In reſpect of the Perſon, we ought have a good Regard to the Nobility of his Condition, and likewiſe to his Knowledge, Morals, perſonal Merit, and his virtuous Behaviour. In reſpect of the *Onera* and Incumbrances of a Living, we ought to conſider whether it be ſufficient for himſelf and his Family, and to maintain Hoſpitality; and likewiſe to pay and ſatisfy ſuch Dues as do of right belong to the Biſhop and the Church. This I call a ſufficient Benefice or Allowance, which every Perſon that founds and endows a Church, ought to make for the Maintenance of its Miniſter. But a *fat Benefice* is ſaid to be that which ſo abounds with an Eſtate and Revenues thereunto belonging, that a Man may expend a great deal in Delicacies of eating and drinking, maintain his Family, keep Hoſpitality, and diſcharge all other Incumbrances, as aforeſaid.

* X. 3.38.22. If a Patron ſhall neglect to preſent unto a Benefice, that has been void above ſix Months, the Biſhop may collate thereunto *; and if the Biſhop ſhall neglect to collate thereunto for ſix Months, it devolves to the Archbiſhop ‖; and if the Archbiſhop ſhall not fill it up within ſix Months enſu-
‖ X. 1.10.3. ing, it lapſes to the King, but according to the *Canon* Law to the Pope *.
* X. 3.8.2. But no one can preſent or give a Benefice to himſelf; ſince there ought to
† X. 3.7.7. be a perſonal Diſtinction between the Giver and Receiver †: And ſuch Perſons as ſhall confer Benefices on unworthy and diſqualified Perſons after a Notice or Correction given, ſhall for that Turn be deprived of the
‖ X. 3.5.29. Power of preſenting unto ſuch Benefices ‖. A Perſon that is admitted unto a Benefice *with Cure of Souls*, ought to be twenty-four Years of
* X. 1.6.7. Age compleat, or (as we ſay) twenty-five *anno Currente* *. A Benefice ought to be void, before it can be diſpos'd of or given away; eſpecially if it be by any Perſon's Death: And this in order to avoid all unlawful Sollicitation, and the impious Deſires of getting other Mens Prefer-
† X. 3.9.2.3. & 13. ments, by wiſhing for their Deaths †. For as the *Civil* Law looks upon all Reverſionary Grants and Donations of Eſtates with an odious Eye, which are made during the Life-time of the Perſons in Poſſeſſion, and to whom they belong, and condemns all Pacts and Covenants made about
‖ C. 2.3.30. C.S. 3.4.4. Succeſſion ‖; ſo the *Canon* Law excommunicates and depoſes all ſuch Perſons as do procure the Preſentation or Collation to Eccleſiaſtical Benefices during the Life-time of the preſent Incumbent or Poſſeſſor there-
† X. 3.8.1. 2.Q.1.7. of †, unleſs ſuch Perſon ſhall in his Life-time, for ſome juſt Cauſe or other, be legally deprived thereof; or the ſame ſhall be obtained through Incapacity, or ſome other way than by the Incumbent's Death.

* Dd. in c.10. vi. 1. 3. V. *vacabunt.* For according to the *Canoniſts* *, Benefices are ſaid to become vacant ſeveral ways, *viz.* by Death, Reſignation, Deprivation, Depoſition, Tranſlation,

lation, and the like: For according to the Archdeacon †, a Benefice is said to be vacant or void, that is without a Minister to officiate therein. But it is to be observ'd, that a Benefice is sometimes said to be vacant *de Facto*, and sometimes *de Jure*. A Benefice is said to be vacant *de Facto*, and not *de Jure*, when the Possession thereof is lost by Spoliation or Intrusion, and the like: But when a Person is *de Facto* incumbent on the Possession of a Benefice without a Title, then it is said to be vacant *de Jure* and not *de Facto*. A Person does, *ipso Jure*, lose and forfeit a Benefice by a Fault committed by him; and then such Benefice is said to be void or vacant by Deprivation or Deposition. As, *First*, if he has purchas'd and obtain'd the same by *manifest Simony*; for 'tis otherwise by the *Canon* Law, if it be acquired by *occult* Simony *. *Secondly*, A Benefice is said to be forfeited, if the Pastor or Possessor thereof be an Heretick Convict †. *Thirdly*, A Clerk shall forfeit his Benefice if he becomes an Intruder, and steps thereinto by Force and Violence; usurping the same by his own private Authority ‖. *Fourthly*, If he does by Calumny impeach an Election, and is not able to prove his Accusation: and if during the Time of three Years, which is the Term of Suspension for this Offence, he meddles with the Administration of his Office *; (for in this Offence, Suspension ought to be previous to Deprivation.) A Beneficiary shall likewise lose his Living if he be guilty of Sodomy †, Assassination ‖, or be found guilty of Forging the Pope's Letters *; and also for striking or prosecuting a Cardinal in the *Romish* Church †. But we here in *England* do not follow the *Canon* Law in several of these Respects, as I shall observe hereafter under the Title of *Deprivation*.

† In c. 4. vi. 1. 6. v. *Vacant.*

* X. 5. 3. 13. extra 5. 2.

† X. 5. 7. 9. vi. 5. 2. 19.

‖ vi. 3. 4. 18.

* vi. 1. 6. 1.

† X. 5. 31. 4.

‖ vi. 5. 4. 1.

* X. 5. 20. 7.

† vi. 5. 9. 5.

There was a Canon made in the fourth *Lateran* Council, forbidding Ecclesiastical Prebends, or any other Offices in the Church, to continue long void, but that they should be filled up, and conferred on such as were fitly qualify'd for the Administration of them within six Months ‖. But yet this Canon was not made in Derogation to any shorter Term of Time in the obtaining of Spiritual Benefices, given by any special Right, which remain in their antient State, as before: For if a Dispute be touching a Benefice, which is granted to any one by Option, he that has the Right of Option ought to chuse within twenty Days, if there be a Specialty of Law for so doing *. In making a Presentation to a vacant Church, according to the *Canon* Law, a Layman ought to Present within four Months, and a Clergyman within six, otherwise a Devolution or Lapse of Right happens †; as I shall shew hereafter, with the Reasons thereof. Though a Mandatary, to whom the Pope has, by virtue of his Prerogative, and his own proper Right, given a Mandate for a Benefice, ought, within ten Days after the Presentation of such Mandate made to him, to whom it is directed, to accept of that Benefice which is void, from the Day of his Knowledge thereof, lest the Ordinary should collate thereunto; yet in *France* a Mandatary cannot interrupt an Ordinary Collator, till a Month is expired from the Day of such Presentation. But in *England*, we have nothing to do with the Pope's Mandates, Reservations of Grace, and Provisions of Benefices.

‖ X. 3. 8. 2.

* vi. 3. 19. c. *unic.*

† vi. c. ut sup.

If an Incumbent of a Church *with Cure of Souls*, under eight Pounds *per Ann.* take a second Benefice *with Cure*, to which he is instituted and inducted, without obtaining a Dispensation for holding them both, by which the first is void in respect of the Patron, so that he may present according to the Statute: and before the Patron presents upon such Voidance, the Archbishop does, by Force of the Statute ‖ of the 25th of *Henry* VIII. grant to him a Licence *perinde valere*, to hold the first with the second Benefice; this is not a good Licence, tho' confirm'd according

‖ 25 H. 8 ch. 21.

to the Statute, to take away the Patron's Preſentation, tho' his Church was only void by Force of a Canon*, and not by the 21ſt of *H.* 8. *ch.* 13. For by the Canon, the firſt Benefice was ſo void, that the Patron might have preſented before any Deprivation; and after the Patron has a Title to preſent, this Title cannot be taken away from him by a ſubſequent Licence or Diſpenſation, unleſs ſuch Licence or Diſpenſation could make a void Church become full †, according to *Baldock*'s Caſe againſt the King. *Trin.* 14 *Car.* and upon a Writ of Error affirmed. *Roll*'s *Abr. pt.* 2. 359.

* X. 3. 5. 18.

† Vaugh. Rep. pa. 21.

Of a Biſhop, his Riſe, Power, and Office in the Church, &c.

A Biſhop in *Greek* called Ἐπίσκοπος, is an Overſeer or Super-intendant of Religious Matters in the Chriſtian Church among Men, and ought, as a good Shepherd of the People, to feed his Flock, and to watch for their Souls ‖, and in the Behalf of his Flock, to preſerve it from the Incurſions of Wolves and other ravenous Beaſts *: For his Office is rather a Truſt of great Care and Vigilance in the Church, than a Function of Power and Government therein. And this Office *Fabian* ſtrenuouſly diſcharg'd in the Council of *Chalcedon* againſt the *Eutychean* Hereſy; which was condemned by all the Biſhops there preſent at that Council, together with the wicked Doctrines and Opinions of thoſe Hereticks †. Wherefore only ſuch Perſons ought to be elected Biſhops, as are Men of good and prudent Behaviour, of a right and orthodox Faith, well-temper'd in their Manners, of a mature Age and great Humility, perfect in Body, and of an unblemiſh'd Birth, according to the Canons of the Church. And from what Place ſoever they come, let them purify all Things with an Integrity of Conſcience ‖, and not cohabit with lewd Women; but in the Place of a Wife, if poſſible, let them cleave and adhere to the Church of Chriſt, and not to one of their own Framing *. And, according to the Papal *Canon* Law, they ought not only to be without Wives, but without Children, which few of them are in *Popiſh* Countries, where they are reſtrain'd from Marriage: And, inſtead of natural Children, let them have all the Faithful of their Family, that the Goods and Eſtate of the Church may not be ſpent on their own Progeny, which they ought to lay out on the Poor †. They ought likewiſe to take care that they be not promoted to this Dignity by evil Arts and Means, *nec prece, nec pretio*; and ought to be ſo far free from all Canvaſſing and Sollicitation, that they ought to acquire their Benefices on earneſt Requeſt made to them, and as it were by Compulſion, avoiding the ſame on Intreaties made to them: ſuch was the Merit and Modeſty of Biſhops in antient Times, before large Revenues and Juriſdiction were added to their Biſhopricks. Therefore, in thoſe Days, if any one came to a Biſhoprick through a Corruption of Gifts and Preſents, or by any other baſe and ſordid Methods, he was not only tumbled down from the height of that Dignity, but was depos'd from the Degree or Order of the Prieſthood, with a Mark of perpetual Infamy ‖; and he that was once depos'd or ejected, could not afterwards be re-admitted to the Honour and Degree, which he had thus ſhamefully loſt *. Beſides, that

‖ Acts. ch. 20. v. 18.
* Diſt. 21. c. 1.
† C. 1. 3. 23.
‖ C. 1. 3. 31. & 42.
* C. 1. 3. 48.
† Nov. 6. c. 1. Nov. 123. c. 1. Nov. 137. c. 2.
‖ C. 1. 3. 31.
* C. 1. 3. 14.

which

which was given for this Degree or Order of Prieſthood, was forfeited to the Church, that ſuſtain'd this Injury; and the Perſon that receiv'd the Gift or Preſent, was fined in Twofold: And ſo the Law ſtands now in point of Simony here in *England**. This Crime of canvaſſing or ſollici- * 31 Elit. cap. 6.
ting for Church-Preferment is by the *Canon* Law called *Simony*; and is by that Law puniſh'd in a moſt grievous and rigorous Manner, if the Law was duly put in Execution, as I ſhall hereafter obſerve under the Title of *Simony*. The Emperor *Juſtinian* has preſcribed a Form to be obſerv'd in the Election of a Biſhop, (for Biſhops were antiently choſen by the People out of the beſt and moſt learned of the Clergy) and, it was Pope *Innocent* the Third, who, for bye ends to the Hierarchy, changed this Form in ſome Reſpect. But moſt Chriſtian Princes do, at this Day, claim the Nomination of fit Perſons to be made Biſhops, and to receive Epiſcopal Inſtitution into Cathedral Churches, as they likewiſe do the Nomination of Abbots for all Monaſteries in their own proper Dominions, where Religious Houſes are ſuffer'd; and in Popiſh Countries, theſe Perſons do afterwards receive their Confirmation from the Hands of the Pope: And tho' here in *England*, the Dean and Chapter do elect a Biſhop upon the King's Nomination of him to a Biſhoprick †; yet it is nothing leſs † 1 Edw. 6. cap. 2.
than a *Præmunire* for them to refuſe and ſet aſide the King's Nomination. And *Covarruvias*, though a *Popiſh* Writer, thinks this to be a very good Law; becauſe (ſays he) 'tis the Intereſt of a King to know what ſort of Perſons they are, that have the Adminiſtration of Churches and the Government of Monaſteries, within their own Territories and Dominions ‖. ‖ Cap. Poſſeſſor. p. 2. §. 10. n. 5.

Though a Biſhop comes under the Appellation of a Prieſt or Presbyter; yet a Prieſt or Presbyter does not come under the Appellation of a Biſhop: becauſe there are many Prieſts which are not Biſhops, tho' there is no Biſhop, that is not a Prieſt in the Church. Indeed the Power of Biſhops and Presbyters was heretofore for ſome Time in common, but in ſuch a Manner (ſay the *Canoniſts*) as that it accrued to Biſhops by a kind of Right, and the Apoſtles gave it to Presbyters by a kind of Privilege indulged them for the common Good and Advantage of the Church. And this continued till ſuch Time as Schiſms and Contentions aroſe in the Chriſtian Church; ſo that every one thought the Perſons he baptiz'd, were his ſpiritual Children and in his own Power: And, therefore, the Power of Presbyters was by a general Decree abrogated all over Chriſtendom; and one certain Presbyter was hereby made to preſide over the reſt.

A Biſhop, according to St. *Paul*'s Direction *, ought to be veſted with * 1 Tim. ch. 3. v. 2, 3, &c.
fourteen Conditions or Qualifications. For he ought to be Blameleſs, that is to ſay, without any Crime or Blemiſh imputed to him; the Husband of one Wife; not given to Wine; a Perſon of Prudence, Modeſty, Hoſpitality and Chaſtity; a Teacher of the People; no Striker or litigious Perſon; not given to filthy Lucre or Covetouſneſs; a Man that governs his own Houſe; no Novice; but a Perſon well apparelled: For it is not the Name, but the Life of the Perſon, that makes a Biſhop. An Election therefore to a Biſhoprick, ought to be made of a Perſon that is fitly qualify'd for it, in reſpect of Knowledge, Age, and good Manners; and, according to the *Canon* Law, to be a Perſon born in lawful Wedlock or Marriage †. And thus the Council of *Lateran* ordains, becauſe ſome Per- † X. 1. 6. 7.
ſons had been elected Biſhops, which were no wiſe qualify'd in reſpect of Age, Knowledge, Morals, and the like; decreeing, That in all the Offices of the ſacred Miniſtry, there ſhould be three Things eſpecially requiſite and neceſſary, *viz.* Maturity of Age, Gravity of Manners, and Knowledge of Letters ‖: And, therefore, if we wou'd argue *à Minori ad Majus*, ‖ X. 1. 14. 15. X. 1. 6. 7.
theſe

theſe Qualifications are with greater ſtrength of Reaſon required in a Biſhop. And by the ſaid Council, it is at this Day required, That a Biſhop or Prelate in the Church ſhould be thirty Years of Age at the leaſt ‖: nor can this Law be diſpenſed with, in reſpect of a Biſhop that is under ſuch an Age, in oppoſition to the ſaid Council. For 'tis certainly very unfit, that ſuch Perſons ſhould be preferr'd to the Government of others, who know not how to govern themſelves. And hence it is, that St. *Paul*, in his firſt Epiſtle to *Timothy* *, ſays, That in the Choice of a Biſhop we ought to have a Regard to a Perſon, *that ruleth well his own Houſe, having his Children in ſubjection with all Gravity.* According to *Innocentius*, a Biſhop, ſuſpected of Sedition againſt the State of any Kingdom or Commonwealth, ought not to be promoted to a Biſhoprick: and that no one ought to intercede with the Prince for him, who lies under the Prince's Diſpleaſure; becauſe the Perſon thus interceding for him, would thereby incur the ſame Diſpleaſure. In the *Juſtinian* Code, we read of a Law made for expelling the Patriarch, or Biſhop of *Aquileia*, that City, for Sedition againſt the State or Republick of *Venice*; and it was therein ſaid, That he ought not to be heard on his Prayer to be reſtored, becauſe he is ſtill preſum'd to make worſe Attempts, and to think it his Duty ſo to do. How juſtly, therefore, was the late Biſhop of *Rocheſter*, Dr. *Francis Atterbury*, depriv'd of his Biſhoprick, and expell'd the Kingdom for High-Treaſon againſt the King and Government! A Biſhop diveſted of his Biſhoprick on the Score of ſome Crime committed againſt the State or Commonwealth, wherein he preſided as a Biſhop, ought to be baniſh'd and live a Hundred Miles diſtance (at leaſt) from ſuch State or Commonwealth; and if a Biſhop, diveſted of his Biſhoprick on ſuch Account, ſhall preſume to return or come into ſuch State or Commonwealth again, he ſhall be deliver'd up, and committed to ſome Monaſtery which is ſituated in another Kingdom. But by the Papal Law, a Biſhop ought not to be deliver'd to a Secular Court of Judicature againſt his Will: for, according to that Law, if a Judge ſhall order a Biſhop to be thus deliver'd up and treated, he ſhall be depriv'd of his Office, and condemn'd in the Sum of Twenty Pounds of Gold to the Uſe of the Church.

‖ X. 1. 6. 7.

* Ch. 3. v. 4.

The Election of a Biſhop or Archbiſhop, where the Papal *Canon* Law prevails, ought to be made within three Months after ſuch Vacancy †; otherwiſe a Devolution was heretofore made to the Pope on that Account ‖: but now 'tis made to the next immediate Superior, *viz.* to the Primate or Archbiſhop *, who in this Caſe has the Power of electing a Biſhop in *Popiſh* Countries, where the King has not the Nomination of him. And ſuch Biſhop elected, ought to be confirm'd within three Months after ſuch Election by his Archbiſhop, or elſe by the Pope in ſome Countries †. As an Election is previous to Confirmation; ſo, according to *Bertachinus*, and other *Canoniſts*, Conſecration is ſubſequent thereunto: For though a Perſon may be ſaid to be a Biſhop upon Confirmation; yet, without Conſecration, he cannot do ſome Things which relate to the Office of a Biſhop, as to Ordain and give Holy Orders to Perſons ſuing for the ſame; but before Conſecration he may do all ſuch Things as relate to Juriſdiction. A Biſhop is ſaid to be *in Morâ* in ſuing for Conſecration, if he does not apply for the ſame within the Time prefix'd by the Canons; that is to ſay, within three Months from the time of his Confirmation had and obtain'd in the Church. So that *firſt* of all a Biſhop is elected; *Secondly*, This Election is confirm'd, whereby the Biſhop elected does, in ſome meaſure, obtain a Right of Adminiſtration; and *Thirdly*, he purchaſes his Conſecration: ſo that it appears from hence, that

† 50 Diſt. c. 11.

‖ X. 3. 8. 12.

* X. 1. 6. 41.

† 100 Diſt. c. 1. 75. Diſt. c. 2.

that the one ariſes from the other. For, by virtue of his Election, he obtains Confirmation; and by virtue of his Confirmation, he receives Conſecration, and a full Adminiſtration of his Paſtoral Office. And hence the *Canoniſts* commonly ſay, That Epiſcopal Conſecration is an Order: and, therefore, in ſeveral Laws, a Biſhop is ſaid to be ordain'd, and in ſome Laws, he is ſaid to be conſecrated, ſince 'tis by Conſecration that he receives the Epiſcopal Order. But 'tis no more an Order, according to *Popiſh* Theologiſts, than the *Prima Tonſura*, they allowing only ſeven Eccleſiaſtical Orders; whereas the *Canoniſts* allow of nine of them in the Church, by reckoning the *Prima Tonſura* and the Epiſcopal Order as two.

Valeſius, in his Notes on the Eccleſiaſtical Hiſtory of *Socrates Scholaſticus* obſerves, that there were in *Egypt*, *Lybia*, and *Pentapolis*, no leſs than a Hundred Biſhops, at the Time when he wrote his Hiſtory; and about the ſame Number you meet with, in the ſecond Apology of *Athanaſius* againſt the *Arrians* *. From the ſixth Book of this Hiſtory of *Socrates*, we read, that the Biſhops formerly were not wont to preach to the People out of the Pulpit: for *Socrates* takes notice of this as a Thing ſingular in *Chryſoſtom*, *viz.* That being about to make an Oration to the People, he went up into the Pulpit, that he might be the more eaſily heard by the Congregation: For moſt commonly, in thoſe Times, the Biſhops preach'd on the Steps of the Altar in a ſtanding Poſture, having not as yet aſſum'd to themſelves the Pride and State of a Throne. And of this we are often inform'd from King *Childebert*'s Conſtitution, which *Sirmond* has recorded in the firſt Volume or Tome of the *French* Councils †: But 'tis imperfectly reported there. I only mention this to ſhew, that Biſhops then did not think Preaching beneath their Office, as ſome have done ſince; for, among other things that belong to a Chriſtian's Salvation, Preaching the Word of God (and not of Men) was thought very neceſſary; becauſe as the Body is nouriſh'd by natural and material Diet, ſo likewiſe is the Soul refreſh'd and nouriſh'd by this ſpiritual Food, if duly apply'd. And becauſe Biſhops ſometimes were not able to preach the Word of God unto the People by reaſon of Sickneſs and the Infirmity of old Age and the like, (for as yet they had not incumber'd their Office with ſecular Employments) they provided fit and able Perſons, at their own Coſts, to diſcharge this great Duty of their Calling; who were, in their ſtead, to inſtruct the People committed to their care, in ſuch a manner, as that they were edify'd both by Preaching and exemplary Lives ‖: And this gave the firſt Hint or Thought to their Succeſſors, after the Empire became Chriſtian, of erecting Cathedral and Collegiate Churches, which have not turned much to the Praiſe and Advantage of Religion itſelf for above a Thouſand Years laſt paſt (eſpecially) in *Popiſh* Countries. For no ſooner had Biſhops entangled themſelves with Temporal Affairs (which they were too fond of) but they began to lay aſide the Spiritual Buſineſs of their Office, to build unto themſelves ſumptuous Houſes, which they call'd Palaces; and to procure large Churches to be erected for them in their ſeveral Diſtricts, ſtiled Cathedrals and Conventual Churches; and in theſe they placed Perſons as Co-adjutors to them in their Epiſcopal Function: But more of this hereafter, under the Title of Churches.

Every City had its proper Biſhop, and whoever endeavour'd to deprive a City thereof, was, by the *Civil* Law, puniſh'd with Infamy and Confiſcation of Goods, tho' this was done even by the Prince's Commiſſion *: And, hereupon, according to that Law, Biſhops were commanded to exhibit a Perſonal Reſidence in the City allotted to them, and not to abſent themſelves from thence for a Year together; nor to travel and go into foreign Parts under pain of Depoſition, if they did not return to their

* Pag. 788.

† Pag. 300.

‖ 7 Q. 1. 1.

* C. 1. 3. 36.

Dioceſs on the Summons and Command of their Superior *, unleſs they were retain'd in the Prince's Service beyond the Year; for by the Prince's Command, Biſhops, and other Prelates of the Church, might at the Time, when this Law was made for their Puniſhment, engage themſelves in the Management of publick Secular Affairs. The Canons of the Church require a conſtant and aſſiduous Reſidence in Biſhops, and others, having the Cure of Souls committed to them †: And the Council of *Trent*, as bad as that Council was, avers this to be a Matter of divine Command *. By the 11th Canon of the Council of *Sardis*, no Biſhop was to abſent himſelf from his Church without evident Neceſſity above three Weeks: But as this was only a Provincial Synod, it did not extend to the whole Church, but only ſhews the Senſe of thoſe Fathers in reſpect of Epiſcopal Reſidence. But,

* C. 1. 3. 43. Nov. 6. l. 3. Nov. 123. c. 10.

† 7 Q. 1. 20.

* Seſs. 22. c. 1. de Reform.

By the 8th Canon of the firſt Council of *Nice*, which was a General Council, it was enacted, That two Biſhops ſhould not have a Title to, or Preſide over one and the ſame Church or City, as a Dioceſs was then call'd: Upon which Account *Auſtin* reſents it †, that he was ordain'd Biſhop of *Hippo*, during the Life-time of *Valerius* Biſhop of that Place, and at his Procurement; *Valerius* not knowing it to be forbidden by the Council of *Nice*. For *Valerius* being advanced in Years, and a *Grecian* by Birth, and not ſufficiently qualify'd to preach in the *Latin* Tongue, aſſum'd, and made uſe of *Auſtin* as a Co-Biſhop, for the greater Benefit of the Church of *Hippo* ||, and the whole *African* Church. For we read, that both *Valerius* and *Auſtin* were *Titular* Biſhops; and, therefore, one City had two Biſhops contrary to this Canon: And thus we likewiſe read, that there were two lawful Biſhops of *Rome* at the ſame Time, *viz. Liberius*, and *Felix*; and alſo two Biſhops of *Antioch*, *viz. Miletius* and *Paulinus*; ſo that the Canons of the Church were little regarded in thoſe early Times of Chriſtianity. But hereunto 'tis ſaid, that there are ſome Things, which are lawful *Jure extraordinario*, on the Account of ſome great Benefit or Neceſſity, which are otherwiſe forbidden *Jure ordinario*. And on this Account, that ſubtle Caſuiſt *Ockham* * diſtinguiſhes, That tho' the Papacy or Eccleſiaſtical Monarchy, be of divine Right (according to the *Popiſh* Notion of it) yet, for the Advantage and Neceſſity of the Church, the Monarchical State thereof may be changed in an extraordinary Manner, for ſome Time, into an Ariſtocratical Form of Government; (which in the primitive State of the Church was the true and original Form thereof:) for the Neceſſity and Advantage of the Church (ſays he) renders thoſe Things lawful, which otherwiſe would be unlawful to do. And, therefore, tho' this ſeems contrary to the Words of the Law, to have two Biſhops in the ſame City or Dioceſs; yet it is not repugnant (ſays he) to the Mind and Intention of the Law.

|| 7 Q. 1. c. 12.

* Lib. 2. Tract. 1.

By the Papal *Canon* Law, it is not lawful for a Biſhop to be tranſlated from one Biſhoprick to another, without the Pope's Licence or Diſpenſation for accepting thereof †, under Pain of being deprived of the Biſhoprick he is in poſſeſſion of; and, upon acting contrary hereunto, he ſhall likewiſe loſe the Biſhoprick which he ſues for. But, by the Council of *Sardis* ||, Tranſlation of Biſhops from one City or Biſhoprick to another was abſolutely forbidden, in order to prevent Avarice and Ambition in Men of that conſpicuous Dignity and Office: For we cannot find any one, that is willing to paſs and be tranſlated from a better to a worſe Biſhoprick in point of Power and Revenues. But you ſee the *Canon* Law makes a cunning Diſtinction here, in order to gratify the Pope's Treaſury, ſaying, That this cannot be done by his own proper Authority, without the Pope's

† X. 1. 7. 1 & 4.

|| Can. 11. vid. Can. Ap. 11. Can. Nic. 15. Can. Ant. 21.

Pope's Licence and Diſpenſation for ſo doing; ſince he is ſo matrimonially wedded unto his Church, that he cannot quit the ſame, even on the Score of going into a Religious Houſe or Order. But a Biſhop tranſlated from one Biſhoprick to another by his own Authority, does not, even by the *Canon* Law, ſtand depriv'd *ipſo facto*; but a declaratory Sentence is neceſſary hereunto.

A Biſhop, in his own Dioceſs, ought to be obey'd by all Perſons whatever under the Royal Dignity, how great ſoever they may be in point of Dignity or Eſtate, provided they be of that Dioceſs, and that the Matter of Obedience does concern and relate to his Epiſcopal Office: And the Papal Law carries this Obedience ſo far, that it makes even the Emperor himſelf ſubject to the Biſhop of the Place *; for by this Law, no Prince is exempt from the Juriſdiction of Biſhops; and, according to the *Papiſts*, this is a Matter of *common Right*. St. *Ambroſe*, Biſhop of *Milan*, (ſay the *Canoniſts*) excommunicated the Emperor *Theodoſius*: And, therefore, they do from hence infer, That a Biſhop, in his Dioceſs, is greater, and ought to have Precedence of all ſecular Princes, how great ſoever they may be in Point of Dignity and Eſtate, as having a Juriſdiction over them: But this does not hold (ſay they) *è converſo*. For a Biſhop is ſet over Things ſpiritual, but a ſecular Prince is only ſet over Things of a Temporal Nature, which are inferior to Things Spiritual; and a Man is *tantò Major*, *quantò Dignioribus & Melioribus præeſt*. But, notwithſtanding what the Pope's Creatures may pretend from this Example of Epiſcopal Power over Kings and Princes, it is to be obſerv'd, that *Theodoſius* was a very weak Prince, and *Ambroſe* a very haughty Prelate: And, therefore, if Biſhops ſhould now aſſume ſuch a Power over Kings and Emperors, they would ſurely be corrected and taught better Manners.

* 11 Q. 3. 11.

A Biſhop may prove himſelf to be a Biſhop ſeveral ways, if an Exception be objected to him that he is no Biſhop. *Firſt*, By the Bulls or Letters of his Election: but then this only ſerves in the *Romiſh* Countries. *Secondly*, He may prove himſelf ſuch *per Collationem Ordinis* †, which was granted; and this conferring of the Epiſcopal Order ought to be in Writing. The *Third* kind of Proof, is made by common Fame and Opinion, whereby he is and has been accounted a Biſhop for many Years ||. And a *Fourth* ſort of Proof ariſes from Length and Diuturnity of Time, which is a good Preſumption of his being Canonically promoted to the Prelacy *: For if it appears, that he has been in the Poſſeſſion of the Prelacy for a long time, no Defect can be objected againſt him, becauſe upon an Objection that he was not Canonically promoted, 'tis ſufficient for him, if he has ſerv'd in that Dignity for a long Time as a Perſon duly promoted, unleſs the contrary appears. But if any Defect appears in his Promotion by Inſpection of the Inſtrument or Writings, he ceaſes to be a Biſhop. And 'tis likewiſe to be obſerv'd, that Prelacy itſelf cannot be proved by Preſcription; ſince Epiſcopacy is not preſcribed by any Time whatſoever.

† 2 Q. 1. 9.

|| Specul. Tit. de Prob.

* Inn. in c. 36. X. 1. 6.

Valeſius in his Notes on the Hiſtory of *Euſebius Pamphylus* obſerves, That probably the firſt Chriſtian Prieſt did, in Imitation of the *Jewiſh* High-Prieſt, wear a Plate of Gold on his Forehead, as a Badge of Honour to his Office: And *Epiphanins*, in his Hiſtory of the *Nazarean* Hereſy, ſays, That *James*, the Brother of our Lord, who was ordain'd the firſt Biſhop of *Jeruſalem*, wore ſuch a Plate of Gold on his Forehead; and the ſame is ſaid of *Mark* the Evangeliſt, in a Manuſcript concerning his Sufferings. I will not contend for the Truth hereof: But if we can believe theſe Accounts of this Matter, we may pretty reaſonably infer; That from hence, in ſucceeding Ages, aroſe the Uſe of the Mitre.

As

As by a Canon of the Council of *Lateran*, Biſhops cannot be depos'd by their Metropolitans, without the Pope's Leave or Licence ſo to do *, (tho' the Archbiſhop, with his Suffragans, may inquire into the Merits of the Cauſe;) ſo a Biſhop, according to the Papal Law, cannot by his Power alone, depoſe any Clerk from his Orders, though he may, by himſelf, give a Perſon Orders †: And, therefore, in this Caſe, that Rule in Law does not hold good which ſays, *viz. Ejus eſt ſolvere, cujus eſt ligare.* And thus, according to that Law *, the Pope can only diſſolve the Bond of ſpiritual Matrimony, which is contracted between a Biſhop confirm'd and his Church; for that which is done by God's Vicar, the Pope, (ſay the *Romaniſts*) is deem'd to be done by God himſelf; and thus is that Saying in the Scripture fulfilled, *Whom God has join'd together, let no Man put aſunder* ||. For as it appears by theſe Words, That no Man can diſſolve carnal Matrimony but God alone, ſo 'tis the ſame thing (ſay they) in ſpiritual Matrimony, ſince no one can diſſolve the ſame but God alone, or (in the Phraſe of the *Romiſh* Church) his Vicar-General upon Earth, the Pope. But if it be objected, that carnal Matrimony is ſometimes diſſolv'd by the Sentence of inferior Judges; then they anſwer with Pope *Innocent*, That an inferior Judge is not then ſaid to diſſolve the Marriage by his own proper Authority, but by the Authority of the Canons which receive their Force from the Pope; and ſo, conſequently, from God; ſince the Power of making Canons (according to the *Papiſts*) firſt proceeded from God himſelf. But in *England*, an Archbiſhop may deprive a Biſhop; and ſo may a Biſhop depoſe a Clerk by his own Power alone, if their Crimes deſerve ſo ſevere a Puniſhment: And 'tis ſaid in the *Canon* Law, That a Biſhop that is unprofitable to his Dioceſs, ought to be depos'd; and no Co-adjutor aſſign'd him *; nor ſhall he be reſtor'd again thereunto.

* 3 Q. 6. 5 & 6.

† 67 Diſt. c. 2.

* 7 Q. 1. 39.

|| Mat. ch. 19. v. 6.

* 15 Q. 6. 3.

Biſhops in a Council, act as a College or Corporation, and not as ſingle Perſons: And in their Dioceſſes, they do conſtitute and make Epiſcopal Synods, after the ſame Manner as Metropolitans do make Provincial Councils. But ſometimes an Aſſembly made by a Biſhop, is called an Epiſcopal Council: And a Biſhop in ſuch Aſſembly or Council being within his Dioceſs, may make a Decree or Canon, which ſhall oblige all thoſe, that are ſubject to his Juriſdiction; and ſuch a Decree is ſtiled an *Epiſcopal* Canon ||. But yet 'tis to be obſerved, That a Biſhop cannot ordain or appoint any Thing that is contrary to the general Canons of the Church. Biſhops in their Dioceſſes have a free Juriſdiction, and may *ex Officio* enquire into Crimes, and puniſh them according to the Canons of the Church, without any Impeachment to their Juriſdiction: And if need be, they may invoke the ſecular Arm, provided (nevertheleſs) that, by ſuch an Invocation, no Prejudice does accrue to the Biſhop's Power and Juriſdiction; for the ſecular Power does not hereby acquire any Right, but only executes another's Power and Authority: for a Biſhop cannot have *armatos Officiales*, if he has not a Temporal Juriſdiction, for the Execution of Juſtice; but ought to invocate and call on the ſecular Arm for his Aſſiſtance: For as in ſpiritual Matters, (ſays the *Canon* Law) ſecular Princes ought to have recourſe to the Church; ſo in Temporals, Eccleſiaſtical Princes ought to have recourſe to ſecular Princes, ſince the Prelate's Office ought not to be diſturbed by promiſcuous Acts of Juſtice. Beſides, the Exerciſe of the temporal Sword is forbidden the Church, even by our Lord himſelf ſaying unto *Peter*, *Put up thy Sword into the Scabbard*: And thus the only Arms the Clergy ought to make uſe of, are Prayers and Tears.

|| X. 1. 32. 2.

A Biſhop, in the *Canon* Law, is ſaid to be *Oculus Dei* †; and, therefore, he ought not to be judged by ſuch as are his Subjects: Let not the Sheep

† 6 Q. 1. 9.

Sheep rebuke the Shepherd, nor the common People accuſe their Biſhop, becauſe the Diſciple is not above his Maſter, nor the Servant above his Lord, ſays the Canon *: nor can a Biſhop be compelled perſonally to appear before a Judge in order to take an Oath, but the Judge ought to ſend a Commiſſioner to his Houſe to ſwear him there: nor can a Biſhop, againſt his Will, according to the Papal Law, be compell'd to give Evidence or Teſtimony in any Cauſe: But if he be willing to give Evidence in a Cauſe, the Judge, or his Miniſter, ought to come to the Biſhop's Houſe, and examine him; and a Biſhop gives Evidence by only having the Goſpels propounded to him, without touching or laying his Hand on them.

* 6 Q. 1. 9.

'Tis the Biſhop's Province to conſider and judge what number of Clerks it is fit for him to ordain: And if he ordains any one that has not a Title, or where-withall to live on, he is oblig'd to maintain and provide for him. But a Biſhop of another Dioceſs, ought neither to ordain or admit a Clerk without the Conſent of his own proper Biſhop, and without Letters Dimiſſory ‖; and Father *Oſius* ſaid, That whoever ſhould thus ordain a Stranger, without the Leave and Conſent of his own Biſhop, ſhould have his Ordination adjudg'd invalid; and herein (ſays *Oſius*) we are all agreed †. If a Biſhop ſhall preſume to ordain any Perſon againſt his Will, ſuch Biſhop ſhall be liable to a Year's Suſpenſion: And if any Perſon that is already a Clerk, ſhall refuſe, at the Biſhop's Inſtance, to be further promoted to a Benefice, (which ſeldom happens among Clergymen) he ſhall be ejected out of the Preferment he is already poſſeſs'd of ‖. A Biſhop has of *Common Right* the Inſtitution and Collation unto all vacant Benefices appertaining to him within his own Dioceſs; and may collate his own Son or Nephew unto ſuch Benefice, if he think fit: but of this hereafter. And as a Biſhop cannot ordain or admit a foreign Clerk to a Living without the Leave or Licence of his proper Biſhop; ſo neither can he conſecrate a Church out of his own Dioceſs, or do any other Epiſcopal Act without Leave had and obtain'd *: But if he has conſecrated a Church, or done any other Epiſcopal Act (as aforeſaid) relating to his Order, ſuch Act is valid, though he may be puniſh'd for it.

‖ 71 Diſt. per totum.

† 15 Q. 6. 1. 2. 3 & 4.

‖ 74 Diſt. c. 1. 2 & 3.

* 92 Diſt. c. 4. 5 & 6.

As a Biſhop may, by the Incumbent's Conſent, according to the *Canon* Law, divide one fat Benefice into two, if occaſion be; ſo he may in the like manner, on a good Account, unite two Pariſh Churches †: But here in *England*, the Patron's Conſent is alſo neceſſary. Tho' by the Papal Law, the Church ſucceeds to a Biſhop dying Inteſtate, as to all his Goods and Eſtate *; yet even by that Law, a Biſhop has the Power and Liberty of making a Will, and diſpoſing of all ſuch Goods and Eſtate, as he has acquired before he became a Biſhop, to his Kindred by Conſanguinity, even to the fourth Degree; but if he has acquired ſuch Goods and Eſtate *intuitu Eccleſiæ*, he cannot make a Will, unleſs it be to the Advantage of the Church; which is not Law with us in *England*.

† 16 Q. 1. 53.

* 7 Q. 1. 17.

Of *Common Right*, the Dean and Chapter are Guardians of the Spiritualties, during the Vacancy of a Biſhoprick ‖: But the Uſage of *England*, is, That the Archbiſhop is the Guardian of the Spiritualties during ſuch Vacancy as to Matters of Juriſdiction: for as to Ordination (according to *Lindwood*'s Opinion) they ought to call in the Aid and Aſſiſtance of ſome neighbouring Biſhop. In the Caſe of the Dean and Chapter of *Durham* againſt the Archbiſhop of *York*, there was much Evidence given, that antiently, during the Vacancy of the See of *Durham*, the Archbiſhop had exercis'd Juriſdiction, *viz.* both *voluntary* and *contentious* Juriſdiction, as Guardian of the Spiritualties: But ſince *Henry* the VIIIth's Time, it has been for the moſt part adminiſtred by the Dean and Chapter †.

‖ X. 5. 7. 9.

† Vent. Rep. pt. 1. p. 225.

We read, that when Cities were firſt converted to Chriſtianity, the Biſhops were elected *per Clerum & Populum*; for it was then thought convenient, that the Laity as well as the Clergy, ſhould be conſider'd in the Election of their Biſhops; and that both Laity and Clergy ſhould concur in the Nomination of them; becauſe he, who was to have the Inſpection of them all, might come in by a general Conſent. But, as the Number of Chriſtians afterwards very much increas'd, this was found to be very inconvenient; for Tumults were raiſed, and ſometimes Murders committed at ſuch popular Elections; and, particularly, at one Time no leſs than three Hundred Perſons were killed at ſuch an Election. To prevent the like Diſorders, the Emperors being then Chriſtians, reſerved the Election of Biſhops to themſelves; but in ſome Meaſure conformable to the old Way, that is to ſay, upon a Biſhop's Death, the Chapter ſent a *Ring* and *Paſtoral Staff* to the Emperor, which he deliver'd to the Perſon whom he appointed to be Biſhop of the Place. And tho' the Pope or Biſhop of *Rome*, who, in Proceſs of Time, got to be the Head of the Church, was well enough pleaſed to ſee the Clergy grow rich; yet he was not ſatisfy'd, that they ſhould have any Dependance on Princes: And, therefore, he pretended, That they took Money for their Nomination of Biſhops, or (at leaſt) charged their Revenues with Penſions; and, thereupon the Canons in Cathedral Churches, came to have Choice of their Biſhops *, which by an Incroachment of the Papacy were uſually confirm'd at *Rome*. But Princes had ſtill ſome Power in thoſe Elections: For we read in the *Saxon* Times, that all Eccleſiaſtical Dignities were conferr'd in Parliament. And this appears by *Ingulphus* Abbot of *Crowland*, in the Reign of *William the Conqueror*, who tells us that *à multis annis retro-actis nulla erat Canonica Prælatorum Electio*; becauſe they were donative by the Delivery of the *Ring* and *Paſtoral Staff* as aforeſaid: the one ſignifying that the Biſhop was wedded to the Church, and the other was an Enſign of Honour always carry'd before him, and was a Token of that Support which they ought to contribute to the Government, or rather that he was now become a Shepherd of Chriſt's Flock. *Hildebrand*, who was Pope in the Reign of the Conqueror, was the firſt that oppos'd this way of making Biſhops here; and for that Purpoſe he call'd a Council of 110 Biſhops, and excommunicated the Emperor *Henry* IV. and all Prelates that receiv'd Inveſtiture at his Hands, or by any Layman *per traditionem Annuli & Baculi*. But, notwithſtanding that Excommunication, *Lanfrank* was made Archbiſhop of *Canterbury* at the ſame Time, and by the ſame Means, according to *Malmsbury*; but the *Saxon* Annals in *Bennet College* Library are, that he was choſen by the Senior Monks of that Church, together with the Laity and Clergy of *England*, in the King's great Council. Howbeit, *Anſelm* did not ſcruple to accept the Biſhoprick by the Delivery of the *Ring* and *Paſtoral Staff* at the Hands of *William Rufus*, tho' never choſen by the Monks of *Canterbury*: And this was the Man, who afterwards conteſted this Matter with *Henry* I. in a moſt extraordinary manner. For that King being forbidden by the Pope to diſpoſe of Biſhopricks as his Predeceſſors had, by the Delivery of the *Ring* and *Staff*, and he not regarding that Prohibition, but inſiſting on his Prerogative, the Archbiſhop refuſed to conſecrate thoſe Biſhops whom the King had appointed: at which he was ſo much incenſed, that he commanded the Archbiſhop to obey the antient Cuſtoms of the Kings his Predeceſſors, under pain of being baniſh'd the Kingdom †. This Conteſt grew ſo high, that the Pope ſent two Biſhops to acquaint the King, that he would connive at this Matter as long as he acted the Part of a Good Prince in other Offices.

* X. 1. 6. 18.

† Pol. Virg. Hiſt. Angl. lib. 2. Hen. I.

Where-

Whereupon the King commanded the Archbiſhop to do Homage, and to conſecrate thoſe Biſhops whom he had made: but this being only a feign'd Meſſage, to keep fair with the King, and the Archbiſhop having receiv'd a private Letter to the contrary, the Archbiſhop ſtill diſobey'd the King. And at length, after ſeveral Heats, the King yielded up the Point, reſerving only the Ceremony of Homage from the Biſhops, in reſpect of the Temporalties to himſelf: whereunto *Anſelm* conſented; provided, it was done before Conſecration. And then the Archbiſhop conſecrated thoſe Biſhops whom the King had appointed; and promiſed, that no Perſon elected to be a Prelate ſhould be refuſed Conſecration, becauſe of the Homage he had done to the King. But yet that very King re-aſſumed his antient Prerogative, and inveſted the very next Archbiſhop who ſucceeded *Anſelm*, with the *Ring* and *Paſtoral Staff*, tho' he did not long enjoy it.

Now to add more Solemnity to this Matter, and that Canonical Elections of Biſhops might not ſeem Uſurpations on the King's Prerogatives, in appointing whom he pleas'd to vacant Sees; King * *John*, by his Charter *de communi Baronum conſenſu*, granted †, That Biſhops ſhould be canonically elected, provided leave was firſt asked of him, and his Aſſent required after ſuch Election, and that he might have the Temporalties during any vacancy. So they were then choſen by the *Dean* and *Chapter*, or by *Priors* and *Convents*; but yet the King retain'd this antient Prerogative of recommending the Perſon to them: And that he might influence the Election, he uſually ſent for the *Dean* and *Chapter*, or ſome of their Number, commiſſion'd by the reſt, who met in his Royal Chapel, or in ſome Church near it; and theſe choſe the Perſon he had recommended. This occaſion'd frequent Conteſts between our Kings and Popes; but ſtill the Crown juſtly claim'd an Authority over all ſpiritual Things and Perſons; and when the Kings were willing to oblige any Pope in this Matter, they would recommend a Perſon to the vacant See, and the Perſon thus recommended, had his Bulls diſpatch'd at *Rome*; and, by a particular Warrant from the Pope, was conſecrated and inveſted with the Spiritualties of the See. And even when the Pope's Supremacy was moſt exalted here, the Kings of *England* were never totally diveſted of this antient Prerogative: For upon the Vacancy of a Biſhoprick, a Writ iſſued out of *Chancery* in order to ſeize the Temporalties into the King's Hands, and before they could be reſtor'd to the new elected Biſhop, he was to appear before the King either in Perſon or by Proxy, and renounce every thing in thoſe Bulls which might be prejudicial to the Crown, or contrary to our Laws. And having taken an Oath of Fealty and Allegiance to the King, there iſſued forth another Writ, reciting that all this was done; and by that Writ, the Temporalties were reſtor'd.

* Palm. Rep. 25.

† Cok. 1 Inſt. 134. 344.

The Parliament, in *Henry* the VIIIth's Time, paſs'd an Act *, That Biſhops ſhould not be preſented to the Pope, or ſue out Bulls of Confirmation from *Rome*; but that, on the vacancy of any See, the Perſon ſhould be preſented to the Archbiſhop: And likewiſe if an Archbiſhoprick ſhould become void, the Succeſſor ſhould be preſented either to an Archbiſhop in the King's Dominions, or to four other Biſhops whom the King ſhould appoint; and that upon ſuch Vacancy, the *Dean* and *Chapter* ſhould certify it to the King in *Chancery*, and pray they may proceed to a new Election. Whereupon the King grants them a Licence under the Great Seal (called a *Conge d'Eſlire*) to elect the Perſon whom he has nominated and appointed by his Letters Miſſive; and they are to chuſe no other under a ſevere Penalty. Within twelve Days after the Receipt

* 25 H. 8. c. 20.

Receipt of this Licence or *Conge d'Eſlire*, they are to proceed to the Election: which is done after this manner, *viz.* The *Dean* and *Chapter* having made their Election, muſt certify it under their Common Seal to the King, and to the Archbiſhop of the Province, and to the Biſhop elected: And then the King gives his Royal Aſſent, under the Great Seal, directed to the Archbiſhop, commanding him to confirm and conſecrate the Biſhop thus elected. And the Archbiſhop ſubſcribes it, *viz. Fiat Confirmatio*; and grants a Commiſſion to his Vicar-General, to perform all Acts requiſite to that Purpoſe. Thereupon the Vicar-General iſſues forth a Citation to ſummon all Perſons who oppoſe this Election, to appear, *&c.* which Citation is affix'd by an Officer of the Arches on the Door of *Bow-Church*, and he makes three Proclamations for the Oppoſers, *&c.* to appear; after the ſame Officer certifies what he has done to the Vicar-General; and no Perſon appearing, *&c.* at the Time and Place appointed, *&c.* the Proctor for the *Dean* and *Chapter* exhibits the Royal Aſſent, and the Archbiſhop's Commiſſion directed to his Vicar-General, which are both read, and then accepted by him. Afterwards the Proctor exhibits his *Proxy* from the *Dean* and *Chapter*, and preſents the new-elected Biſhop to the Vicar-General, returns the Citation, and deſires that three Proclamations may be made for the Oppoſers to appear: which being done, and none appearing, he deſires that they may proceed to confirmation *in Pœnam contumaciæ*; and this is ſubſcribed by the Vicar-General in a Schedule, and decreed by him accordingly. Then the Proctor exhibits a ſummary Petition, ſetting forth the whole Proceſs of Election, in which 'tis deſired that a certain Time may be aſſign'd him to prove it; and this is likewiſe deſired by the Vicar General. Then he exhibits the King's and Archbiſhop's Aſſent once more, and that Certificate which he return'd to the Vicar-General, and of the affixing the Citation on the Door of *Bow-Church*, and deſires a Time may be appointed for the final Sentence, which is alſo decreed. Then three Proclamations are made again for the Oppoſers to appear, but none coming, they are pronounced *contumacious*; and 'tis then decreed to proceed to Sentence; and this is in another Schedule read and ſubſcribed by the Vicar-General. Then the Biſhop elect takes the Oaths of Supremacy, Canonical Obedience, and againſt Simony; and then the Dean of the Arches reads and ſubſcribes the Sentence. The *Dean* and *Chapter* are to certify this Election in twenty Days after the Delivery of the Letters Miſſive, or they incur a *Præmunire*: And if they refuſe to elect, then the King may nominate the Perſon by his Letters Patents.

* 25 H. 8. ch. 20. §. 5.

Next after Confirmation follows the Conſecration of the Biſhop elected*, according to the King's Mandate, which is ſolemnly done by the Archbiſhop, with the Aſſiſtance of two other Biſhops, according to the approv'd Rites and Ceremonies of the Church of *England*, and in conformity to the Manner and Form of conſecrating Biſhops according to the Rule laid down in the fourth Council of *Carthage*, about the Year 470, generally receiv'd in all the Provinces of the *Weſtern* Church. After the Premiſes, there iſſues a Mandate from the Archbiſhop to the Archdeacon of his Province, to inſtall the Biſhop elected, confirm'd, and conſecrated, who either by himſelf or Proctor, (which laſt is moſt uſual) being in the Preſence of a Publick Notary introduced into the Cathedral Church, on any Day, between the Hours of nine and eleven, by the ſaid Archdeacon, he firſt declares his Aſſent to the King's Supremacy, *&c.* and the Archdeacon being accompany'd with the Canons, *&c.* leads him to the Choir; and, placing him in the Epiſcopal Seat, pronounces as follows †, *viz. Ego Authoritate mihi commiſſâ Induco & Inthronizo Reverendum in Chriſto Patrem Do-*

† §. 6. d. Stat.

Dominum J. S. *Epiſcopum* ; *& Dominus cuſtodiat Introitum ſuum & Exitum ex hoc, nunc & in ſæculum, &c.* Then, after divine Service proper for the Occaſion, the Biſhop being conducted into the Chapter-Houſe, and there placed on a high Seat, the Archdeacon and all the Prebendaries of the Church acknowledge Canonical Obedience to him. And the Publick Notary, by the Archdeacons Order, records the whole Matter of Fact in this Affair, in an Inſtrument to remain as Authentick to Poſterity : And this is called *Inveſtiture.* After all which, the Biſhop is introduced into the King's Preſence to do his Homage for his Temporalties or Barony, which he performs, by kneeling down and putting his Hands between the King's Hands, ſitting in a Chair of State, and by taking a ſolemn Oath to be true and faithful to his Majeſty, and that he holds his Temporalties of him.

In the Time of the *Saxons*, all Biſhops and Abbots ſat in State-Councils by Reaſon of their Office, as they were ſpiritual Perſons, and not on Account of any Tenures; but after the Conqueſt, the Abbots ſat there by virtue of their Tenures, (as already rehears'd) and the Biſhops in a double Capacity, as Biſhops, and likewiſe as Barons by Tenure : And this appears * when Archbiſhop *Becket* was condemn'd in Parliament ; for there was a Diſpute, who ſhould pronounce the Sentence, either a Biſhop or a Temporal Lord. Thoſe, who would have a Biſhop do it, alledg'd, That they were Eccleſiaſtical Perſons, and the Perſon to be condemn'd, being one of their own Order, they inſiſted that one of them ought to do it; but the Biſhops reply'd, that this was not a ſpiritual, but a ſecular Judgment, and that they did not ſit there *merely* as Biſhops, but as Barons. And in the very next Year it was declar'd by the Conſtitutions of *Clarendon* †, That Biſhops, and all others holding of the King *in Capite*, have their Poſſeſſions of him *ſicut Baroniam, & ſicut cæteri Barones debent intereſſe Judiciis curiæ Regis, &c.* And they ought to ſit there as Biſhops likewiſe, that is to ſay, not as mere ſpiritual Perſons veſted with a Power only to Ordain and Confirm, *&c.* but as they are the Governours of the Church : And 'tis for this Reaſon, that in the vacancy of a Biſhoprick, the Guardian of the Spiritualties was ſummon'd to Parliament in the Biſhop's Room. And tho' the five new Biſhops of *Briſtol, Cheſter, Glouceſter, Oxford* and *Peterborough*, made by *Henry* the VIIIth, have no Baronies; yet they ſit there as Biſhops of thoſe Sees by the King's Writ.

* An. 10. & 11. H. 2.

† Cap. 12.

But notwithſtanding the Laws of *William the Conqueror*, Biſhops ſtill ſat as Judges in the King's Courts, as they had done in the *Saxon* Times ; but it was upon Cauſes merely that concern'd the Church : ſo that the Conqueror's Law extended only to ſeparate the Laity out of the Eccleſiaſtical Courts, and not the Clergy out of the Lay-Courts, as the Biſhops would have it in *Henry* the IId's Reign ; when the Clergy, eſpecially thoſe of the higheſt Rank, diſputed their Services due by Tenure, as if they deſign'd to have no Lay Lord over them, not even the King himſelf; acknowledging no Superior but the Pope. Doubtleſs the Uſe of Tenures in thoſe Times, was of great Importance to the Peace of the State and Government of the Realm, ſince by theſe Tenures, not only all Degrees of Men were principally united and made dependant on the Crown, from the Lord Paramount to the Tenant Peravale ; but eſpecially were united with the Laity, and made ſubject to the King, without which, a ſtrange Metamorphoſis in Government muſt needs have enſued, beyond the Shape of any reaſonable Conceit ; the one half almoſt of the People of *England* being abſolutely under the Dominion of a foreign Power.

Of Blaſphemy, and the ſeveral Kinds.

THO' *Blaſphemy*, in the general Senſe of the Word, is defin'd to be an irreligious defaming or depraving of ſomething that is good and ſacred; yet ſtrictly and properly taken, it is an offering of ſome Indignity or Injury unto God himſelf, either by Words or Writing*: And it is threefold, *viz. Firſt*, when we aſcribe ſomething to him which is not ſuitable to his Nature; and this is a Sin, as the Divines call it, *contra miſericordiam*. *Secondly*, When we deny him ſome Attribute which is eſſential to his Godhead; and this, they ſay, is a Sin contrary to Juſtice. And, laſtly, when we attribute to the Creature, that which is only proper to the divine Creator of all Things; and this they term a Sin againſt the Majeſty of God †. *Lucas de Penna* ‖, reckons up no leſs than ten *Species* of Blaſphemy; but *Angelus Clavaſius* *, has reduced them all to the three foregoing Kinds.

* Navar. cap. 12. n. 81. Leſſ. lib. 2. de Blaſph.

† Lindw. lib. 1. Tit. 9. cap. 1. v. *Blaſphemia.*

‖ In l. 5. c. 10. 11.

* In ſumm. v. *Blaſphemia.* n. 3.

St. *Jude* in his Epiſtle ſays, That to blaſpheme the divine Majeſty, is a very great Crime: And *Athanaſius* in his Comment on this Text of the Goſpel, *viz. Whoſoever ſhall ſpeak Blaſphemy, &c.* ſays, That there is this Difference between all other Sins and Blaſphemy, *viz.* That he who commits other Sins, tranſgreſſes the Law; but he, who Blaſphemes, acts the part of an impious Man, in defiance of the Deity itſelf. Therefore as Blaſphemy is a Malediction and a Sacrilegious Detraction from the Godhead, it has different Puniſhments annex'd to it by the *Canon* Law, according to the Meaſure and Dignity of him to whom it is offer'd; for as that Species of Treaſon is greater which is committed againſt the Prince, than that which is committed againſt an inferior Magiſtrate, ſo (ſays the *Canon* Law) is that *Species* of Blaſphemy greater, which is committed againſt God, than that which is committed againſt his Saints. For in the *Romiſh* Church, Blaſphemy extends itſelf to the Virgin *Mary*, and all the Saints of her Communion.

Blaſphemous Words, are not only an Offence againſt God, and contrary to Religion itſelf, and as ſuch ought to be puniſh'd in the Eccleſiaſtical Court: But they are alſo a Crime againſt the Laws, State, and Government of the Realm, and even againſt Chriſtianity itſelf; which makes one Part of the Law of *England*. And, therefore, they are puniſhable at the Common Law alſo. See *Taylour*'s Caſe in *Ventris*'s Reports *. By a Statute in the 9th and 10th of King *William* III. it is ordain'd, That if any Perſon bred in, or profeſſing the Chriſtian Religion, ſhall by Writing, Printing, Preaching, or by advis'd Speaking, deny any one of the Perſons in the Trinity, or aſſert there are more Gods than one, or deny the Chriſtian Religion to be true, or the Holy Scriptures to be of divine Authority; and ſhall be convicted thereof by Indictment or Information at *Weſtminſter*, or at the County Aſſizes, he ſhall be diſabled to hold any Office, and ſhall not enjoy that which he has, but the ſame is made void †.

* Pt. 1ſt. 293.

† 9 & 10 Will. cap. 32.

There were various Puniſhments heretofore for this Crime. The Emperor *Juſtinian* puniſh'd it with Death ‖. Sometimes it was puniſh'd by cutting out the Tongue *; but by the *Civil* Law, the Puniſhment did not

‖ Nov. 77. c. 1.

* Spelm. Conc. A. D. 840.

not extend to Life or Limb; for a Layman was anathamatiz'd, and a Clergyman depos'd †: But, by the *Canon* Law, if Blaſphemy was publickly committed, the Offender was to undergo publick Pennance, but even in that Caſe a Biſhop could abſolve him; and for a private Blaſphemy, any Prieſt might do it ‖. Our *Saxon* Anceſtors were not guilty of this Crime; and, therefore, amongſt their Laws we find no mention made of any Puniſhment for it. King *Henry* III. order'd that Blaſphemers ſhould be arreſted, but the Books do not ſay how they ſhould be puniſh'd. By the Eccleſiaſtical Laws of *England*, as they were reform'd by the Thirty two Commiſſioners under *Edward* the VIth's Reign, the Puniſhment inflicted on Blaſphemers, was, That the Guilty were to be incapable of any publick Truſt and Imployment, were not ſuffered to be Witneſſes in any Court, or to any laſt Will, and were not to have the Benefit of the Law *. But as this Body of Laws was never confirm'd by Royal Aſſent, or by Parliament, they are in no wiſe binding and valid. By the 109th of King *James* the Iſt's Canons, this Offence is to be preſented to the Eccleſiaſtical Court in order to Puniſhment; and 'tis comprehended under the Words of *Wickedneſs of Life*: for 'tis not expreſly named, as Adultery, Whoredom, and other Crimes are. *Baldus* ſays, that Blaſphemy is a kind of Hereſy †, for which a Layman is anathematiz'd by the Church of God, and a Clerk depoſed from all Eccleſiaſtical Orders. The *Canon* Law ſeems not ſevere enough in the Puniſhment of this Crime, probably becauſe the *Romiſh* Church holds, that there is a Blaſphemy againſt their Saints; and Blaſphemy againſt God and againſt their Saints, has but one and the ſame Puniſhment with them, which is a ſolemn and publick Pennance, if the Crime was publickly committed ‖, as already hinted. In the Primitive Times this Sin was puniſh'd by delivering the Offender over to Satan, which was an Eccleſiaſtical Cenſure of the *greater* Excommunication; whereby the Offender became to others as a Publican and an Heathen *.

† 22 Q. 1. 10.

‖ Anton. in c. 2. vi. 5. 10.

* Reform. Legum Eccleſ.

† In l. 6. c. 2. 1.

‖ X. 5. 26. 2.

* Matth. 18. v. 17.

Of Bulls Papal, and the Meaning thereof.

THE Word *Bulla* in *Latin*, properly denotes a Bubble or Bladder of Water ſwoln with Air, which is form'd from the falling of Rain, and which immediately vaniſhes and diſappears: And hence that old Proverbial Saying had its riſe, *viz. Homo Bulla*, or Man is a Bubble, to ſhew the Vanity and Shortneſs of human Life †. But the *Canoniſts*, as I ſhall treat of a *Bull* in this Place, add a more reverend Eſteem unto the Pope's *Bulls*, and make them to ſignify ſomething in *Popiſh* Countries ‖. The Word *Bulla* alſo denotes *the Boſs of a Nail or Bridle*; and hence, according to ſome Mens Opinion, it is, in a metaphorical Senſe, taken for a Seal, or a *Diploma* ſealed by it: But among the Antients (I think) it was a golden Badge or Ornament, which Perſons, that triumph'd over their Enemies, wore before them on their Breaſt, hanging down like a Medal in our Days; and it came to ſignify a Deed, Inſtrument, or Writing deſcribed on Parchment or Vellum, with a Piece of Lead hanging thereunto by a String; and ſuch Writing or Inſtrument is called a *Bull* from the Lead annex'd to it *. On this Label of Lead, the Heads of the two Apoſtles St. *Peter* and St. *Paul* are impreſſed from the Papal

† Reb. Prax. Ben.

‖ X. 5. 20. 506.

* Gloſs. in Clem. 2. 9. c. unic. v. *aurea Bulla.*

Papal Seal: And this is made uſe of to diſtinguiſh other of the Pope's Writings from his Briefs, there being no Lead affix'd to theſe laſt but only Wax. For the Apoſtolical Letters are of a twofold Kind and Difference, *viz.* ſome are called *Briefs*, becauſe they are compriz'd in a ſhort and compendious way of Writing; and ſuch are ſealed on Wax only, *cum annulo Piſcatoris*, that is to ſay, with the Impreſſion of a Signet-Ring, which the *Romaniſts* are ſo weak as to believe that it was the Seal or Signet of St. *Peter* the Fiſherman, and that he made Uſe of it. The other Apoſtolical Letters are called *Bulls* from the Leaden *Bulla* (as aforeſaid) hanging and affix'd thereunto: And, therefore, theſe Letters are not ſaid to be expedited till that *Bull* is annex'd to them †; and as ſoon as the Leaden *Bull* is affix'd to them, theſe Letters are ſaid to be compleatly finiſh'd. And becauſe they often carry'd the Papal Thunder of Excommunication along with them, for the Non-payment of the Pope's pretended Dues, they became a Terror to weak and ſimple People for ſome Ages, till at length from their frequent Demands (which was only Begging at firſt) theſe Fulminations from the *Vatican* were turn'd into Ridicule; and as they were called *Bull-Beggars*, they were uſed as Words of Scorn and Contempt, and only repeated to quiet and frighten ignorant Children withal. *Eybenius Cherubinus* has made a Collection of theſe *Bulls*, and printed it at *Rome* * in ſix Volumes in Folio: which gives us a full View of the wonderful Art and Craft of the Hierarchy in raiſing ſuch a Structure of Power and Iniquity to itſelf, which none can pull down but the Almighty Hand of God alone. For therein we ſee the Church of *Rome* almoſt in its Beginning, how it rear'd itſelf by degrees on Papal *Bulls*, and how the weak Parts of the Building have been ſince ſtrengthen'd by the Cunning of the ſeveral Undertakers, the Pope and his Cardinals. Out of this Collection we may frame a good Hiſtory of *Popery*; and the learned *Puffendorf* in his Introduction to the Hiſtory of *Europe*, ſeems to me to have made uſe of it in writing of the *Spiritual Monarchy*.

† Alex. conſ. 215. vol. 2.

*A.D. 1638.

Of Burial, and the Right and Practice thereof.

BY the *Canon* Law, the Biſhop of the Dioceſs had not only the lawful Diſtribution of the Goods of Perſons dying both Teſtate and Inteſtate; but has likewiſe the Care of ſeeing that all Chriſtians, after their Deaths, be not deny'd Church-Burial, according to the Uſage and Cuſtom of the Place, and the Rules of the Eccleſiaſtical Law: For every Chriſtian that dies in the Communion of the Church, has a Right of being bury'd in the Church-yard, and likewiſe of having the Office of the Church perform'd by the Pariſh-Prieſt at the Time of his Interment, if it be not otherwiſe prohibited by Law; as it is with us unto Perſons excommunicated, and laying violent Hands on themſelves, by a Rubrick of the Burial-Service. So that by *Chriſtian Burial*, we mean the Burying of any Perſon in the Church-yard, or ſome other ſacred Place, wherein other Chriſtians are uſually bury'd; and the Performing of the Service of the Church at the Time of his Interment. I ſay *in ſome ſacred Place*, becauſe though every Perſon may have a Burying-Place in his own Eſtate, and

and may be bury'd there, whether ſuch Place be peculiar to himſelf, or common to others; yet ſuch Place is not ſacred, unleſs it be made ſo by the Intervention of the Biſhop's Authority *.

* Myns. in §. 9. J. 2. 1. 13 Q. 1. 1.

The Uſe of Chriſtian Burial is a Right accruing to the Church, and it was firſt introduc'd by the *Canon* Law for the ſake of Decency, and of putting other Men in mind of their latter end; but it was afterwards made uſe of as a Matter of Profit and Advantage to the Clergy, when they came to ſing their *Dirges*, and perform other Religious Offices for the Dead ‖: But the great Abuſe of this innocent Ceremony, and the Scandal occaſion'd to Religion by the Greedineſs of the Clergy, did, in Proceſs of Time, cauſe a Law to be made by † Pope *Innocent* III. againſt demanding any thing for burying in the Church-yard, and againſt ſelling the Ground where the Corpſe was interr'd. But ſtill the Clergy were left at liberty to receive what they could get for Exequies and other Funeral Offices, which they ſeem'd to be much aſham'd of at the firſt Inſtitution of this Chriſtian Right in the Church; believing it then to be their Duty to perform this Service for the Dead, as they were Pariſh-Prieſts, *Gratis*, in virtue of their Office, and out of a tender Regard to the Living; and, therefore, they would then receive nothing for their trouble ‖. But when they ſaw how fond and ſuperſtitious Men grew on this Account, by their Preaching to the People, That the Souls of their deceaſed Friends were at Reſt by this Holy Ceremony *, they began to make ſome Demands for the Performance thereof, which were ſmall and inconſiderable in the Beginning; and, becauſe there was no Law then to ground their Demands on for the Celebration of this Office, they invented the Uſe of Church-yards and Holy Ground to bury the Dead in †, and then ſold out the Soil to the People for this Purpoſe: but the People at length reflecting how impious it was in the Clergy to ſell that Ground, which was dedicated to the Service of God and his Church; a Complaint thereof was made to the aforeſaid Pope, who forbid the ſame by a *Decretal*, as already mention'd.

‖ 13 Q. 2. 22.

† X. 3. 29. 13.

‖ 13 Q. 2. 15.

* 13 Q. 2, 22.

† 13 Q. 2. 17.

But as I can find no Law here with us forbidding the Clergy to receive any Money for this Office, ſo I find none that does expreſly warrant them to demand any: And, therefore, they muſt ground their Demand on ſome immemorial Cuſtom or Preſcription for ſo doing. In the *Saxon* Times there was a Funeral Duty to be paid called, *Pecunia Sepulcralis & Symbolum animæ*, and a *Saxon Soulſhot*; which was required to be paid by the Council at *Ænham*, and inforced by the Laws of *Canutus* ‖, Cap. 14. and was due to the Church, unto which the Party deceas'd did belong, whether he was there bury'd or not. But ſome take this for the Foundation of *Mortuaries*, but then the Money muſt be turn'd into Goods: For in *Glanvil*'s Time, a Freeholder was allow'd to make his Will of all other Things, provided that he gave his firſt beſt Chattel to his Lord, and his ſecond to the Church. And this was not originally *pro animâ defuncti*, as *Lindwood* * thinks, from the Modern *Canoniſts*. For others have ſaid, that this was in Lieu of Tithes ſubſtracted, and Oblations not duly paid: But of this I ſhall obſerve hereafter, when I come to ſpeak of *Mortuaries*; for I apprehend a *Mortuary* and the *Pecunia Sepulcralis* to be two diſtinct Things.

‖ Spelm. Con. p. 517.

* Lib. 1. Tit. 3. c. 1.

It is ſaid in the *Canon* Law, that if a Perſon dies Inteſtate, and does not in his Life-time make choice of a Place to be bury'd at, he ſhall be bury'd in the Sepulchre of his Anceſtors; provided, his Pariſh-Church has a Canonical Portion of that which he leaves behind him for Church-Burial †. For tho' Pope *Leo* the IIId, made a Decree, that every one ſhould, according to the Cuſtom of the antient Patriarchs, be bury'd in

† X. 3. 28. 1.

‖ vi. 3. 12. 7. the Sepulchre of his Parents ‖; yet no one was to be deny'd to chuſe a Place in his Life-Time where he would be bury'd, or where he would bury another: But becauſe the Labourer is worthy of his Hire (ſays that Pope) he order'd, that the third part of his Funeral Subſtance ſhould be paid to that Church wherein he ought to be bury'd, if he did not make choice of being bury'd elſewhere; and if this was paid, he was to be bury'd where he pleas'd. And this was decreed under the Pain of Excommunication. So that now the Clergy were grown very high in their Demands. But this was alter'd, and only a fourth Part of his Subſtance did belong to the Pariſh-Church where ſuch Pariſhioner was bury'd, and not to the Church in which Pariſh the Perſon died: and then this Portion was due on his Election of Sepulture. But if a Pariſhioner of a Cathedral Church was bury'd elſewhere, the Canonical Portion was due to the Chapter of ſuch Cathedral out of his Funeral Eſtate, or Goods

* X. 3. 28. 8. left to the Church on the Account of Burial *. For a Cathedral ſometimes has a diſtinct Pariſh which has Parochial Rights as well as an inferior Pariſh Church; and where a Cathedral Church has a diſtinct Pariſh, the Parochial Rights belong to the Chapter, and not to the Biſhop. The Diſtinction which the *Canoniſts* make in Receiving this Portion, is, that it is paid in reſpect of their Labour and the Journey they take to the Church, not in regard to divine Service perform'd on that Occaſion,

† X. 5. 3. 8. ſince that would be Simony †.

I have ſaid, that nothing ought of *common Right* to be demanded for the Burial of any one in conſecrated Ground, as the Church or Church-

‖ X. 5. 3. 36. Hoſt. ibi. yard is; yea, nothing ought to be demanded for the Burial Service ‖, ſince a Clergyman is obliged hereunto in virtue of his Benefice; but is

X. 3. 29. 13. otherwiſe, if he be not obliged in virtue of his Benefice; but even then he ought not to covenant and bargain for any Thing: becauſe, according to the *Canon* Law, it would even then be Simony; ſince Burial (ſays the Law) ought not to be ſold. But though a Clergyman cannot demand any thing of this kind for Burial, yet Laymen (ſays the Law) may be compelled to obſerve pious and laudable Cuſtoms. And a Perſon, that ſues to have a Cuſtom obſerv'd herein, ought to uſe a great deal of Caution in his Suit: for if he ſues on the Account of the Soil,

* X. 3. 29. 13. or on the Burial-Office, he ſhall loſe his Suit *; nor ſhall it be any Advantage to him then to alledge a Cuſtom therein. But if he alledges, That it has been a Cuſtom for every Perſon dying to leave ſo much to be paid to the Prieſt or to the Church, or that ſo much has been antiently paid thereunto for every Perſon deceas'd, he ſhall prevail in his

‖ X. 5. 3. 42. Suit ‖.

Though, by the Papal Law, the Perſon who buries a foreign Pariſhioner dying Inteſtate in any other than the Pariſh-Church of the City or Place, where the Perſon died, ſhall be oblig'd to reſtore his Bones, and to compound for the Benefits which he has taken to himſelf on that

† X. 3. 28. 5 & 6. Account †; yet Scholars and Strangers dying in their Travels may, and ought to be bury'd in the Pariſh where they die, or elſe be carry'd to the Cathedral Church for Burial; for as that Church extends its Power all over the Dioceſs, it ought to admit ſuch Perſons unto Burial. But the

‖ In c. 1. X. 3. 28. *Abbot* ‖ makes a Diſtinction in reſpect of Scholars, who come into a Pariſh with a Deſign of ſtaying there for ſome time, and ſuch as come thither only with a Deſign of paſſing thro' the ſame and not tarrying: For in the firſt Caſe they ought to be bury'd in the Pariſh Church where they die; but in the ſecond, they ought to be carry'd to the Cathedral Church, as aforeſaid.

By

By the *Canon* Law, if a Clergyman knowingly and preſumptuouſly buries any one that is an Heretick, or a Receiver or Favourer of Hereticks, in ſacred Gound, he incurs the Puniſhment of Excommunication: But he, who buries any of the aforeſaid in a Profane Place, does not incur the ſaid Puniſhment, tho' he ſhould (perhaps) at the Time of their Burial, recite the Prayers of the Church, or uſe any other Eccleſiaſtical Ceremonies thereat; ſince this is not called Church-Burial. But a Clergyman is not forbidden to bury an Heretick, or a Favourer thereof, under the aforeſaid Penalty, unleſs he has been denounced as ſuch; becauſe, ſince the Council of *Conſtance*, we are not oblig'd to avoid any Perſon under a Pretence of any Sentence or Eccleſiaſtical Cenſure generally pronounced, either by the Law itſelf, or by the Miniſtry of Man. But all and every Perſon, that adminiſters Eccleſiaſtical Burial to a Perſon, knowing or believing him to be an Heretick, or an Encourager of ſuch, ſhall, according to the Papal Law, *ipſo facto*, incur this Cenſure of Excommunication. Hence it follows (ſay the *Canoniſts*) that not only he, who *more Fidelium* attends the Body of an Heretick to the Church as a Prieſt, and buries it there, is liable to this Cenſure; but even he, who carries an Heretick's Body that is found in the Field, to any Church or Church-yard, and buries it there. For even ſuch an one is ſaid to give Church or Chriſtian Burial to an Heretick.

As to the *Civil* Law, in reſpect of Burial, we find two *Prætorian* Edicts relating to the Right of *Sepulchres* †. The firſt is touching the Religious Obſervation, and the Expences of Funerals: And the ſecond is about the Bearing or Burying the Corpſe of the Perſon deceaſed. And, by this Law, if a Father has been at any Expence for his Daughter's Funeral, he may immediately have an Action againſt the Husband, in whoſe Hands the Dowry was, without waiting for any Time in Law, which was given him for the Reſtitution of ſuch Dower: For by the ſecond Edict of the *Prætor*, an Action (in *Latin* ſtiled *Actio Funeraria* ||) is given to him, that has expended any Thing on the Account of another's Funeral, againſt thoſe to whom it belong'd to diſcharge the Funeral Expences. By the Novel Conſtitutions, Burial may not be inhibited or deny'd to any one; nor can a dead Corpſe be arreſted on any Account, no, not ſo much as for Debt *. *Tancredus* ſays, That in *England*, Sepulture, or Burial of the Dead, may be deferr'd and put off for the Debt of the Perſon deceas'd †: But this is not valid according to the *Canoniſts*, nor according to the preſent Laws of *England*. For though a Debtor may in his Lifetime be ſometimes impriſon'd for Debt ||; yet his Corpſe or dead Body ſhall, by Death, be freed from any ſuch Impriſonment, becauſe Death ſets all Things free. Nor may the Body of any Debtor be detain'd and lie unbury'd above Ground (at the Suit of his Creditors) as a certain kind of Pledge or Pawn, till ſuch Time as the Debt is entirely paid: for it has been often determin'd, that a Man's Debts ought not to be any hindrance to his Burial, ſince Burial ought not to be deny'd to the Corpſe of any Debtor, whether he be rich or poor. Yea, if a Creditor ſhould appeal, in order to hinder the Burial of his Debtor's Corpſe, his Appeal (ſays that Law) ought not to be receiv'd, ſince the Buſineſs of Burial requires a quick Diſpatch, nor does it admit of any delay tho' the Debt be entirely Liquid. For ſome have thought, that the Debtor's Corpſe, if the Creditor demands the ſame, may be detain'd without Burial, as aforeſaid. But this Opinion is inhuman and contrary to Chriſtian Charity, and, as yet, not ſuitable to the Manners of *Barbarians* themſelves; and, therefore, 'tis evidently condemn'd by many Perſons. 'Tis reckon'd impious among Hea-

† D. 11. 7. 1. &c. D. 11. 8. 1.

|| D. 11. 7. 12.

* Nov. 116. c. 5. Nov. 60. l. 1.

† In c. 25. X. 2. 28.

|| X. 3. 23. 3.

Heathens, and much more ſo among Chriſtians, to keep a poor Debtor's Corpſe without Burial, ſince it can in no wiſe diſcharge the Debt. For natural Reaſon, as well as divine and human Laws, will not ſuffer Burial to be deny'd to the Corpſe of any deceas'd, unleſs it be for ſome Cauſe, relating to the Advantage of the State; for 'tis written in *Eccleſiaſticus* *, *For the dead detain it not:* That is to ſay, give Burial freely thereunto without Reward, and hinder not the ſame.

* Ch. 7. v. 33.

It was likewiſe forbidden by an Edict of the *Prætor*, for any one to remove or transfer the Body of any deceas'd Perſon from one Place to another, without the publick Authority of the Emperor ‖. And hereupon we read, there formerly happen'd a great Sedition in the State; for that *Macedonius* an *Arian* did, by his own Authority, and againſt the Will of the greateſt part of the People, remove the Coffin, wherein the Body of *Conſtantine the Great* was laid, out of the Houſe where this Coffin ſtood, into the Church: which Thing the Emperor *Conſtantius* reſented very highly, tho' he himſelf was an *Arian*, not only becauſe there were ſeveral Perſons killed in this Sedition, but becauſe *Macedonius* had preſum'd to remove his Father's Body without adviſing with him about it †. Nor by the *Civil* Law can a Corpſe be bury'd in another's Tomb or Sepulchre, contrary to the Will of the Proprietor; and the Perſon acting contrary hereunto, is liable to an Action on the Caſe ‖.

‖ C. 3. 44. 14.

† Socrat. Hiſt. lib. 5. cap. 32.

‖ D. 11. 7. 2.

By the Law of *England*, the Freehold of the Church is in the Incumbent to ſome Purpoſes; and ſo is the Freehold of the Church-yard: and, therefore, none can be bury'd in the Church without his Leave, (for the Ordinary, or Church-wardens cannot licenſe it) but they may in the Church-yard, becauſe it is the burying Place of the Pariſhioners; And tho' the Parſon gives Leave to bury in the Church, yet ſomething may be due to the Church-wardens (by Cuſtom) for burying there. *Edward Topſal*, Clerk and Parſon of St. *Botolphs* without *Alderſgate*, and the Church-wardens of the ſame, libelled in the Eccleſiaſtical Court againſt Sir *John Ferrers*, Kt. alledging, That there was a Cuſtom within the City of *London*, and eſpecially within that Pariſh, that if any Perſon dies within that Pariſh, being a Man or Woman, and be carry'd out of the ſaid Pariſh and bury'd elſewhere, there ought then to be paid to the Parſon of this Pariſh ſo much, if he or ſhe were bury'd in the Chancel elſewhere, and ſo much to the Church-Wardens, being the Sums that they alledg'd were by Cuſtom payable to them, for ſuch as were bury'd in their own Chancel. And then alledging that the Wife of Sir *John Ferrers* died within the ſaid Pariſh, and was carry'd away and bury'd in the Chancel of another Church, and ſo demanded of him the ſaid Sum; whereupon Sir *John Ferrers* pray'd a Prohibition, and it was granted: For it is an unreaſonable Cuſtom, that a Man ſhould be forc'd to be bury'd in the Place where he dies, or elſe to pay for it as if he were, and ſo upon the Matter to pay twice for his Burial *, which is nothing leſs than Extortion in the Parſon that demands it and does not officiate. Nor is that Cuſtom leſs againſt Reaſon, that he, that is no Pariſhioner, but only paſſes through a Pariſh in order to his Burial, or lies for a Night in an Inn, ſhould have paid for his Paſſage to the Prieſt that offers the Corpſe Burial.

* Hob. Rep.

By a Statute in *Charles* the IId's Reign †, the Miniſter of every Pariſh is to keep a Regiſter of all Burials, and of *Affidavits* of Perſons bury'd in Woollen; and theſe *Affidavits* muſt be brought within eight Days after the Burial, otherwiſe the Miniſter muſt enter a *Memorandum* of the Default, and of the Time when he gave Notice thereof to the Pariſh Officers, which Notice muſt be given in Writing under the Miniſter's Hand; and tho' this may be done at any Time, yet the beſt way

† 30 Car. ch. 3.

way is ſoon after the eight Days are expir'd; and if the Miniſter makes Default in any of theſe Particulars, he ſhall forfeit five Pounds.

That Matters relating to Burial, belong to the Cognizance of the Eccleſiaſtical Court, is very plainly declared by a Conſultation in the *Regiſter* *. Touching the Place of Burial, a Parſon, to an Aſſize brought againſt him for a Houſe, pleaded, That he was Parſon of *P.* and that to be Parcel of his Church by Time immemorial, and that there had been burying of dead Bodies there †: Whereupon *Perſey* was of an Opinion, that the Temporal Court ought not to take Cognizance thereof. And as to the Church-yard, it is a good Plea againſt the Juriſdiction of the Temporal Court, to plead, that the Land is the Parſon's Church-yard ‖. And *Bracton* (I think) alledges the true Reaſon hereof, becauſe it is dedicated to God: For, ſays he, *Negotium terminabitur in foro ſeculari, ſi de Feodo Laico agatur, niſi fuerit dedicatum & deo ſacratum; ſic enim res efficietur ſacra: Hoc autem dici non poteſt de re in liberam & perpetuam Eleemoſynam datâ* †. For though a Thing be given in *Frank-Almogne* to an Eccleſiaſtical Perſon, yet it ſtill remains of Lay-Fee, and is not ſaid to be dedicated to God. Therefore a Treſpaſs done on a Parſon's Glebe-Land (which is a Freehold) cannot be try'd in a Spiritual Court *: But 'tis otherwiſe, according to *Fitz-Herbert*, Tit. *Prohibition* 26. in a Treſpaſs done in a Church-yard: For if a Man takes Trees that are growing in a Church-yard, the Parſon may ſue for them in Court Chriſtian ‖. *Sed Quære.*

* Reg. 50. b.

† Lib. 44. Aſſ. pag. 8.

‖ 44 E. 3. Lib. Aſſiz.

† Bract. lib. 5. cap. 16.

* 19 H. 6. 20.

‖ 17 H. 3.

Of Calumny, and the Oath thereof.

THO' the Word *Calumny*, when it is extended to *Judicial* Matters, often denotes a malicious Vexing of any Perſon with falſe, vain, and fraudulent Law-Suits †, whether it be by way of Action or Exception, or by a malicious Procraſtination and Delaying of a Suit; yet I ſhall here uſe it as it ſignifies an Oath, which the Plaintiff and Defendant are both obliged to take next immediately after Conteſtation of Suit, according to the general Rules of Practice ‖: Becauſe it relates to the whole Cauſe, and was introduced in favour of the publick Welfare, not only to avoid Frauds and litigious Suits, but likewiſe to hinder the Truth of a Cauſe from lying conceal'd *; and, therefore, a Cuſtom directing the contrary, is deemed unreaſonable and invalid, as being derogatory to the Advantage of the Publick Weal. But by the Perverſeneſs of Man, according to *Socinus* † and others, ſuch a Cuſtom may now become valid, ſince *Litigants* in this Age, do rather take this Oath with a Deſign of committing than avoiding Calumny; it being every where taken with ſo much Levity and Readineſs, both by the Parties themſelves, as well as by their *Judicial* Proctors, that the Religion of an Oath plainly paſſes into contempt ‖.

† D. 8. 16. 1. 1.

‖ X. 2. 7. 7.

* C. 2. 59. 2. 4.

† In c. 5. X. 2. 7.

‖ Bald. in l. 24. C. 8. 45. n. 1.

This Oath is ſometimes ſtiled *the Oath of Malice*, and heretofore could not be refuſed, but now it may (according to ſome Mens Opinion) when the Party to whom it is tendred, has founded his Intention on ſome publick Inſtrument: And it ought not only to be taken in Cauſes of the

* vi. 2. 4. 2. *first Inſtance*, but alſo in Cauſes of *Appeal* and *ſecond Inſtance* *. And though, according to the general Rule of Practice, it ought to be taken on the Motion of either of the Parties immediately after Conteſtation of Suit, as aforeſaid; yet ſometimes it may and ought to be taken even before
† vi. 2. 4. 1. X. 2. 7. 7. Conteſtation of Suit, as on a *Dilatory* Exception and the like †: Nay, if this Oath be taken at any Time afterwards, how long ſoever it be, it does not
‖ vi. 2. 4. 1. invalidate the Proceſs; no, tho' it ſhould be wholly omitted ‖. But the Oath of *Calumny* may be *tacitly* remitted, which is done when 'tis not *eo ipſo*
* vi. 2. 4. 1. demanded by either of the Parties; yet it cannot be *expreſly* remitted *; becauſe ſuch a Pact or Agreement would open a Way to Calumny and Malice; and would, conſequently, carry along with it much Miſchief and diſhoneſt Dealing in Law-Suits. If the Plaintiff ſhall refuſe to take this Oath, he ſhall forego his Action or Cauſe of Suit; and if the Defendant ſhall refuſe it, he ſhall be condemn'd as a Perſon confeſſing the Cauſe of
† X. 2. 7. 7. §. *Pœna.* Action †. The Plaintiff herein ſwears, That he does not commence his Suit thro' Malice, but with an honeſt Intent, and not with a View of *Calumny*, believing his Action to be juſt; and the Defendant ſwears, That he will not propound any Exception *animo Calumniandi*, with a Deſign of vexing the adverſe Party, but only ſuch as may be for his juſt
‖ C. 2. 59. 2. Defence ‖. And thus *Calumny* is, when any one does *ex certâ Scientiâ vel Dolo* bring an unjuſt Action, or maliciouſly implead another in Judgment; or when the adverſe Party does in this manner propound any unjuſt Exception, for the ſake either of prolonging the Suit, or defaming his Ad-
* C. 2. 59. 1. verſary *.

The *Canoniſts* ſay, that this Oath was introduced by the Law of God,
† V. 7. & 8. and for a Proof hereof, they quote the 22d Chapter of *Exodus* †, where it is ſaid, 'If a Man ſhall deliver unto his Neighbour Money or Stuff to 'keep, and it be ſtolen out of the Man's Houſe, if the Thief be found, 'let him pay double: But if the Thief be not found, then the Maſter 'of the Houſe ſhall be brought to the Judges, and examined on Oath, 'whether he has put his Hand unto his Neighbour's Goods.' But, according to *Rebuffus*, this Oath of *Calumny* is not obſerv'd in *France*: And 'tis the ſame Thing, according to the Uſage and Cuſtom of *Saxony*. In *Holland* and *England*, tho' the ſame be not often adminiſtred, yet it is not entirely aboliſh'd and grown into diſuſe in their Courts of Law: But in *England*, Proctors are not allow'd, but prohibited by King
‖ Can. 132. *James*'s Canons ‖, to take this Oath *in Animam Domini*, as Advocates and Proctors are obliged to do in *Popiſh* Countries, according to an Impe-
* C. 2. 59. 2. rial Conſtitution * enacted for this End and Purpoſe. Indeed heretofore it was a Doubt, even in *Popiſh* Countries, whether a Proctor might take this Oath, but now 'tis determin'd that he may, according to a Text of
† vi. 2. 4. 3. the *Canon* Law †. And in purſuance hereof, Oaths of this kind are daily taken in the *Imperial* Chamber and elſewhere, by Proctors *in Animam Domini*; though a general Mandate or Proxy is not ſufficient to this
‖ vi. 2. 4. 3. End, but a ſpecial Proxy is required hereunto ‖. In the *Imperial* Chamber, if this Oath of *Calumny* be demanded by the Party, it may not be omitted: For tho' Nullities of the *firſt* and *ſecond Inſtances* are not regarded; yet a legal Proceſs, and a Judicial Order is required, though it be a ſupreme Court of Judicature. Hence it comes to paſs, that if the Oath of *Calumny* be there *Judicially* demanded and not taken, and it be concluded in the Cauſe by the Parties on both ſides, the Judge may, *ex officio*, reſcind this Concluſion thus made; and by an interlocutory Order, enjoin the Party to take this Oath as demanded, under pain of Law: For the Judge may, by virtue of his Office, even after a concluſion in the
* X. 2. 34. 32. Cauſe, demand this Oath to be taken *.

Though

Though a Judge ſhould be impower'd to proceed in a Cauſe in a ſummary Way, *& ſine figurâ Judicii*; yet according to *Bartolus*, he cannot remit this Oath of *Calumny*; and the Text in the *Clementines* proves this very clearly: For both the *Civil* and *Canon* Law, enjoins it to be taken in every Cauſe both Civil and Criminal. But this (I think) admits of a Limitation; for we have an expreſs Text in the *Canon* Law, which ſays, That this Oath is not adminiſtred in ſpiritual Cauſes touching Churches, Tithes and Things Spiritual *, becauſe ſuch Cauſes are ended not by any rigorous Form of the *Civil* Law, but by a Canonical *Equity*.

* X. 2. 7. 9

Of a Canonry, and the ſeveral ſorts of Canons in a Cathedral or Conventual Church.

A *Canonry*, in the Senſe of the *Canon* Law, is an Eccleſiaſtical Benefice in ſome Cathedral or Collegiate Church, which has a Prebend, or a ſtated Allowance out of the Revenues of ſuch Church commonly annex'd to it: For he that has a Canonry, either really has at preſent, or (at leaſt) may expect to have on the next Avoidance, a Prebend laid to his Canonry; and in reſpect of ſuch Prebend he has *Jus ad rem*, though not *Jus in re*, as the Books phraſe it ||. For in ſome of the ſaid Churches there are *ſupernumerary* Canons, (whom we falſely call *Prebendaries*) which do not receive any of the Profits or Emoluments thereof, but only live and ſerve there on a future Expectation of ſome Prebend: But in other Canonries, which are included within the Number of ſuch as do receive a Benefit from thence, the Canonry has of Neceſſity a Prebend, and a Prebend of Neceſſity has a Canonry belonging to it, whether the Prebends be diſtinct or inſeparably annex'd to their Canonries or not; and in theſe a *ſupernumerary* Canon, when he obtains a Prebend, ceaſes to be a *ſupernumerary*, and becomes a *numerary* Canon †.

|| vi. 3. 7. 8.

† Ægid. Bellam. Conſ. 34. n. 4.

The Perſons that do enjoy theſe Canonries are ſtiled *Canons* from the *Greek* or *Latin* Word *Canon*, which ſometimes ſignifies a Liſt or Regiſter of the Clergy, becauſe ſuch Perſons Names were entred into the Regiſter or Matriculation-Book of the Church; or (as others think) becauſe they do receive a Portion or ſtated Allowance out of the Treaſury of the Church; which Allowance was, by the ancient Lawyers, called a *Canon*, and not a *Prebend*, as now it is: And as a Canonry (according to *Innocentius*) is much more honourable than a *ſimple* Benefice, theſe Canons are ſtiled Clerks *of the firſt Degree*, and other beneficed Men, Clerks *of the ſecond Degree*. Yet theſe Canons even of a Cathedral Church have not properly a Dignity ||, though a Dignity be annex'd to their Canonries: but in a large Senſe, as they are collateral to Biſhops, they are Men of great Honour in the Church, and thus they have a Dignity *; and if there be not a Cuſtom to the contrary, they have Precedence of Abbots and all other Dignitaries in a Cathedral Church, and walk before them in all Proceſſions, becauſe they are not divided from the Biſhop. There are ſome Canons that officiate in reſpect of the more ſolemn Part of Divine Service, which they ought to perform as Canons of a Ca-

|| Dd. in c. 11. vi. 1. 3.

* Felin. in c. 28. X. 1. 29.

Cathedral Church; and as theſe Perſons are oblig'd to perform the Communion Service, and other ſolemn Parts of Divine Worſhip, in their turns Weekly *, they are ſometimes called *Hebdomadal* Canons, and are in one Degree before *ſimple* Prebendaries. In the *Romiſh* Church, there are ſome that are ſtiled *Regular*, and others that are term'd *Secular* Canons. The *Regular* Canons are ſuch as are placed in Monaſteries, and hence it is forbidden unto them to hold a Place in two Monaſteries †; and theſe Perſons have a Right of voting in their Chapter ‖. *Volaterranus* informs us, that the Abbot *Arnulphus* founded the Order of *Regular* Canons about the Year of our Lord 1066: But *Munſter* ſays, that the Canons of *Spires*, *Worms*, and *Mentz*, laying aſide the Profeſſion of a Monaſtick Life, became *Secular*, and began to live aſunder about the Year 966. And all thoſe are reckon'd among *Secular* Canons, that are not of that Kind which we ſtile *Regular*; as there are many in *France* and other Countries. There are alſo in *Popiſh* Countries, Women which they call *Secular* Canoneſſes, living after the Example of *Secular* Canons, which do not renounce their Properties, or make any Profeſſion *; but the Council of *Vienna* did not approve of theſe, and calling them *Beguins* †, commands them to chuſe ſome Monaſtick Rule or Order of Life.

* X. 3. 5. 25.

† X. 3. 36. 9. Gloſs. in c. 2. Cl. 1. 9.

‖ X. 1. 6. 47.

* Cl. 3. 10. 2.

† Cl. 3. 11. 1.

The ſupernumerary Canons were thoſe unto whom the Pope gave a Canonry, and the firſt Prebend that ſhould become void; but yet they could not, by their own Authority, take poſſeſſion of a vacant Prebend ‖: And of theſe Supernumeraries there are two *Species*, one *of Law*, and the other of *Fact*. That *of Law* is, when the Pope commands a Chapter to admit ſuch a Perſon as a Canon or Friar; and, then they conferring the Right of a Canonry on him, he is by ſuch Admiſſion made a Canon. The other is, when the Pope creates a Canon beyond the Number limited, and commands the Chapter to aſſign unto ſuch Canon a Stall in the Choir and Place in the Chapter *. Theſe Supernumerary Canons, if they have a Stall in the Choir, and a Place in the Chapter, ought to be preſent at all Elections, Alienations, and other Debates, as other Canons are, unleſs there be a Cuſtom to the contrary †. And if an Archdeaconry ought to be conferr'd on a Canon, it may be conferr'd on a *ſupernumerary* Canon, having a Stall in the Choir, and a Place in the Chapter, according to *Caſtrenſis* ‖; but this only proceeds, when he is voluntarily inſtalled, and not when he comes by a Papal Mandate, I think.

‖ Fed. de Sen. Conſ. 290. n. 5.

* D. Conſ. n. 5.

† Fed. de Sen. d. Conſ. n. 5.

‖ Conſ. 366. lib. 1.

Canons are Collaterals unto Biſhops, as Cardinals are to the Popes; and, therefore, as Men cannot be Cardinals without being in Orders; ſo neither can Men be Canons of a Church, without being in Orders *: For the Number of Canons ought not to be ſupply'd by Laymen †. But though a Canon, that is not in Holy Orders, cannot be a Member in any Cathedral or Collegiate Church, or have a Voice in the Chapter; yet a Canon, promoted to Holy Orders before he is of a Lawful Age for the ſuſception of Orders, ſhall have a Voice in the Chapter, becauſe this Right and Power principally flows from the Canonry itſelf. At this Day, by a Canon of the Council of *Trent*, none can be choſen but ſuch as are in Prieſts, Deacons, or Sub-deacons Orders; and hereby they are obliged to be reſident and officiate in their Churches, under the Penalties ordained by that Council ‖. For antiently Perſons might be Canons of a Church, if they were Clerks in the *Leſſer* Orders. In reſpect of Canons and Prebendaries, the ſame is enacted by a Statute in *Charles* the IId's Reign here in *England*, excepting the Law-Profeſſor at *Oxford*, who may be a Layman *. But (notwithſtanding the Law of Reſidence as aforeſaid) if a Canon of any Church ſhall abſent himſelf from thence with or in the Service of his Biſhop, he ſhall receive the Profits of his Prebend, tho' there ſhould be a Con-

* Cl. 1. 6. 2.

† X. 3. 7. 2.

‖ Seſs. 24. c. 12. de Reform.

* 14 Car. 2. cap. 4.

Conſtitution of ſuch Church to the contrary; which was the Caſe of two Canons in the Church of *Melda*, and this Conſtitution was ſtrengthen'd with an Oath by the Apoſtolick See †.

† X. 3. 4. 15.

The Biſhop, with the Conſent of the Chapter, may reſtrain the antient Number of Canons, and Prebendaries, and out of many Canonries and Prebends, conſtitute a leſſer Number: for it tends to the Diſparagement of the Church (ſay the *Canoniſts*) that the Canons, who conſtitute and make one Body-Politick, ſhould not be able to ſupport themſelves in a ſuitable and decent Manner on the Rents of the Church. So that one lawful Cauſe for reſtraining the Number of Canons and Prebendaries in any Church, is, when the Rents and Revenues of the Prebends and Canonries are not enough to ſupport the Prebendaries and Canons in a fit and convenient Manner: For there ought to be only ſo many Canons and Prebendaries in a Church, as may handſomely live on the Rents and Revenues thereof.

The Collation of Prebends and Canonries in a Cathedral Church does, according to the Opinion of ſeveral Perſons, belong of common Right to the Biſhop and Chapter together ‖; and wherever the Biſhop and Chapter have ſuch Collation *ſimul & conjunctim*, neither the Biſhop alone, nor his Chapter alone, can collate thereunto: But *Ægid. Bellamera* * is of a contrary Opinion, and ſays, that the Biſhop has the ſole Collation unto theſe Preferments. With us here in *England*, ſometimes the King, and ſometimes the Biſhop ſole Collates thereunto; and in ſome Cathedrals the Chapter chuſe their Canons. But of *common* Right, in ſecular Collegiate Churches, vacant Prebends and Canonries are diſpos'd of by Way of Election and Preſentation made by the Dean and Chapter; and it belongs to the Biſhop to give Inſtitution hereunto †; unleſs there be a Cuſtom to the contrary, which ought to be regarded.

‖ Fed. de Sen. Conſ. 232.

* Conſ. 10. n. 58.

† Fed. de Sen. Conſ. 34. per tot.

Of Cancellation, or Cancelling of Deeds.

THO' *Cancellation* may more properly be inſerted in the Title of Inſtruments; yet I ſhall give it the Reader in this Place at large, becauſe it may ſerve to explain what comes afterwards under the aforeſaid Title of Inſtruments, and that of Laſt Wills and Teſtaments. Now *Cancellation*, according to *Bartolus* ‖, is an expunging or wiping out of the Contents of an Inſtrument by two Lines drawn in the manner of a Croſs: But, notwithſtanding the Authority of this Definition, there are ſeveral ways of cancelling a Deed or Inſtrument in Writing. And the firſt kind of *Cancelling* is made by Word of Mouth; and a ſecond is made by ſome Act done, which has a much greater Power and Operation in Law, than that which is made by word of Mouth only; eſpecially when the whole is made in ſuch an effectual manner, that the Inſtrument cannot be read. The *Cancelling* of an Inſtrument, or Laſt Will and Teſtament, which is made by a Notary on ſome Requeſt, is effected by the making of ſome other Inſtrument or Teſtament, or in ſuch a manner whereby the firſt Inſtrument is not torn; becauſe ſuch an Inſtrument ought to appear as a cancelled Deed *: And 'tis the ſame Thing, if ſuch *Cancellation* be made by the Judge's Decree; becauſe the Notary may not then tear an Inſtrument thus cancelled. The *Cancelling* of an In-

‖ In l. 1. D. 28. 4. 3.

*Alex. Conſ. 74. lib. 1.

ſtrument formally made by Debtor and Creditor, diſcharges the Debt; and that is call'd a formal *Cancelling* of a Deed, according to *Baldus* *, when it is made upon a good Conſideration, where the Conſideration adds Strength to the *Cancelling* thereof: And this alſo proceeds in a *Cancellation* which is not formally made, when it appears, that the ſame was made by the Creditor, for it ſhall diſcharge the Debtor †; and ſuch Inſtrument is preſum'd to be cancelled by the Creditor, if it be found cancelled in his Cuſtody, and he was deem'd a Man of Care and Caution in other Matters. But if ſuch Inſtrument be found cancelled in the Cuſtody of the Debtor, unleſs it be upon a formal Conſideration, it does not diſcharge him, if it may be proved that the Inſtrument was intruſted to his Keeping; for it ſhall be preſumed, that he himſelf cancelled it ‖. But in a doubtful Caſe, if an Inſtrument be found cancelled, it is preſum'd to be cancelled by the Will and Conſent of the Creditor, whether it be found cancelled in the Keeping of the Debtor, or in the Hands of any other Perſon *. If it be written on the Back of an Inſtrument, or of a Bill of Hand-writing, that Part of the Debt or Legacy is paid, it is a *Cancellation* as to that Part of the Debt or Legacy, and the ſame is preſum'd to be made by the Creditor's Conſent.

* Conſ. 305. lib. 4.

† Bald. ut ſupra.

‖ Bald. ut ſup.

*Alex. conſ. 14. n. 17. lib. 6.

He that cancels or defaces a Teſtament, is thereby deem'd to have a Will and Meaning of taking away the Force and Virtue thereof †; which Will, in this reſpect, ought to obſerv'd as a Law: and ſo the Teſtament cancelled and defaced, is to be adjudged void ‖. And that this *Cancelling* or Defacing of the Teſtament being objected deſtroys the Force thereof, is ſuppos'd to be extended to thoſe Teſtaments Nuncupative, that are afterwards reduced to Writing: ſo that if a Man firſt makes a Will by word of Mouth, then cauſes the ſame to be written, and afterwards willingly cancels or cuts the ſame Writing or otherwiſe defaces it, ſuch Teſtament is then as if it had never been written at all *. Nor does it avail a Man to prove the ſame by Witneſſes: for tho' Writing does not belong to the Subſtance of the Teſtament, yet by *Cancelling*, the Teſtator is preſum'd to have repented of the Making of it, and to have revoked the ſame †. Moreover, tho' no Cauſe of Unworthineſs appears either in the Executor, or any Legatee, which could induce the Teſtator to diſappoint them of their Hope; yet by *Cancelling* the Will, the ſame ſhall be void; and the Teſtator is preſum'd to have done it in Favour of them that are to have the Adminiſtration of his Goods after he dies Inteſtate ‖. And thus much of *Cancellation* for the preſent, till I come to ſpeak of Inſtruments and Laſt Wills and Teſtaments.

† D. 28. 4. 1 & 2. & Dd. ibid.

‖ Gloſs. in l. 1. D. 28. 4.

* Zaz. Conſ. 2. vol. 1. n. 29.

† Vaſq. de Succ. l. 2. §. 15. Requiſ. 17. n. 61. 62.

‖ Dd. in l. 1. D. 28. 4.

Of Cardinals, their Riſe and Power in the Church.

ABOUT the Year 817, when Pope *Paſcal* the Iſt, was advanced to the Papacy, the Prieſts of the ſeveral Churches in *Rome*, in order to have a nearer and cloſer Correſpondence with the Pope, and as well to qualify themſelves for electing him, as to adorn their Power with a more eminent Title, began to call themſelves *Cardinals*; and arrogated ſo much to themſelves, eſpecially having excluded the People of *Rome*

Rome from any Voice in the Election, that a Pope was ſeldom choſen, unleſs it was out of their Number: Whereupon, after the Death of *Paſcal*, *Eugene* the IId, was created Pope, from the Title of *Cardinal* of *Sancta Sabina*. And thus in Proceſs of Time, this Order of *Cardinals*, which was unknown to the Chriſtian Church in former Ages, became an Order erected in the Church of *Rome*, ſuperior unto Biſhops themſelves: For at firſt they were only eſteem'd and reckon'd among the Number of Prieſts and Deacons, till after the tenth Century, when they began to exalt themſelves above their Degree. But notwithſtanding this, they were accounted inferior to Biſhops till the Year 1200, or (others ſay) till the Year 1305, when *Clement* the Vth, was Pope; ſince which Time they have ſo far advanced themſelves, that they ſet themſelves above Kings, or (at leaſt) make themſelves equal to them, and retain Biſhops themſelves as Servants in their Houſes: and it will be impoſſible to cleanſe and reform the *Romiſh* Church (that *Augean* Stable of Filth and Naſtineſs) till both Cardinals and Biſhops are brought to their former Ranks and proper Places in the Church.

Heretofore none but Cardinal-Prieſts, and Cardinal-Deacons, could chuſe the Pope; for as yet a Cardinal could not be a Biſhop, becauſe a Biſhoprick requires continual Reſidence; and, as a Cardinal is the Pope's Aſſiſtant, and his Preſence always required in Council, he cannot reſide on his Biſhoprick, which was once looked upon as a very great Crime not to do. Nor ought any Perſon whatever to ſtand for the Papacy, unleſs he advanced himſelf thereunto by diſtinct Degrees, as Cardinal-Prieſt, or Cardinal-Deacon: And, by the *Canon* Law, if a Pope was inthron'd without a Canonical Election of Cardinals, and the Preſence of Religious Clerks, he was not to be deem'd Apoſtolical, but *Apoſtatical* *; and by theſe Cardinals the Pope governs his Territories. But tho' the Number of Cardinals, by a Conſtitution of Pope *Sixtus* the Vth, was limited to Seventy, according to that of *Chriſt*'s Diſciples; yet Popes, by a Diſpenſation, do ſometimes exceed this Number, and ſometimes they do not come up to it.

* 79 Diſt. c. 1.

Among theſe Cardinals, we find ſome Perſons deſcended from the chiefeſt Families in *Europe:* and among them, to encourage their Fidelity to him, the Pope divides the four chief Offices of State. The firſt is that of *Great Penitentiary*, who, together with his Counſellors, preſcribes the Meaſure of *Pennance* to ſuch Perſons as make a Confeſſion of their Sins, after he has conſider'd and ponder'd the Matter well; that is to ſay, after he has compounded with them for an eaſy *Pennance*. There are other Inferior *Penitentiaries*, that are ſubject to him; and do either abſolve the Perſons Confeſſing, or elſe do, by concealing their Names, remit them to the ſupreme Tribunal of the *Great Penitentiary*, for a Puniſhment of their Sins, according to the greatneſs of their Crimes. The ſecond great Officer is that of the Pope's *Vicar*, who has the Care of Divine Worſhip, and of the Spiritual Government of the Church. The third is that of his *Vice-Chancellor*, for he reſerves the Office of *Chancellor* to himſelf. And the fourth great Officer is that of the Pope's *Chamberlain*. He has other Miniſters under him, as all other Princes have: But of theſe I ſhall not diſcourſe.

Theſe Men are ſtiled *Cardinals* †, becauſe (according to ſome Men's Opinion) they are ſerviceable to the Apoſtolick See, as an Axel or Hinge (in *Latin* called *Cardo*) on which the whole Government of the Church turns ‖. Yet they may more properly be ſo ſtiled by way of *Adjective*, becauſe they have from the Pope's Grant the Hinge and Management of all

† Gloſs. in c. 4. extra. 3. v. *Cardinalibus.*

‖ 22 Diſt. cap. 2.

all the Affairs of the *Romiſh* Church, according to *Sylvius* on theſe Words of *Virgil, viz.*

——— *Haud tanto ceſſabit cardine rerum.*

They are ſaid to be part of the Pope's Body in the ſame Senſe as Senators are ſaid to be Part of the Prince's Body: And ſometimes they are ſtiled the Pope's Brethren, and Co-adjutors, by whoſe Advice he governs and judges the *Popiſh* Part of Mankind. And thus the Church has firſt its Senate or College of Cardinals; out of which, on the Pope's Death, another Pope is choſen as from his Body: And, therefore, as theſe Men are ſaid to be the Pope's Companions, they are of the greateſt Dignity in that Church; and are, according to *Joh. Andreas*, ſtiled Children of the firſt Degree to the Pope, who is the only Spouſe of the Church, if we may believe the *Romaniſts*. In all Embaſſies and Legations, by a Decree of the Council of *Lateran* *, they bear the Arms of the Apoſtolick See; and Legates *à Latere* are for the moſt part choſen out of the Body of Cardinals. The Council of *Baſil* preſcribed a Form for the electing of all Cardinals many Years ago, but this Form is now laid aſide by the Pope's ſole Nomination of them: and every ſuch Election, when it obtain'd, was to be made by the Conſent of all the Cardinals then preſent; and by way of Scrutiny; pitching on ſome honeſt Man of good Morals, and born in lawful Wedlock, who was a Licentiate or Doctor in ſome Faculty, of thirty Years of Age, and could not be the Pope's Nephew either by Brother or Siſter's Side, or the Nephew of any of the Cardinals. But now as Cardinals are made by the Pope's Will and Pleaſure, they may be not only the Pope's Nephews, but are very often his natural Children called by the Name of *Nephews*.

* X. 5. 33. 23.

In Reſpect of their Titles or Benefices, there are Cardinal-Biſhops, Cardinal-Prieſts, and Cardinal-Deacons; and all theſe Cardinals, in Reſpect of their Titles decreed them, have almoſt all of them Epiſcopal Juriſdiction; and theſe Titles are equivalent and borrow'd from the Churches or Dioceſſes †: And by theſe Titles the Dignity of the Cardinalſhip is divided and diſtinguiſh'd. The Cardinal Biſhops are the Cardinals of *Oſtia*, *Præneſte*, *Sancta Sabina*, *Velitra*, *Albano*, *Sancto Ruffino*, *Tuſculano*, *&c.* The Cardinals were ſummon'd formerly by the Pope to meet twice a Week as the Pope's Council, which was called the Conſiſtory; but now upon the Decreaſe of Buſineſs in the Church, once a Week is ſufficient. To theſe Pope *Innocent* the IVth, about the Year 1250, gave the Red Hat, and granted the Honour of riding thro' the City of *Rome* on Horſe-back ‖.

† X. 1. 33. 11.

‖ Pol. Virg. lib. 4.

Of Catechiſm or Catechizing.

CAtechiſm is derived from the *Greek* Verb κατηχέω, originally ſignifying the ſame as in the *Engliſh* Tongue. This Prepoſition κατα makes it, being a Verb *Neuter*, to have an *active* Signification: And he is properly ſaid κατηχεῖν, who tells us any thing which he would teach us by *way of Inſtruction*. And hence it ſignifies to teach the Rudiments or firſt Grounds

Grounds of any Art; but in a peculiar Senſe, to teach the Principles of the Chriſtian Religion, which we in *Engliſh* call *Catechizing*, as fitly enough derived from the *Greek* Word. Some ſay, that Heathen Authors never knew the Uſe of this Word, but they are entirely miſtaken; for *Lucian* uſes it in this very ſenſe, *viz.* to *teach the Rudiments of an Art* *. * Vid. Steph. Lex.

By Catechizing then, according to the general Notion of the Word, I mean nothing elſe but the Miniſter's Inſtructing the Youth of his Pariſh in the ways of Virtue and Religion by an eaſy and familiar Method, which here in *England* was enjoin'd by the antient Canons of the Church, as may be ſeen in the 11th Canon of the Council of *Cloveſloe*, and in the 6th of King *Edgar*'s Canons. Now the Buſineſs of Catechizing was inſtituted for three Reaſons. *Firſt*, For the Inſtructing Youth in the common Articles of Religion and the Chriſtian Faith. *Secondly*, That they may be able to give an Anſwer, in making a Profeſſion of their Faith. And, *Thirdly*, That they may make a Promiſe, and give ſome Surety of the Obſervance of this Faith. And becauſe a Perſon of an adult Age *proprium habet peccatum*, and may of himſelf anſwer for himſelf, theſe three Things, as abovemention'd, are required of him: But as to an Infant guilty of no actual Sin, and who cannot in his own Perſon be ſaid to believe, theſe three Things are required from him by his Subſtitute or Vicar, who anſwers for him touching his Profeſſion and Obſervance of this Faith. For it was the Cuſtom of the Catechumens, or Catechized before the receiving of Baptiſm, to repeat the *Creed* and at every Article the Prieſt asked them, *whether they believed?* To which they anſwer'd, *yes I believe:* Wherefore, when they ſaid, *they believe the Remiſſion of Sins*, *Novatian* not allowing the Remiſſion of Sins, aboliſh'd that Article, and the Confeſſion of Faith, which the Catechiz'd repeated †. † Cypr. Epiſt. 70 & 76.

Of a Caveat, and the ſeveral Kinds thereof.

A *Caveat* in Law is in the Nature of an Inhibition; and is an Intimation given to ſome Ordinary or Eccleſiaſtical Judge by the Act of Man, notifying to him, that he ought to beware how he acts in ſuch or ſuch an Affair: And this ſuſpends the Proceedings of ſuch ordinary or Eccleſiaſtical Judge, till ſuch Time as the Merits of ſuch a *Caveat* are determin'd, or (at leaſt) till the ſame is ſubducted. Among the ſeveral ſorts of *Caveats*, theſe are three, *viz.* The firſt relates to the Admiſſion of Clerks unto Eccleſiaſtical Benefices; the ſecond to the admitting of Perſons to Letters of Adminiſtration; and the third has a reſpect to the Probate of laſt Wills and Teſtaments. I ſhall begin with the firſt.

If a Patron, before his Church is void, ſuſpects ſome Pretender or other will conteſt the Title of his Advowſon, it is adviſable for him to enter a *Caveat* with the Biſhop or his Regiſter in this Form, *viz. Caveat Epiſcopus* Winton, *nè quis admittatur ad Eccleſiam de* H. *niſi convocatus vel citatus* R. B. *&c.* The *Canoniſts* allow this to be done in the Incumbent's Life-time *quia veretur damnum futurum*; and that if another receives Canonical Inſtitution after the entry of ſuch a *Caveat*, without Notice given to him who enter'd it, the Inſtitution is void. But 'tis otherwiſe at the Common Law: For a *Caveat* is only for the Benefit of the Biſhop,

ſhop, and to prevent his being found a Diſturber; it does not preſerve *Jus illæſum* ſo as to make all ſubſequent Proceedings void, becauſe it does not come from any Superior. And 'tis the ſame in the Spiritual Court as it is in the Temporal, that is to ſay, it is only an Act of Caution for the bettter Information of the Judges. In the Caſe of *Hutchins* againſt *Glover*, it was concluded that a *Caveat* is void, if it be entred before the Church is void, and upon that Reaſon only, which implies, That if it had been ſeaſonably enter'd, it ſhould have had its effect by the Common Law. For in the Lord *Zouch*'s Caſe it was ſaid, That if a Church becomes void, and a ſtranger enters a *Caveat* with the Biſhop's Regiſter, that none be inſtituted to the Church till he be made privy to it, and the Biſhop before he has notice of the *Caveat*, inſtitutes a Clerk, ſuch Inſtitution is merely void by the *Canon* Law; for the Regiſter ought to notify the *Caveat* to the Biſhop, and his Negligence, in this Caſe, ſhall not prejudice him that enter'd it. And if the Biſhop, upon notice of the *Caveat*, aſſigns a Day to him that puts it in, and before the Day inſtitutes a Clerk, ſuch Inſtitution is merely void. And 'twas ſaid in *Hutchins*'s Caſe, That a *Caveat* to hinder Admiſſion and Inſtitution into an Eccleſiaſtical Benefice, according to the *Canon* Law, was only in force for three Months; and that any one may ſafely preſent after that Time, as if no *Caveat* had been enter'd *. But though a *Caveat* enter'd in the Incumbent's Life time be idle and to no purpoſe, according to the Common Law: For 'twas ſaid both in *Rone*'s † and *Hutchins's* Caſe, that a Biſhop need not regard a *Caveat* enter'd before the voidance of a Church; yet (I think) a Biſhop would do well to ſhew regard hereto, as being a Judge, and not only ſo, but the great Paſtor of the Dioceſs too; and ought, conſequently, ſo to behave himſelf, as to manifeſt his due reſpect to Equity as well as ſtrict Law: And, therefore, to do what he lawfully may, that no Perſon by his Haſte be ſurpriz'd, but may have a timely opportunity to ſet up his Intereſt without any Diſadvantage thereunto. But 'tis not adviſeable for a Biſhop to refuſe Admiſſion and Inſtitution of a Clerk only, becauſe a *Caveat* was enter'd before ſuch Voidance, but that he only ſuſpends the Admiſſion of him, till he can enquire touching his Life and Converſation and the like; leſt the Biſhop, in a *Quare Impedit*, ſhould be found a Diſturber ‖. And this puts me in mind, that a *Caveat* may be enter'd againſt the Admiſſion of a Clerk upon the ſcore of ſcandalous Crimes committed by him; but then theſe Crimes ought to be of ſuch a Nature as would induce Deprivation, if they were done after Inſtitution: But in this Caſe, even by the *Canon* Law, the *Caveat* ought to be enter'd after the Incumbent's Death; and the Biſhop, before he receives ſuch a *Caveat*, may require proper ſecurity for the Proſecution and Maintaining thereof.

* Crok. Rep. pt. 2d. 464.

† Poph. Rep. p. 133. Rolls. Rep. 1. p. 191. 227.

‖ Rolls ut ſupra.

Secondly, In reſpect of Letters of Adminiſtration, which if granted whilſt a *Caveat* is depending, it is void in Law. *W.* Adminiſtratrix, ſued the Defendant in the Court of Chancery: The Defendant ſhew'd, That before Adminiſtration was committed to the Plaintiff, he put in a *Caveat* in the Eccleſiaſtical Court, pending which *Caveat*, the Plaintiff obtain'd Letters of Adminiſtration, of which he demanded Judgment pending the Appeal. It was ſaid that the ſame was a good Cauſe to ſtay the Suit till the Appeal was determin'd. In this Caſe it was alſo ſaid, that the ſame was not like to a Writ of Error; for by purchaſing a Writ of Error, the Judgment is not impeach'd till the Record is reverſed: but the very bringing of an Appeal, is a Suſpenſion of the firſt Judgment for the principal Matter *. And thus alſo in this kind of *Caveat*, there is a difference between the *Common* and *Canon* Law: For if after a *Caveat*

* Gouldesb. Rep. p. 119.

veat enter'd againſt the granting of Letters of Adminiſtration, they be (notwithſtanding ſuch *Caveat* depending) granted by another, it is good at Common Law; but 'tis otherwiſe in the Spiritual Court, where, by the *Civil* Law, an Adminiſtration (pending a *Caveat*) is void.

Of a Cauſe, Controverſy, Suit, Inſtance, and the like.

IN Judgment ſome Perſons are neceſſarily preſent as *Principals*, and others only as *Acceſſaries*. The *Principals* are the Judge, Plaintiff, and Defendant in Civil Cauſes; and ſome add Witneſſes hereunto: But, I think, Witneſſes ought more truly to be reckon'd among *Acceſſaries*. And therefore, ſince Witneſſes only ſerve to ſtrengthen and confirm the Plaintiff or Defendant's Intention when other Proofs cannot be had, I ſhall treat of them hereafter in a more proper Place, and proceed to treat of a *Cauſe*, as being that which gives a Beginning to Judicature.

Now the Word *Cauſe* is ſo call'd (according to ſome †) from the *Latin* Word *Chaos*, which was the beginning of all things; and in this Senſe, a Cauſe may be ſaid to be the *material* Beginning of a *Judicial Proceſs*: But, in my humble Opinion, a Cauſe which is deduced in Judgment is ſo called from the *Latin* Word *Caſus*; becauſe it caſually happens and comes to paſs ‖. There are ſeven Cauſes conſider'd in Judgment, *viz.* the *Material*, *Efficient* and *Formal* Cauſe; and likewiſe a *Natural*, *Subſtantial*, and *Accidental* Cauſe; and, laſtly, a *Final* Cauſe. The firſt is the *Material* Cauſe, from whence any thing immediately proceeds and comes to paſs; and that which happens or is derived from it, is in *Latin* term'd *Materiatum* or *Res Materiata* *: As when a Cup or Bowl is made of Silver, the Silver is called the *material* Cauſe thereof, and the Cup or Bowl is called the *Materiatum*. But in reſpect to Judicature, the *material* Cauſe of a *Judicial* Proceſs is the very Cauſe itſelf which is brought into Court, whether it be a Civil or a Criminal Cauſe †; becauſe a *Judicial* Proceeding immediately happens, and is derived from the Cauſe itſelf: And the *Judicial* Proceſs may be called the *Materiatum*. The *Efficient* Cauſe is that which makes an Act, or performs ſome Work by the Help and Means of the *Material* Cauſe: And, according to *Baldus*, is divided into a *proximate* and *remote* Cauſe, as may be exemplify'd in Building. For the Maſon or Builder of the Walls is ſaid to be the *proximate* Cauſe, as being the immediate Maker of the Walls: But the Proprietor or Maſter thereof, who cauſes the Walls to be built, is the *remote* Cauſe thereof: Therefore, in matters of Judicature, the *efficient* Cauſe is the Judge, Plaintiff and Defendant; becauſe the Court and Buſineſs of Judicature conſiſts of theſe three Perſons ‖: And this is call'd the *proximate efficient* Cauſe of Judicature, becauſe Judicature immediately proceeds from theſe three Perſons. A *remote efficient* Cauſe may alſo be conſider'd in Judicature; as when a Perſon litigates by his Proctor and the like: For then a Proctor is the *Proximate*, and his Client is the *remote* Cauſe; or rather the Proctor may be term'd the efficient Inſtrumental Cauſe. The third Cauſe conſider'd in Judgment is the *Formal* Cauſe, which

† Card. in Clem. 1. §. ab *olim*. in 3. oppoſ. de Sepult.

‖ X. 5. 40. 10.

* Text. Gloſs. & Bart. in l. 18. D. 13. 7.

† X. 5. 40. 10.

‖ X. 5. 40. 10.

which conſiſts in the Order and Method preſcribed and laid down by the Law for doing any Act; as when an Act ought to be done with ſome ſolemnity of Law; for then ſuch ſolemnity is ſaid to be in the Form of the Act itſelf. An example hereof we have in a laſt Will and Teſtament, wherein (according to the *Civil* Law) ſeven Witneſſes are *formally* requir'd: ſo that if one of theſe Witneſſes are wanting in Number, the Teſtament is not valid *. 'Tis the ſame thing in a Stipulation, wherein the Form is, That an Interrogation be previous thereunto; and an Anſwer ought to follow on ſuch an Interrogation or Queſtion put †: And ſo it is in the Alienation of a Minor's Eſtate, and of that of the Church ||. And thus where the Law ſays, that ſuch an Act ought to be executed in Writing, that Writing *Baldus* * ſtiles the Form of the Act. That is called the *Formal* Cauſe of a Thing, which gives a Being to the Thing; and if that Form be omitted, it vitiates the Act †. But in reſpect of the *Formal* Cauſe of a *Judicial* Cauſe, we may reckon the Order and Solemnity of the Proceſs itſelf, *viz.* That a Libel ought to be firſt exhibited; 2dly, Conteſtation of Suit made; 3dly, a Term-Probatory aſſign'd; and, laſtly, a Sentence pronounc'd: For if this Form or Order be omitted or perverted, the Sentence is not valid ||. Moreover, 'Tis of the Form and Solemnity of Judicature, that the Judge ſhould ſit on the Bench, and not ſtand up. The fourth Cauſe conſider'd in Judicature is the *Subſtantial* Cauſe; on which the whole Force, Name, and Effect of the Act itſelf depend. For Example, in a Contract of *Bargain* and *Sale*, the Subſtance of that Contract is the Thing and Price agreed on: For without theſe Things, ſuch Contract cannot be made and executed, without its being null and void *. Thus alſo in Matters of Judicature, the *Subſtantials* of all *Judicial* Proceſſes are the Eſſential Acts of Judicature themſelves; as a Libel, Conteſtation of Suit; the Oath of Calumny in ſome Courts and the like. I would not have any one fancy, that the Inſtance which I have given in the *Formalia* of Judicature, to be one and the ſame with this of the *Subſtantials*: For in the *Formalia*, I only conſider the Order of the Solemnity, but in *Subſtantials*, I conſider the Acts themſelves properly intervening †. The fifth Cauſe conſider'd in Judicature is a *natural* Cauſe; and thoſe Things are ſaid to be natural to any Act, which *tacitly* proceed from the Nature of the Act itſelf, without that which is ſaid to be of the Act: Thus we ſay in a Loan or *Mutuum* wherein it *tacitly* proceeds from the Nature of it, that they ought to be founded on Equity on both Sides, and ought to be ſatisfy'd ||. And alſo in a Contract of Sale, wherein it *tacitly* proceeds from the Nature of it, That the Vendor ſhould be liable to an Eviction *, and ſhould not be obliged to pay the Price, but only to deliver the Goods †. And thus in matters of Judicature, Firſt, 'Tis the Nature of a *Judicial* Proceſs, that it ought to be determin'd in that Court where it had its Beginning ||. 2dly, That it ought to be an individual Thing *. And 3dly, That an Equality be obſerv'd between Plaintiff and Defendant, and that it ſhould not halt on either Side. And, laſtly, That the Inſtance of the Cauſe ought to be finiſh'd within three Years in a Civil, and two Years in a Criminal Cauſe †. A ſixth Cauſe conſider'd in Judicature, is ſtiled an *Accidental* Cauſe; and the *Accidental* of any Act, is ſaid to be whatever advenes to the Act itſelf already ſubſtantiated ||; For an *Accident*, according to the *Logibians*, is that, *quod poteſt adeſſe & abeſſe ab aliquo ſubjecto præter ipſius ſubjecti corruptionem*. Therefore every Pact which is annex'd to a Contract of Sale, beſides the Thing and the Price, is call'd an *Accidental* Pact or Covenant; becauſe, according to *Baldus* *, the Contract may ſubſiſt without it. And thus in Judicature, all Things that happen in a *Judicial* Pro-

* C. 6. 23. 12.

† D. 45. 1. 5. 1.

|| D. 27. 9. per tot. c. 1. 2.

* In l. 12. C. 6. 55.

† D. 10. 4. 9. 5.

|| C. 7. 45. 4. Bart. ibi.

* C. 4. 38. 15.

† Clem. 2. 1. 2.

|| D. 12. 1. 3.

* C. 8. 45. 6.

† D. 19. 1. 11.

D. 18. 1. 25.

|| D. 5. 1. 30.

* D. 10. 2. 27.

† C. 3. 1. 13.

|| D. 18. 1. 72. Gloſs. ibi.

* In. l. 13. D. 18. 1. & fin.

Proceſs by the Oppoſition of either Party, beſides the Subſtance and Form of the Proceſs itſelf, may be called the *Accidentals* *: And an Example hereof may be given in all Exceptions, which the Litigant propounds againſt the Perſon of his Adverſary, or againſt Witneſſes, the Libel, and the like. All theſe Things are called *Accidentals*; becauſe ſome new Incident in Judicature may emerge upon them, on which the Judge ought to proceed by Interlocution, and the principal Matter in Queſtion, may be handled without them; becauſe it does not touch the Subſtance or Form of the *Judicial* Proceſs. The laſt Cauſe conſider'd in Judicature, is what we call the final Cauſe; and it is ſo ſtiled, becauſe ſome Act is done to that End; and if this End ceaſes, the Effect of that Act ceaſes with it †: Thus in a *Judicial* Proceſs, the final End thereof is a definitive Sentence; for that a Cauſe is brought into Court, to the end that it ſhould be determin'd by a Sentence ‖, and that every one ſhould have his Right *: And to this end the Laws tend very much, and abhor to find Suits engender and protract Suits †. And that the Sentence itſelf is the final End of a *Judicial* Proceſs, appears from hence; becauſe where there is no Sentence, the Effect of the *Judicial* Proceſs, which is the Execution, ceaſes. *Socinus* ſays ‖, that the final Cauſe of every Act is the principal Intent of the Man that does that Act; and as the principal Intent of a Man's commencing and proſecuting a Suit, is the coming at a Sentence, the Sentence itſelf is the final Cauſe of the Suit; which is properly called the Cauſe, and none elſe; and is the Cauſe of all other Cauſes, according to *Ariſtotle*.

* C. 3. 1. 3.

† D. 37. 14. 6. 2.

‖ C. 3. 1. 13.

* vi. 2. 14. 1.

† C. 3. 1. 2. C. 7. 51. 3.

‖ Conſ. 251.

Having thus ſhewn after what manner theſe ſeven Cauſes are conſider'd in Judicature, I ſhall next conſider, as a Supplement hereunto, whether a *Judicial* Proceſs may be made (at leaſt) by the Conſent of the Litigants, without the Intervention of theſe ſeven Cauſes, or ſome of them? *viz.* Whether the Parties may renounce the Subſtantials and Formals of a *Judicial* Proceſs; and thus of the other Cauſes abovemention'd. And, firſt, as to the material Cauſe, the Parties cannot wave and renounce the ſame; becauſe as a *Judicial* Proceſs is *quid Materiatum* from the Cauſe itſelf deduced in Judgment, it cannot *in eſſe* be produced *ſine ejus Materiâ*; and conſequently, neither the Parties, nor the Judge can act *Judicially* without the material Cauſe; becauſe it is impoſſible in the Nature of Things, ſince a Shipwright may as well build a Ship without Planks and Timber †. 2dly, In reſpect of the *Efficient*, the Parties cannot renounce the ſame, nor can a *Judicial* Proceſs be produced, *in eſſe*, without it; becauſe it would be as abſurd and ridiculous, as for a Child to be born without a Father. *3dly*, In Reſpect of the *Formal* Cauſe, it admits of this Diſtinction, *viz.* That either the Form is ſuch as principally reſpects the Favour of one of the Parties, and then the Party may wave ſuch a Form as is in Favour of himſelf, and the *Judicial* Proceſs is valid, as in the Oath of a Witneſs; for a Witneſs is obliged to ſwear *pro formâ*, otherwiſe his Depoſition is not valid without an Oath *, and yet the Oath may be remitted to the Witneſs by conſent of Parties, and his Depoſition ſhall be valid, becauſe this Form is introduced in favour of the Party. Or elſe the Form is ſuch as principally reſpects publick Right, and then it cannot be wav'd; as the Order of a *Judicial* Proceſs: But this ought only to be underſtood to proceed, when the Parties would omit the Form of a *Judicial* Proceſs, and would have the Judge's Sentence valid without ſuch Order obſerv'd, which they cannot do. But if the Parties would wholly ſet aſide this Order, and would have the Judge proceed *ex arbitrio*, they may do this, and the Sentence ſhall be valid as an Award of Arbitration and the like †; becauſe the Parties may ratify a Sentence that is null, and it ſhall be valid *in vim pacti*. 4*thly*, In regard of a *Sub-*

† D. 7. 8. 14. 3.

* C. 4. 20. 9. Abb. in c. 39. X. 2. 20.

† Abb. in c. 4. X. 1. 29.

Subſtantial Cauſe, wherein, in every reſpect, you may make the ſame Diſtinction as I have done in a *Formal* Cauſe; becauſe theſe two Cauſes, *quoad hoc*, do tread the ſame Steps: And as the Parties cannot renounce the *Formalia* of a Cauſe; ſo neither can they the *Subſtantials* of a *Judicial* Proceſs *, becauſe the *Formalia* are in Favour of the Publick to this End, *viz.* for the preventing of Forgeries, *&c.* 5*thly*, In reſpect of a *natural* Cauſe, I make this Diſtinction, *viz.* There are ſome Things which ariſe from the Nature of a *Judicial* Proceſs for the Advantage of the Publick, as the *Peremption* of *Inſtance* by three Years continuance †: And ſome things which ariſe from thence for the Advantage of the Parties; and theſe the Parties may wave if they pleaſe; as touching that Rule in Law, *viz.* Where a *Judicial* Proceſs is begun, there it ought to be ended. For a Litigant may (pending a *Judicial* Proceſs before one Judge) draw his Adverſary before another Judge, if he does not oppoſe the ſame by an Exception of *Pendency of Suit*; and ſuch Proceſs ſhall be valid; becauſe if he does not oppoſe it, he is deem'd to give his Conſent, and he may impute it to himſelf ‖. Therefore, it appears, that Conſent of Parties may toll this Naturality, (becauſe it reſpects the Intereſt of the Parties themſelves) leſt the Defendant ſhould be moleſted in ſeveral Courts *, and leſt that ſhould come into Judgment which has been expreſly agreed on between the Parties, that it ſhould not come into Judgment. Therefore it follows, that the Parties may agree, That that ſhould not come into Judgment, which otherwiſe of its own Nature would come into Judgment. Laſtly, In reſpect of the final Cauſe of Judicature, which is the Sentence, the Parties may renounce the ſame; and by an Accommodation (pending Suit) cauſe no Sentence to be pronounced, putting an end to the Suit without the ſame †.

* D. 30. 1. 55.

† C. 3. 1. 13.

‖ Abb. Joh. &c. in c. 9. X. 1. 2.

* C. 3. 1. 10.

† A'ex. in l. 4. C. 2. 3.

A *Judicial* Cauſe is defined to be that very Right, which is deduced and ſet fourth in a *Judicial* Proceeding: And hence it is, that a *Judicial* Cauſe is either ſaid to be Civil or Criminal, according as the Action or Accuſation is deduced in the ſaid Proceeding ‖: And a Cauſe is ſo called before as well as after Conteſtation of Suit, comprehending both a Civil and a Criminal Cauſe. The Difference between a *Cauſe* and a *Controverſy* herein conſiſts, *viz.* That it cannot be ſtiled a *Cauſe*, unleſs it be in Judgment: But a *Controverſy* may happen, either in or out of Judgment, that is to ſay, it may be either *Judicial* or *Extra-judicial*, according to the Circumſtances of the Matter: For a Controverſy may be *ſine lite* *.

‖ Bald. in l. 16. C. 2. 4.

* C. 2. 4. 16.

A Controverſy is ſaid to happen not only by bringing an Action on the Plaintiff's ſide, but alſo by objecting or propounding any Exception on the Part of the Defendant: And 'tis ſaid to be a *Controverſy*, whether it happens *de Jure* or *de Facto*. A *Controverſy* alſo happens by any kind of Reſiſtance or Oppoſition made whatſoever: and 'tis a *Controverſy* even before a Conteſtation of Suit, or Iſſue join'd in the Cauſe.

A *Cauſe* herein differs from what we in *Latin* ſtile a *Negotium*; becauſe it is not ſtiled a *Cauſe* unleſs it be in Judgment †, as aforeſaid: But a *Negotium* is ſaid to be ſuch either in or out of Judgment; or in other Terms, it may be either ſtiled *Judicial* or *Extra-judicial*. Hence a Proctor, *ad Negotia*, may be concern'd for his Client both in and out of Judgment; that is to ſay, he may have the Management of Matters *Judicial* and *Extra-judicial*: But a Proctor, *ad Cauſas*, cannot have the Management of *Extra-judicial* Matters ‖.

† Dd. in l. 41. C. 2. 4.

‖ C. 3. 1. 13.

The Word *Lis*, which we in *Engliſh* tranſlate a *Suit*, is a more general Term than any of the former: For 'tis ſometimes put for the *Inſtance* of a Cauſe *, and ſometimes for the Cauſe itſelf deduced in Judgment: And in this Senſe, he that renounces the Suit, is deem'd to renounce the

* D. 50. 16. 36.

In-

Inſtance and Cauſe of Suit. According to *Baldus*, the *Lis* or Suit begins before a Conteſtation of Suit; but, according to the more common Opinion, the Gloſs of *Baldus* is herein reprobated and diſallow'd of: For a *Lis* or *Suit* does not commence but from Conteſtation of Suit. Yet *Felinus* limits this receiv'd Opinion in four Reſpects. *Firſt*, in favour of *Liberation* or a *Diſcharge*. *2dly*, *Quoad inducendum vitium Litigioſi*. *3dly*, In Reſpect of introducing a Pendency of Suit. And *4thly*, In reſpect of perpetuating the Juriſdiction of the Judge: Becauſe, in all theſe Caſes, a *Lis* or *Suit* commences before a Conteſtation; and thus by a Citation only.

The *Inſtance of a Cauſe* is ſaid to be that *Judicial* Proceſs, which is made from the Conteſtation of a Suit, even to the Time of pronouncing Sentence in the Cauſe, or till the end of three Years: For when no Sentence is pronounc'd in a Civil Cauſe within three Years, or in a Criminal Cauſe within two Years*, the *Inſtance* is ſaid to be perempted. And thus when we ſay that the *Inſtance is perempted*, we mean that the *Judicial* Proceſs is accounted *pro non facto*; becauſe no Sentence can be pronounced thereon. Yet this Word has no Relation to the Cauſe, nor to a *Judicial* Proceeding; for that the Cauſe is not perempted, altho' the *Inſtance* be ſo: Nor is the Right of the Party, nor the *Judicial* Proceſs in Right of that Party ſo far perempted, but that the ſame may be begun again, and ventilated *de Novo*; but only that *Judicial* Courſe of Proceeding, which was begun and ended within the Time limited, is perempted. This, I ſay, is by a *Peremption of Inſtance* render'd vain, fruitleſs, and accounted *pro non facto*; becauſe we cannot thereby come at the final Cauſe of Judgment: *viz.* a Definitive Sentence, unleſs the matter be deduced in Judgment *de Novo*. And this *Peremption of Inſtance* was introduced in Favour of the Publick, leſt Suits ſhould otherwiſe be rendred immortal and perpetual †. 'Tis the common Opinion of the Doctors, that an *Inſtance* begins to have its Currency in Cauſes from the Time of conteſting Suit; ſo that if Litigants do not conteſt Suit for One Thouſand Years, the *Inſtance* of Suit would not begin during that Time: And hence *Baldus* obſerves ‖, That if the Parties ſhould litigate for ten Years touching the Legitimation of Perſons without conteſting Suit, the *Inſtance* would never periſh in that Time.

* C. 3. 1. 13.

† C. 3. 1. 13.

‖ In l. 73. D. 5. 1. 2.

But what is to be done in Cauſes, wherein no Conteſtation of Suit is required, as in *ſummary* and *executive* Cauſes? Why in theſe Cauſes the *Inſtance* is current, as ſoon as the Judge begins to take Cognizance of the Merits of the Cauſe *. But for a fuller Declaration hereof, it may be ſaid, that in Cauſes of this Nature, that Act which is done immediately after Conteſtation of Suit in Cauſes wherein Suit is conteſted, has the Force of Conteſtation of Suit. And hence the *Inſtance* ſhall begin its currency from that Act †.

* Alex. in 13. C. 3. 1.

† Dd. in l. 21. & 23. C. de Proc.

If the Parties litigant have proceeded in a Cauſe after the ordinary way of Proceeding, *viz.* by exhibiting a Libel, conteſting Suit, and doing other *Judicial* Acts in a ſolemn and plenary manner, when they might have well omitted thoſe *Judicial* Solemnities, and have proceeded in a ſummary way by virtue of ſome Statute; they do hereby ſeemingly renounce the *ſummary*, and embrace the *ordinary* way of Proceeding; whether the Parties do expreſly conſent or agree hereunto or not: So that if any Defect ſhall ariſe in *Judicial* Proceedings, which of *common Right* vitiates the Proceſs or Sentence, ſuch Defect ſhall vitiate the Proceſs thus begun in a *plenary* way. And in ſuch a Caſe, the Common and not the Municipal Law ſhall be obſerv'd ‖; becauſe the Party is hereby deem'd to have receded from the *ſummary* way of Proceeding; and, conſequently, the Common Law ought to be obſerv'd. For, according

‖ Gloſs. & Dd. in l. 22. D. 12. 1.

to

to *Baldus*, when the Parties may proceed *ſummarily*, and they chuſe the *ordinary* way of Proceeding, the Cauſe is made *Plenary*: And thus this ſeems entirely to depend on the Will of the Parties *. If a Libel intervenes and be exhibited in a Cauſe, wherein a Libel is not required; and, the Cauſe being thus commenced *viâ ordinariâ*, it ought to be ended in a ſolemn manner by a Sentence; for that the Cauſe is hereby made a *Plenary* Cauſe, and ought to be determin'd *Plenarily* †. If the Prince commits a Cauſe to the Judge to proceed therein in a *ſummary* Manner, and he proceeds *plenarily*, the Proceſs is invalid, as being made in a *Plenary* and *Ordinary* way ‖.

* Bald. in l. 5. C. 7. 14.

† Gloſs. in l. 22. D. 4. 2.

‖ Lanf. in Clem. cap. ſæpe.

The whole Courſe or Mode of *Judicial* Proceeding is divided into three Parts. The firſt Part laſts from the Date of the Citation to the joining of Iſſue or Conteſtation of Suit, *excluſively*. The ſecond continues to a Concluſion in the Cauſe, *incluſively*. And the third Part endures from a Concluſion in the Cauſe to the Time of pronouncing a definitive Sentence, *incluſively*: And each of theſe three Parts has its diſtinct Diviſions; one of which ſucceſſively follows the other. The firſt entire Part of Judicature is ſtiled *Principium Judicii* among the *Civilians*, beginning with the Citation, and ending with Conteſtation of Suit *excluſively* as aforeſaid: And, conſequently, all the Acts and Members done in this firſt Part, are ſaid to be done *in principio Judicii*; becauſe Judgment is then ſaid to be begun, when Conteſtation of Suit is made. Therefore I ſhall here conſider, what are the particular Acts or Members that are compriz'd in this firſt Part of Judicature; wherein there is uſually ſaid to be an Intervention of ten Acts; ſome of which I ſhall treat of in the following Chapters, namely, *Firſt*, Of a Citation; 2*ly*, Of Contumacy; 3*dly*, Of exhibiting a Libel; 4*thly*, Of Re-convention; 5*thly*, Of What the *Civilians* call *Laudatio Authoris*; 6*thly*, Of Nomination; 7*thly*, Of Interrogation; 8*thly*, Of Satiſdation or Bail; 9*thly*, Of Exceptions; And, 10*thly*, Of Conteſtation of Suit: Of all of which ſeverally in their proper Places. Moreover, 'tis here to be noted, that we come at this *Principium Judicii* ſeveral ways, *viz.* either by way of Action, Accuſation, Inquiſition, Denunciation, or by imploring the Office of the Judge. Of which four ways of commencing Judicature, I ſhall here firſt briefly diſcourſe of by the Bye.

Judicature is firſt commenced by way of Action: But this only conſiſts and lies in a Civil Cauſe; as when any one proſecutes that which is due to him by impleading the adverſe Party *civilly*, as I ſhall hereafter obſerve. And the Plaintiff is then ſaid to bring his Action; or, as we phraſe it in *Latin* Terms, *agere in Judicio*. In every Perſonal Action, there is a twofold Cauſe of ſuing; the one called the *Proximate*, and the other the *Remote* Cauſe thereof †. In a Perſonal Action, the *Proximate* Cauſe is the Obligation ‖, and the *Remote* Cauſe is the Contract *: And in ſuch an Action 'tis ſufficient to expreſs the *Remote* Cauſe in this or the like Manner, *viz. Peto à te Decem ex Mutuo vel ex Depoſito*, that is to ſay, I demand of you the ten Pounds, which I lent you, or which I lodg'd in your Hands by way of *Depoſit*: And the Reaſon of this is, becauſe a *Proximate* Cauſe is preſum'd and inferr'd from a *Remote* Cauſe. But in ſuch an Action it is not enough barely to expreſs the *Proximate* Cauſe in the Libel: becauſe ſuch a Libel would be uncertain, and conſequently inept, for that it concludes no certain Right of Action, nor can the Defendant deliberate with himſelf, if the *Remote* Cauſe of Action be not expreſs'd in the Libel, whether he will ſubmit or contend in the Cauſe. In a *Real* Action, the *Proximate* Cauſe is the Property or Ownerſhip of the Thing in Controverſy; and the *Remote* Cauſe is the Fact whereby ſuch Ownerſhip

† D. 5. 1. 55.

‖ D. 3. 3. 42. 2.

* H. D. 44. 7. 2.

ſhip or Property is cauſed ; or the very Right of bringing the Action. As for Example, I demand ſuch an Eſtate, becauſe it was devis'd or ſold to me by *Titius*, and a delivery thereof made : And, in ſuch an Action, according to the common Opinion of the Doctors, it is ſufficient to expreſs the *Proximate* Cauſe in the Libel ; and ſuch a Libel is valid, becauſe the Defendant is thereby render'd more certain of the Plaintiff's Right of Action ; and, conſequently, he better knows, whether he will conteſt or give up the Suit *. For ſeveral Perſons cannot at one and the ſame Time have an entire Property in one and the ſame Thing † ; nor can Dominion and Property accrue unto one Perſon by virtue of ſeveral Titles ‖. And, therefore, it is not neceſſary in ſuch a Libel to expreſs the Name of the Action ; becauſe the Nature and Quality of the Action is inferr'd and demonſtrated *ex Cauſâ petendi*, that is to ſay, from the Cauſe and Manner of concluding *. And the Judge may, and ought to infer what Action is commenced from what is deduced therein, if the Matter be obſcure: which is much for the Plaintiff's Advantage. For in a doubtful Cauſe that Remedy and that Action is underſtood to be given, which may be beſt apply'd to the Fact or Caſe in Point †.

* X. 2. 3. 2.
D. 2. 13. 1.
† D. 13. 6. 5. 15.
‖ D. 41. 2. 3. 7.
* X. 2. 8. 3.
† D. 5. 1. 66.

The ſecond way of coming into Judgment, is by way of *Accuſation*. As when any one brings a Criminal Cauſe into Judgment by impeaching or accuſing his Adverſary, and this thro' the Means of a Libel or ſome other Complaint form'd in Writing, touching ſome Crime committed by the Party accus'd, and inſcribed by the Accuſer, as I have already obſerv'd under that Title.

The third way we come into Judgment, is by way of Inquiſition or Enquiry. And this Method of *Judicial* Proceeding, likewiſe obtains in all Criminal Cauſes, wherein an enquiry is made, and the Proceſs is form'd for the Advantage of the Publick; whenever a Perſon has committed ſome Crime, and no particular Man accuſes him thereof: For in ſuch a Caſe, the Judge may then *ex mero Officio* make ſome enquiry touching the ſame, leſt ſuch a Crime ſhould go unpuniſh'd. And the Judge may puniſh the Perſon found guilty thereof upon ſuch an enquiry, by the Means of legal Evidence: for by the Law, no one can be condemn'd of any Crime, unleſs ſome *Accuſation* or *Inquiſition* be previous to ſuch a Condemnation. But of this hereafter.

A Law-Suit ought to be decided in Purſuance of ſuch Laws, as have an Exiſtence at the Time when the Suit or Controverſy was commenced, and not according to a Privilege obtain'd *pendente lite*, unleſs mention be therein made of the Pendency of ſuch Suit. Now the Pendency of a Suit in reſpect of both the Parties, is induced by joining of Iſſue in the Cauſe : Therefore, tho' it may be ſtiled *Lis* or *Suit* before Conteſtation of Suit; yet it cannot be ſaid to be *Lis Mota*, or Pendency of Suit, till afterwards. Nor is there any Thing pray'd by the Defendant, becauſe a Libel has been offer'd to the Judge : And therefore, before Conteſtation of Suit, the Defendant is not *in Mora* *. But a Libel offer'd to the Prince, effects a Pendency of Suit ; and ſo does the Prince's Reſcript or Decree: which *Baldus* underſtands to be true, when ſuch Reſcript is granted at the Inſtance of a Party ; but it is otherwiſe, if it be granted *Motu proprio* †. But a Pendency of Suit, in reſpect of the Plaintiff, is induced *ex ſolâ Commiſſione*, or by the Judge's Decree for citing the Defendant, tho' ſuch Citation has not as yet reached his Knowledge, but 'tis neceſſary, in reſpect of the Defendant, that he ſhould have Knowledge of it ‖.

* Bald. Conſ. 150. N. 1.
† Bald. Conſ. 490.
‖ Clem. 2. 5. Rom. Conſ. 330. n. 2.

It has been ſaid, That by the *Civil* Law, Criminal Cauſes ought to be determin'd within the Space of two Years : yet ſome have doubted how

this ought to be underſtood, ſince theſe are of greater Weight and Importance than Civil Cauſes * ; and various Reaſons have been aſſign'd for this Doubt. For it ſeems to impugn a Law in the *Digeſts* †, which grants Delays and Imparlances in Law rather in Criminal than Civil Cauſes. But to this I anſwer, That as to the *Inſtance* or Time of *Inſtance*, the *curricula annorum* were juſtly lop'd off, to the end that the Parties might proceed in Criminal Cauſes with more Care and Vigilance, as being in an *odious* Affair or Matter. But 'tis otherwiſe in ſuch Delays as conduce to the finding out of Truth in the Cauſe, from which Delays a Criminal Cauſe ought not to be barr'd in any wiſe ; becauſe theſe Delays ought to go with a more open Boſom in Criminal than in Civil Cauſes. Again, it has been remembred, that Civil Cauſes ought to be ended within three Years time ; but yet you may extend this Term, if the Matter be delay'd thro' the Cavils and Subterfuges of the adverſe Party. But tho' Civil Cauſes, of how great Weight and Conſequence ſoever, according to ſome Mens Opinions, are of leſs Moment than Criminal Cauſes; yet *Bartolus*, and the Doctors || are, by Implication, of a different Opinion, delivering it as their common Suffrage, That Civil Cauſes are, in ſome Reſpects, equivalent unto Criminal Cauſes, and of as great Importance. As where a great Sum of Money is ſued for ; or where the State of Man or the like is in Debate, and canvaſs'd in Judgment. But I then ſay, That this Equivalency only reſpects the careful and diligent admiſſion of Proofs; but, as to the Time of *Inſtance*, they are not equivalent. By the Uſage of *England*, *France*, and *Holland*, there is no certain Time preſcribed, within which Criminal Cauſes ought to be determin'd; yet they ought to be decided and come to an end with all poſſible Diſpatch ; and to be heard before all other Cauſes. But where the *Civil* Law is moſt ſtrictly practis'd, the Time of *Inſtance* ſhall not commence or run till after Conteſtation of Suit ; becauſe 'tis not call'd an *Inſtance* till Judgment is commenced. But Judgment is not begun till Conteſtation of Suit, as aforeſaid. Hence if any Diſpute ariſes before Conteſtation of Suit, thoſe ſhall only be deem'd Acts of *Imparlance* in reſpect of Time: As when the Diſpute is about the Juriſdiction of the Court, or about a ſuſpected Judge, or any other *dilatory* Matters; as an Exception touching the Litigant's Perſon is. Theſe, I ſay, are not reckon'd any Part of the *Inſtance*, tho' the Diſpute ſhould laſt ten or twenty Years.

* D. 48. 19. 10. fin.
† D. 2. 12. 10.
|| In l. 31. D. 12. 2.

I have ſaid, That the *Inſtance* of a Civil Cauſe may continue for three Years: But this is otherwiſe in *Fiſcal* Cauſes *, and Cauſes of publick Employment: Nor does the *Inſtance* of a Cauſe expire at the end of three Years, if the Judge before whom the Cauſe was begun, dies near the end of that Term, and another ſucceeds him, for the Law gives his Succeſſor another entire Year to diſpatch the Cauſe ; and thus, in this Caſe, the *Inſtance* is prorogued by a Diſpoſition of Law beyond three Years †: And 'tis the ſame Thing when the Judge is changed or removed from his Office on the account of Abſence, Infirmity, or any juſt Cauſe. Nor does this Form of *Inſtance* obtain, when the Judge may proceed and give Sentence at his own Diſcretion: Nor does it prevail in the Cauſes of ſuch Perſons, unto whom the Laws have granted the Benefit of Reſtitution *in integrum*, as unto Women, Minors, and Church; nor does it proceed, when the Cauſe is concluded, and the Proceſs tranſmitted for the Advice and Opinion of ſome eminent Lawyer thereon. But touching this Matter, I make ſome Doubt; for when the Judge perceives the Inſtance to lapſe, he may read Sentence, and refer himſelf to the Judgement of the Perſon he conſults.

* C. 3. 1. 13.
† C. 3. 1. 13.

Of

Of Eccleſiaſtical Cenſures, and the Diviſion thereof.

THE *Canoniſts* define an *Eccleſiaſtical Cenſure* to be a ſpiritual Puniſhment inflicted by ſome Eccleſiaſtical Judge, whereby he deprives a Perſon baptiz'd, of the Uſe of ſome ſpiritual Things, which conduce not only to his preſent Welfare in the Church, but likewiſe to his future and eternal Salvation. 'Tis call'd a *Puniſhment* by way of *Genus*; for herein all Cenſures agree: And 'tis ſaid to be *Spiritual*, becauſe (ſay they) it is *Pœna animæ*, a Puniſhment inflicted on the Soul of Man; for ſo far do the Prieſts extend their Arm of Power. And 'tis ſaid *to be inflicted by ſome Eccleſiaſtical Judge*, to point out the efficient Cauſe of ſuch a Cenſure: For ſince an Eccleſiaſtical Cenſure is a Spiritual Puniſhment, it cannot be impos'd (according to the *Canon* Law) by any other than an Eccleſiaſtical Perſon, who has the Power of inflicting the ſame; tho' ſome have queſtion'd, whether the Church has the Power of inflicting Cenſures. Such as maintain the Affirmative, quote St. *Matthew*'s Goſpel for their Purpoſe, where the Power of binding was conferr'd on the Apoſtles in theſe Words, *viz. Whatſoever ye ſhall bind on Earth* *, *&c.* which Words, (ſay they) as they are general, ought to be underſtood in a general Senſe touching every Cenſure and every Thing, which may be deem'd neceſſary to good Government in the Church: And as the Power of pronouncing Cenſures, conduces to good Government *in Foro externo*; it, therefore, follows (ſay they) that the Church has this Power *in Foro interno*. 'Tis, moreover, added in the abovemention'd Definition, *viz. Whereby he deprives a Perſon baptiz'd*, in order to ſhew, That a Perſon baptiz'd ought to be the only Subject of this Cenſure: For as an Heathen or Infidel is not a Subject of the Church, he cannot be ſubject to Cenſures inflicted by the Church, as a Perſon baptized is, who is a Member of the Church. 'Tis alſo therein ſaid, *of the Uſe of ſome Spiritual Things*, to ſhew how it differs from Civil Puniſhments, which conſiſt only in Things Temporal, as Confiſcation of Goods, Pecuniary Mulcts or Fines, and the like. But the Church, by its Cenſures, deprives us of things Spiritual, as the Uſe of the Sacrament, the Execution of Eccleſiaſtical Offices and Employments, *&c.* And 'tis likewiſe ſaid of the Uſe of *ſome* Spiritual Things; becauſe ſuch a Cenſure, does not deprive a Man of all Spirituals, but only of ſome Particulars; ſince it does not deprive him of virtuous Actions, nor take from him the Power of doing ſuch. Laſtly, This Definition ſpeaks of ſuch Things *as conduce to eternal Salvation*, in order to manifeſt the End of this Cenſure: For the Church, by Cenſures, does not intend the deſtroying of Mens Souls, but only the ſaving them, by enjoining Repentance for paſt Errors, a Return from Contumacy, and an Abſtaining from future Sins.

* Ch. 18. v. 18.

Under the Name of an *Eccleſiaſtical Cenſure*, we may reckon Suſpenſion *ab Officio & Beneficio*, an Interdict, and a Sentence of Excommunication †: So that a Church-Cenſure, according to Pope *Innocent* III. is threefold; who being ask'd, what was meant by *Eccleſiaſtical Cenſures*, anſwer'd,

† X. 5. 40. 20.

anſwer'd, That Excommunication, Suſpenſion, and an Interdict, was thereby intended. But (I think) this Anſwer lame and imperfect, if any other *Species* of Cenſure beſides three may be aſſign'd. For hereunto it is objected, That Irregularity, Depoſition, and Degradation, are Eccleſiaſtical Cenſures: But hereunto I anſwer, *Firſt*, That Irregularity is no Church-Cenſure, becauſe every Irregularity is not put *in Pœnam delicti*, ſince ſome are inflicted on the account of ſome Defect without any Offence committed. And again, becauſe Irregularity was not principally inſtituted for the Correction of Men's Manners alone as a Cenſure is; but on ſeveral other accounts. And as to Depoſition and Degradation, 'tis plain, that theſe are not Cenſures: For a Cenſure, according to its Inſtitution, may be remov'd on a Foundation of Repentance and Amendment in the Delinquent; but Depoſition, and Degradation, are without hope of any Remiſſion; and, therefore, the Law ſtiles them an indiſſolvable Bond; but a Cenſure, a diſſolvable Bond.

An Eccleſiaſtical Cenſure is twofold; the one inflicted by Law; and the other inflicted by Man. A Cenſure inflicted by Law, is ſaid to be that which is pronounced by the Legiſlator, with an Intent of making a Law or general Statute perpetual; and is, *ipſo Jure*, inflicted on Tranſgreſſors thereof by way of Puniſhment. But a Cenſure *ab Homine*, is ſaid to be that which is pronounced by ſome Judge or Superior commanding ſomething, not with a Deſign of making a Law or Statute perpetual, but with a Purpoſe of enacting ſome temporal and tranſitory Precept; and is inflicted on contumacious and diſobedient Offenders. Some ſay, That a Cenſure *ab Homine*, ceaſes on the Death of the Perſon, that pronounced the ſame; but a Cenſure inflicted *à Jure* continues, tho' ſuch Law be extinct, or the Law-giver removed from his Office *. Beſides, a Cenſure inflicted *à Jure*, can only be pronounc'd by ſuch as have the Power of making Laws, as *General* and *Provincial* Councils, the Pope and his Legate in *Popiſh* Countries, a Biſhop in his Dioceſs, and the like.

* X. 1. 40. 10.

But touching a Cenſure of Excommunication, Suſpenſion, and Interdict, there is one *Species*, which is ſtiled a Cenſure *latæ Sententiæ*, and another *Sententiæ ferendæ*. The firſt is ſaid to be that, which is incurr'd *ipſo facto*, without any other Sentence of the Judge: But a Cenſure *Sententiæ ferendæ*, is ſaid to be only that which favours of Commination, and is not *ipſo facto* incurr'd before the Judge's Sentence, as all the Doctors confeſs. Now a Cenſure *latæ Sententiæ* may be known from the following Rules, *viz.* *Firſt*, When theſe Particles or Words are put in the Law, as *ipſo facto*, *ipſo Jure*, or *latæ Sententiæ*. *2dly*, When Adverbs are put and go along with the Cenſure; as *confeſtim*, *ſtatim*, *illicò*, *extunc*, *omninò*, *prorsùs*, *incontinenti*, *protinus*, *&c.* *3dly*, When the Cenſure is given by a Verb of the preſent or præterperfect Tenſe; as when 'tis ſaid, *That he who does this or that, is excommunicated or ſuſpended*, or let him be excommunicated or ſuſpended, *aut Noverit ſe Excommunicatum vel ſuſpenſum*, *aut Noverit ſe excommunicari vel ſuſpendi*, or, I Excommunicate him, and the like. *4thly*, When the Cenſure is by Verbs of the *Imperative* Mood, and preſent Tenſe; as, Let him that ſhall do ſo or ſo, be ſubject to an Excommunication, or *habeatur pro excommunicato*, or let him incur Excommunication, and the like: And this is the common Opinion of all the Doctors. And likewiſe from the following Rules we may eaſily diſtinguiſh a Cenſure not to be *latæ*, but *ferendæ Sententiæ*, viz. *Firſt*, When it is ſaid, *Let him incur a Cenſure of Commination*, or *we command it under the Pain of Excommunication*, *Suſpenſion*, and the like. *2dly*, When a Cenſure is pronounced by a Verb of the future Tenſe; as when

when 'tis ſaid, That he *who ſhall do ſo or ſo, ſhall be excommunicated or ſuſpended*, and the like. 3*dly*, When it be doubtful, whether the Cenſure be *latæ*, or *ferendæ Sententiæ*, it ſhall then be judged not to be *latæ*, but *ferendæ Sententiæ*: For odious Matters admit not of an Ampliation, but ought to be reſtrain'd and interpreted in the mildeſt Senſe, according to that vulgar Maxim of all Lawyers and others, *viz. In pœnis benignior eſt Interpretatio facienda* *.

* vi. de Reg. Jur. 49.

There is a Difference between an *Eccleſiaſtical Cenſure*, and an *Eccleſiaſtical Severity*: For under the Appellation of a *Cenſure*, we only include Excommunication, Suſpenſion, and an Interdict †; but under the Denomination of an *Eccleſiaſtical Severity*, every other Puniſhment of the Church is intended, according to the Quality and Nature of the Offence: But according to ſome, a *Cenſure* and a *Severity* is the ſame Thing. And in the like manner an *Eccleſiaſtical Cenſure* and an *Eccleſiaſtical Animadverſion* are different Things: For a *Cenſure* has a relation to a *ſpiritual* Puniſhment ‖, but an *Animadverſion* has only a reſpect to a *Temporal* one *, as Degradation and the Delivering of a Perſon over to the Secular Court. All Eccleſiaſtical Perſons or Prelates, to whom an Ordinary Juriſdiction is given either by Law, Cuſtom, Canon, or Privilege, may fulminate theſe Church-Cenſures: But Perſons having only a ſimple Cure of Souls, cannot do it at this day, becauſe there lies a Preſcription againſt them †. And therefore an Archdeacon, as being a Prelate, may thunder out an Eccleſiaſtical Cenſure againſt Delinquents.

† X. 5. 40. 20.

‖ 5. 40. 20.

* X. 5. 37. 12.

† Lindw. lib. 1. Tit. 3. c. 1. v. *Conſ. Eccleſiaſticam.*

Of a Certificate, and the ſeveral Kinds thereof.

A *Certificate* (in *Latin* called *Certificatorium*) is, according to *Lindwood* †, a Reſponſive Letter, or Letter by way of Anſwer, directed to the Judge on or touching ſome Mandate which iſſued out from him to cite ſome Perſon or other. By the Provincial Conſtitution quoted in the Margin, it was ordain'd, That no Certificate ſhould be deliver'd or otherwiſe granted to any one under Seal of a Rural Dean, unleſs the ſame was firſt *openly* and *publickly* recited before the Sealing thereof on ſome ſolemn Day, as on a *Sunday*, or ſome other Feſtival enjoin'd to be ſolemniz'd by the Church, after the end of the Offertory in the Church, where the Perſon cited dwelt or had his chief Reſidence: I ſay *openly* and *publickly*, that it might be heard by all the People. For it ought not to be done in any ſecret Place of the Church, but in the Hearing of the Congregation, that it may hereby appear, that a Rural Dean putting a Seal thereunto, was not in any Fraud or Deceit. Provided always, that the Perſon cited had a ſufficient Term allow'd him for his Appearance, the Day and Place for the ſame being prefix'd thereunto. But if he was in any Caſe ſo far ſtraitned in Point of Time, that he could not appear at the Place according to the Time prefix'd, ſuch Certificate ought to be granted in the Church or ſome publick Place, on a Citation publickly made before credible Witneſſes, ſo that the Day of the Citation, and the Place it ſelf be expreſs'd in the Certificate. And thus a Certificate ought not by any means to be made before the Citation itſelf was executed, as it was cuſtomary before this Conſtitution was enacted, for Rural Deans, being

† Lib. 2. Tit. 1. c. 2. v. *Certificatorium.*

bribed hereunto, to ſeal falſe Certificates. A Certificate ought to contain the Tenor of the Mandate, and the Form and Manner of the Execution of it made by the Mandatary; ſo that the Form of the Mandate be diligently obſerv'd *.

* X. 1. 3. 22.

But I ſhall here ſay ſomething of Biſhops Certificates, which is another kind of Certificate than that abovemention'd, becauſe I find no Title ſo fit for this Matter hereafter. Therefore, if Excommunication, Baſtardy, Bigamy, Depoſition, or a Divorce, be certify'd by a Biſhop of this Realm, ſuch Certificate is admitted in the King's Courts; but the Pope's cannot be: And as Biſhops Certificates are, in theſe Caſes, admitted at the *Common Law*, ſo divers Statutes ſince have authoriz'd their Certificates duly made into the King's Courts, in certain other Caſes. But there are two Caſes, where the Certificate of a Man's Excommunication from a Biſhop, ſhall not diſable the Party excommunicated from bringing his Action, as regularly Excommunication does, when 'tis duly certify'd. For *Firſt*, if a Biſhop be a Party to a Suit, and excommunicates his Adverſary; ſuch Excommunication (though it be certify'd) ſhall not diſable or bar his Adverſary from his Action. *Secondly*, Where an Action of Debt was brought by an Executor, and an Excommunication under the Biſhop's Seal was certify'd and pleaded againſt ſuch Executor; this was adjug'd no good Plea, becauſe the Executor was to recover nothing to his own Uſe †. But if this was the only Ground and Reaſon of ſuch Judgment, then where this Reaſon is not found in Fact; as it may often happen, when the Goods and Chattels are great, and the Debts and Legacies ſmall, and where the Executor has a Clauſe *de Reſiduis* by the Will, whereby all the Remainder of the Goods and Chattels, after Debts and Legacies paid, bequeath'd to him; I think that in a different Caſe the Law ſhould be otherwiſe, becauſe a great deal comes to the Executor's own particular Uſe.

† 14 H. 6. 21 H. 6.

This Certificate of *Excommunication* by Biſhops, of all others is moſt in Uſe, and would be more ſo (eſpecially on the Statute *de Excommunicato capiendo*) if the great Expence of that way of Proceeding did not prevent the ſame, as likewiſe the manifold Abuſes about the Execution of that Writ committed by Under-Officers. In theſe Certificates, the Biſhops and ſuch others, having in ſome particular Caſes Authority to certify (as the Chancellor of *Oxford*, the Guardian of the Spiritualties, and the Biſhop's Official or Vicar-General, *ipſo in remotis agente*) ought to ſee, that they make no Error; and, therefore, ought to obſerve theſe three Things. *Firſt*, That it be therein expreſs'd ‖, that the Party againſt whom they certify, is excommunicated *Majori Excommunicatione*; becauſe for the leſſer Excommunication, a Man ſhall not be impriſon'd for his Perſeverance therein. *Secondly*, It ought to be certify'd, that he was by Name and particularly ſo excommunicated, and not in Groſs, in the Company of a Multitude (as it often happen'd in ancient Times) or indefinitely and in the generality; as when the Biſhops excommunicated all, who ſhould violate the *Great Charter*. For that Excommunication (according to *Fitz-Herbert*) muſt grow on ſome ſpecial Suit againſt a Man either *ex Officio*, or elſe mov'd by a Party, whereon a *Significavit* may be grounded. *Thirdly*, Though an inferior Officer under the Biſhop, as his Chancellor, Commiſſary, Archdeacon, and the like, has excommunicated the Party certify'd; yet the Biſhop's Certificate muſt run, that it was done *noſtrâ authoritate ordinariâ*. But I cannot find in any Place of the *Regiſter*, or in *Fitz-Herbert*'s *Natura Brevium*, that it is neceſſary (at the *Common* Law) to expreſs in the Certificate the particular Cauſe of Excommunication. 'Tis true, that when the Proceeding is on any

‖ Nov. Nat. Br. p. 64. f.

any of the ten Crimes mention'd in the Statute * made for that Purpoſe, the particular original Cauſe muſt be expreſs'd in the Certificate. Nevertheleſs, when the Proceeding is on any other Crime of Eccleſiaſtical Cognizance, or in Matters Teſtamentary, Matrimonial, or for Tithes, *&c.* whether moved *of Office*, or at the *Inſtance* of the Party ; there the *common* Law (as before) is retain'd.

* 5 Eliz. cap. 23.

Now we find Precedents of theſe Writs in the *Regiſter*, wherein no particular, but only a general Cauſe is expreſs'd. Which, as in other Certificates of Biſhops, as touching *Baſtardy* and the like, the Court believes without further Traverſe or Examination, *viz.* In divers Precedents of this kind of Writs is only contain'd †, That the Party was excommunicated *propter ſuam manifeſtam contumaciam :* But what was the original Cauſe of his being conven'd, out of which ſuch Contumacy grew, is not declar'd at all ; and yet the Certificates were allow'd to be good in Law. Likewiſe in another Precedent of the ſame Writ, tho' more particularity be found ; yet 'tis left ſo general, as that no ſpecial and certain Cauſe can be known thereby to the Court whereunto it is directed : For 'tis certify'd ‖, that a Party was excommunicated *propter ſuam manifeſtam contumaciam, in non parendo certis mandatis licitis ſibi factis :* But what thoſe Mandates were, we do not learn. And theſe Certificates do only in the generality mention the Parties Contumacies and Diſobedience. So there is alſo a Precedent of Crimes themſelves certify'd in the generality, whereupon a Writ of *excommunicato capiendo* was nevertheleſs awarded : For 'tis ſaid *, that a Clerk excommunicated *propter manifeſtas ſuas offenſas*, was order'd to be arreſted and impriſon'd.

† Reg. in Brev. orig. p. 65. a. 66. a. 69. a.

‖ Ibid. 65. b.

* Ibid. p. 66. b.

But tho' this be a ſpecial Right and Liberty of the Church of *England*, yet this Writ *de excommunicato capiendo* is not always to go forth, and on every Certificate of a Biſhop whatever, or of any other thereunto authoriz'd, tho' the Certificate be contriv'd in ever ſo due a Form. For if he that excommunicated the Perſon, be himſelf, for ſome ſuppos'd Contempt, to be attach'd at the Suit of the Party certify'd, then the Execution of attaching the Party excommunicated ſhall be reſpited, till the other Plea of attaching the Ordinary be determin'd † ; leſt otherwiſe the Party's Suit againſt the Ordinary ſhould be hinder'd by his Impriſonment. Yet 'tis to be underſtood, that a Biſhop ſhall have a *Significavit* upon his own Certificate, touching an Excommunication for *Contumacy* incurr'd even in his Predeceſſor's Time ‖. But tho' the Certificate be duly made, and the Writ *de excommunicato capiendo* be thereupon iſſued forth ; yet if there be a looſe or corrupt Execution thereof by the Sheriff or his Under-Officers, both the Biſhop's Endeavour, and the King's Care, to have Juſtice inflicted on contemptuous Perſons, are wholly fruſtrated. And tho' this Careleſſneſs in times paſt was not ſo common as at preſent ; yet it ſeems by the *Aliâs* and *Pluriès* in the Regiſter *, that Sheriffs and their Under-Officers were then alſo ſlack enough in the Performance of this their Duty ; tho' 'tis ſaid in the King's Writ in this Behalf †, that the undue Execution of it, redounds *in contemptum manifeſtum Regis, Epiſcopi damnum non modicum & gravamen, ac Juris Eccleſiæ ſuæ læſionem.* In which Reſpect, ſuch a negligent Sheriff is (by Law) on a Writ to be called into the Court from whence the Writ iſſued, and there to anſwer his Contempt. And thus much of the Biſhop's Certificate, of which I ſhall ſay more hereafter under the Title of *Excommunication.*

† Ibid. p. 67. b. & in Brev. Jud. pag. 39. 71. b. & 72. a.

‖ Nov. ` at. Br. p. 64 & 65. f.

* Reg. in. Br. orig. p. 65. a.

† Ibid. p. 65. b.

Of

Of Chancellors, Commiſſaries, Officials, and Vicar-Generals.

CHancellors or *Biſhops Lawyers*, in *Latin* called *Eccleſiecdici* or *Epiſcoporum Ecdici*, were firſt introduced into the Church by the ſecond Canon of the Council of *Chalcedon*: And were Men trained up in the *Civil* and *Canon* Law of thoſe Ages, to direct the Biſhops in Matters of Judgment relating as well to Criminal as to Civil Affairs in the Church. For I find by ſeveral Laws in the *Juſtinian* Code (ſome of his own making and ſome other Emperors before his Time even from the Days of *Conſtantine the Great*;) that Biſhops in their Epiſcopal Audience, had the Cognizance and Practice of all Matters relating to the Church, whether they were of a Civil or Criminal Nature, and to this End and Purpoſe they had their Chancellors and Officials to aſſiſt them in Points of Law, and to defend the Rights of the Church, according to *Gothofred* in his Annotations on the Law here quoted in the Margin ||, who collects the Matter from *Papias*; tho' ſome think theſe Officers were of a very late Date, and introduced by the Sloth and Negligence of Biſhops, unwilling to hear and determine thoſe Cauſes wherein they had Juriſdiction. But theſe Lawyers were not at firſt deputed and aſſign'd unto any certain Place, but ſupply'd the Office of the Biſhop (at large) in hearing Eccleſiaſtical Cauſes which were of a *Contentious* Juriſdiction, or (at leaſt) aſſiſted him therein: And, therefore, they ought to be well skilled in both Laws, which few of them are at preſent. They carry the Biſhop's Authority every where in Matters of Juriſdiction; and as they and the Biſhop make but one Conſiſtory, they are ſometimes ſtiled the Biſhops Vicars-General, extending their Authority throughout the whole Dioceſs: And herein they are diſtinguiſhed from the *Commiſſaries* of Biſhops, whoſe Authority is only in ſome certain Place of the Dioceſs, and in ſome certain Cauſes of the Juriſdiction limited to them by the Biſhop's Commiſſion; and, therefore, the Law calls them *Judices* or *Officiales Foranei*, as if you would ſay, *Officiales aſtricti cuidam foro Diocæſeos tantum**. But now a *Chancellor* as diſtinguiſh'd from a *Vicar-General*, *Commiſſary* and *Principal Official*, is he, that has that Cognizance of all Cauſes both of *voluntary* and *contentious* Juriſdiction committed to him; whereas properly ſpeaking, a *Vicar-General* has only all Cauſes of *Voluntary* Juriſdiction delegated to him †; and a *Principal Official*, only Cauſes of *Contentious* Juriſdictions granted him. And thus the Power of Vicar-Generals differs from that of Principal Officials; ſince Officials are ſaid to be thoſe Perſons, to whom the Cognizance of Cauſes is generally committed by ſuch as have Eccleſiaſtical Juriſdiction; and on ſuch Perſons the Cognizance of Cauſes is transferred throughout all the Dioceſs, but not the Power of Inquiſition, nor the Correction of Crimes; nor can they remove Perſons from their Benefices, or collate to Benefices, without a ſpecial Commiſſion to do theſe Things: For a general Commiſſion alone of taking Cognizance in Cauſes, is not ſufficient to conſtitute any one a Principal Official to theſe Ends, unleſs the ſame be either expreſs'd by Word of Mouth, or

|| C. 1. 3. 33. 2.

* Gloſs. in c. 2. Clem. 2.

† vi. 1. 13. 2. Lindw. lib. 2. tit. 4. c. 1.

or in Writing, by the Perſons that commiſſion him, ſo that his Intention hereby may be made known and appear. But Vicars-General may do all the aforeſaid Matters by virtue of their Office, except collating to Benefices. And theſe are the Perſons, to whom Archbiſhops and Biſhops do by Commiſſion or Letters Patent delegate their Power and Juriſdiction in Eccleſiaſtical and other Matters.

But (beſides theſe) Archdeacons have likewiſe their *Officials* for their Exerciſe of Eccleſiaſtical Juriſdiction in certain Parts of the Dioceſs; having acquired Juriſdiction from their Biſhops, either by an expreſs Compoſition or Grant, or elſe by Preſcription and Length of Uſage, Time out of Mind. And though in a large Senſe of the Word, every one may be called an *Official*, to whom the Adminiſtration of any Office is committed; yet here the Office and Buſineſs of theſe Perſons conſiſts chiefly in the Cognizance and Hearing of Cauſes, which are transferr'd in virtue of the Office itſelf, by ſome general Commiſſion made to them for that End and Purpoſe *. Though an Archdeacon's Official cannot viſit (at leaſt) *Jure proprio*; yet he may do this in the Right of the Archdeacon, when the Archdeacon himſelf is hinder'd ||. But, notwithſtanding the aforemention'd Diſtinction of a *Chancellor* and a *Vicar-General* in Spirituals, ſtrictly ſpeaking; yet in Truth, and according to the common way of Speech, a Chancellor is a Vicar General to the Biſhop to all Intents and Purpoſes of Law: And if the Biſhop will not chuſe a Chancellor, the Metropolitan may and ought to do it; for the Biſhop himſelf, according to the Common Law, cannot be a Judge in his own Conſiſtory, but in ſome particular Caſes. And for this Reaſon it is, That if the Biſhop provides an inſufficient Chancellor, it properly belongs to the Eccleſiaſtical Law to examine the Matter: And tho' it be objected, That the Biſhop ought to examine the Perſon himſelf before his Admiſſion of him; yet (I conceive) he may well enough examine him afterwards: And this was the Opinion of Ch. J. *Richardſon* in *Sutton*'s Caſe †. If a Miniſter, after Induction, becomes very Irregular, he may be examined and deprived: But if he becomes Dumb or Blind after Induction, he ſhall not be remov'd; but the Biſhop, in this Caſe, ſhall allow him a *Co-adjutor* ||, *Jones*'s Caſe. Therefore, if the Canons of the Church be, that no inſufficient Perſon ſhall exerciſe the Office of a Chancellor and the like, it is merely with their Law to try the ſame; and the Common-Law Judges cannot grant a Prohibition, in Caſes wherein they are not Judges *; nor can they give any Remedy to the Subject therein. And *Yelverton* ſaid, That upon a Conference, he and all the Court were of Opinion, that no Prohibition ſhould be granted in this Caſe.

* vi. I. 13. 2.

|| Lindw. lib. 1. Tit. 10. c. 4. v. *Viſitationibus.*

† Littl. Rep. p. 22.

|| Mod. Rep. pt. 4.

* Brown. Rep. pt. 2.

Sutton, Chancellor of *Glouceſter*, moved for a Prohibition to ſtay a Suit before the Eccleſiaſtical Commiſſioners, on Articles exhibited againſt him; becauſe he, being a Divine, and never brought up to the Knowledge of the *Civil* and *Canon* Laws, took upon himſelf the Office of a Chancellor to the Biſhop of *Glouceſter*; whereas there are divers Canons and Eccleſiaſtical Conſtitutions, and alſo Directions from King *James* and *Charles* the Firſt, That no one ſhould be admitted to a Biſhop's Chancellorſhip without good Knowledge in the *Civil* and *Canon* Laws; ſince divers Cauſes triable in the Spiritual Court are of Weight, and the Judges there ought to be found Proficients in thoſe Laws, elſe they cannot adminiſter Right to the King's Subjects. *Sutton* being examin'd on theſe Articles, confeſs'd himſelf to be a Divine, and to have a Spiritual Living; and ſaid, that the Office of the Biſhop's Chancellor was grantable for Life, and that the Biſhop of *Glouceſter* had granted him this Office for Life, with the Confirmation of the Dean and Chapter, where-

by he had a Freehold therein, and ought to enjoy it during his Life. And that (notwithſtanding this Anſwer) they proceeded againſt him: Wherefore he pray'd to have a Prohibition, but the Court deny'd it; and he was thereupon deprived of his Chancellorſhip by the Eccleſiaſtical Commiſſioners.

By the *Canon* Law, neither a Layman, nor a Parſon in Wedlock could exerciſe this Office of a Chancellor or Vicar-General, or any other Eccleſiaſtical Juriſdiction whatever; becauſe (ſays that Law) he is of another Condition or Profeſſion; and, according to the *Canoniſts*, Men ought not to aſſociate and join themſelves together in the ſame Office under a Diſparity of Condition or Profeſſion. But yet a Layman and a Clerk, even according to that Law, might be join'd together as Executors, in reſpect of any Man's laſt Will and Teſtament, where any Thing was to be got to the Church: which plainly ſhews the Knaviſh Diſtinction of the *Canon* Law for the Intereſt of the Clergy. But a Religious might, by the leave of his Abbot, be a Biſhop's Chancellor, or Biſhop's Official, or Vicar-General, tho' he was of another Profeſſion, becauſe (ſays the Law) this Office is an Office with Cure of Souls; which is not true from the Nature of it in our Law-Books; and many of the beſt *Canoniſts* have diſavow'd it in their Works. After *Henry* the VIIIth had re-aſſumed the Supremacy *, a Statute was made, by which all Doctors of the *Civil* Law, whether marry'd or not, might be made Chancellors, and ſit as Judges in Biſhops Courts, tho' they were Laymen. 'Tis true this Law was repeal'd in the Firſt and Second of *Philip* and *Mary*, but it was revived by the Firſt of Queen *Elizabeth*.

* 37 H. 8. ch. 17.

In Dr. *Trevor*'s Caſe †, it was reſolv'd, by all the Judges giving their Opinions, in a Reference had to them by the Lord Chancellor, that the Offices of Chancellor, Regiſter, and Commiſſary, in the Eccleſiaſtical Courts, are within the Statute of *Edward* VI. ‖ *againſt Buying and Selling of Offices*: For though they are principally concern'd in Matters *pro ſalute animæ*; yet they have alſo a Concern in Matters of *Matrimony* and *Legitimation*, which touches the Inheritance of the Subject; and likewiſe about Matters of Legacy for Chattels *Real* and *Perſonal*; and in this reſpect they are Courts of Judicature. And, therefore, the Officers of thoſe Courts, are Officers as well within the View of that Statute, which reſtrains the Buying of Offices, as any other Offices within the Courts of Common Law *.

† Cok. Rep. pt. 12.

‖ 5 & 6 E. 6. ch. 16.

* Crok. Rep. Jac. p. 269.

It has been already hinted, that a *Commiſſary*, in *Latin* ſtiled *Commiſſarius*, is a Title of Eccleſiaſtical Juriſdiction appertaining to ſuch a Perſon as exerciſes Spiritual Juriſdiction (at leaſt) ſo far as his Commiſſion permits him, in ſuch Places of the Dioceſs as are remotely diſtant from the Chief City: As when the Chancellor cannot call the Subjects of his Juriſdiction to the Biſhop's principal Conſiſtory without too great a Moleſtation and Inconvenience to them. And being by the *Canoniſts* in *Latin* ſometimes term'd *Officialis Foraneus*, he is (ſay they) appointed to this eſpecial End and Purpoſe, *viz.* to ſupply the Biſhop's Juriſdiction and other *Judicial* Offices in the out Parts of his Dioceſs; or elſe in ſuch Pariſhes as are peculiar to the Biſhop, and are exempted from the Archdeacon's Juriſdiction. But a Commiſſaryſhip is not grantable for Life, ſo as to bind the ſucceeding Biſhop, though it ſhould be confirm'd by the Dean and Chapter: And ſo it has been adjudg'd. The Caſe was thus, *viz.* The Deanery of *Wolverhampton*, annex'd to the Deanery of *Windſor*, being a Peculiar, and having ordinary Juriſdiction, the Dean made a Commiſſary, who was confirm'd by the Chapter; and the Queſtion was, whether this was good to bind the Succeſſor? *Dodderidge* ſaid,

ſaid, that ſuch a Juriſdiction is judicial, and that ſuch a Grant is but a Commiſſion or Authority at all Times remaining in the Ordinary. 'Tis true, that Eccleſiaſtical Juriſdiction in *Judicial* Acts may be executed by a Subſtitute; but in Law they are the Acts of them that depute or ſubſtitute the other *. A Commiſſary may excommunicate, and prove a Laſt Will and Teſtament; but that ſhall be in the Name of the Ordinary †: And a Grant of ſuch Power is not good, but only during the Life of the Ordinary, and ſhall not bind his Succeſſor; for the Law has appointed, who ſhall execute ſuch Juriſdiction *ſede vacante*, *viz.* the Archbiſhops in their ſeveral reſpective Provinces ‖. And if that ſhould be a good Grant to bind the Succeſſor, then the Succeſſor cannot remove him; and yet the Succeſſor ſhall anſwer for the Acts and Offences of the Commiſſary, which is too hard and unreaſonable *.

* 11 H. 4. 64. a. 7. E. 4. 14. 20 H. 6. 1.

† 20 E. 3.

‖ 17 E. 3. 23.

*Noy's Rep. 153.

By the Statute of the 37th of *Henry* VIII. Cap. 17. Lay-Perſons marry'd or unmarry'd, being Doctors of the *Civil* Law, may be Chancellors, Officials, Commiſſaries, Regiſters, *&c* And it has been reſolved, that a Patent granted to a Chancellor, Commiſſary, Official and the like, being a Layman, tho' no Doctor of the *Civil* Law, is a good Grant; for the Statute does not reſtrain any ſuch Grant: And it is but an Affirmance of the Common Law, where it was doubted, whether a Layman or a marry'd Perſon might have ſuch Offices. And to avoid ſuch Doubts, this Statute was made: which explains, That ſuch Grants are good enough, ſince it is but an affirmative Statute, and no Reſtriction couched therein. And tho' Doctors of the *Civil* Law, being Laymen or marry'd Perſons, may have ſuch Offices, yet this is no Reſtriction, but that others beſides Doctors of that Law, may have them. And for this very Point there is an adjudged Caſe between *Prat* and *Stock* †; where, upon a Demurrer, the Statute was pleaded againſt the Plaintiff, to whom a Commiſſaryſhip was granted, being but only a Batchelor of Law; and, he having granted Letters of Adminiſtration, the Grant was deemed good. And it was alſo reſolved, That where an Officer for Life accepts of another Grant of the ſame Office to him and another, it is not any ſurrender of the firſt Grant. But the Offices of an Officialty to an Archdeacon, and of a Chancellorſhip or Commiſſaryſhip to a Biſhop, granted to two, where they were only grantable to one for Life, and being granted in Reverſion, it is a void Grant by the Statute-Law againſt the Succeſſors: For the Statutes reſtrain all Grants of any Thing, and render them voidable againſt the Succeſſor, beſides Grants of Neceſſity, and Leaſes for three Lives or one and twenty Years: And all other Grants, as well of Offices as of other Things, not warranted by the Statutes, are made void as againſt the Succeſſors ‖. See the Caſe of *Vaughan* and *Compton* 14 *Jac.* at the Aſſizes for the Office of the Regiſterſhip of *Suffolk*; and between *Jones* and *Powel* for the Regiſters Place of *Hereford*, wherein it was adjudged, That ſuch Offices granted in Reverſion were void unleſs granted as before directed, *viz.* Where the Grant has been by Survivorſhip.

† Hill. 35 Eliz. Rot. 181.

‖ Cok. 10. Rep. fol. 60. Cok. 5. Rep. fol. 14.

It has been ſaid, that a Biſhop's Official or Chancellor, is he, to whom the Biſhop delegates the Cognizance of Cauſes in a general Manner; and as ſuch, an Official or Chancellor, has the ſame Conſiſtorial Audience with the Biſhop himſelf that deputes him *: an Appeal does not lie from ſuch an Official to the Biſhop himſelf, but to him only unto whom it ought to be appealed from the Biſhop himſelf: But 'tis not the ſame Thing in Commiſſaries, who are not Principal Officials, tho' deputed to an univerſality of Cauſes in a certain Part of the Dioceſs; becauſe a Principal Official is an Ordinary, and the other only a delegated Judge.

* vi. 2. 15. 3.

Of

Of Chapels, and the Diviſion thereof.

THE *Latin* Word *Capella*, or in *Engliſh* a *Chapel*, is ſo called by *Rebuffus*, *quaſi capiens populum vel laudem dei*; but according to the Archdeacon *, it is ſo ſtiled *à Caprinis pellibus*, that is to ſay, from the Goat-Skins with which Altars were heretofore cover'd: yet the *Provoſt* † will have it to be termed *à Cappâ divi Martini*. Now a Chapel is a Place which uſually contains a leſſer compaſs or ſpace of Ground than a Church does; and, conſequently, does not hold ſo many Folk as a Church does: And in this Senſe an *Altar* is ſometimes termed a Chapel in the Books of the *Canon* Law. And ſometimes, in theſe Books, a Chapel is ſaid to be the ſame as an *Oratory*, and is called an *Oratory*; becauſe Prayers, in *Latin* ſtiled *Orationes*, ought to be perform'd and celebrated therein, and no other profane Matters. A *Chapel*, according to *Rebuffus*, differs from a *Chapellany*; becauſe, according to the *Canon* Law, every Parochial Church that ſubſiſts of itſelf, and has its own proper Bounds diſtinct and ſeparated from the Mother Church, may be called a *Chapel* ||; provided it be not a Cathedral or Collegiate Church: But a *Chapellany* is uſually ſaid to be that, which does not ſubſiſt of it ſelf, but is built and founded within ſome other Church, and is dependant thereon.

* In c. 54. Q. 16. 1.

† In c. 8. Diſt. 23.

|| Clem. 5. 6. 1.

A ſecular Chaplainſhip or *Capellania* was that, which Men built and founded on their own Eſtates, and in their own proper Houſes for divine Worſhip, and was given to certain Prieſts for the Adminiſtration of Divine Service therein; and the Perſon thus officiating therein, was in *Latin* called *Capellanus* from the *Chapel* or *Chapellany*, over which he was ſet to celebrate the ſame *. And, upon this Account, he was to receive certain yearly Stipends; and that without the Authority of the Biſhop of the Dioceſs. Wherefore, the *Canon* Law looks upon ſuch a Foundation only as a *profane* Building; or, as *Johannes Faber* calls it, a Legacy to Pious Uſes: And, therefore, it may be granted to any Prieſt, according to the Diſcretion of the Patron, Founder, or his Heir. But if the Patron of a ſecular or free Chapel preſents to the ſame by the Name of a Church, and his Clerk be inſtituted and inducted thereinto, *&c.* it has loſt the Name of a free Chapel.

* X. 3. 37. 1.

A Chapel may be Parochial, and have Parochial Rights, and therein the Sacraments of the Church may be adminiſtred to the Pariſhioners in ſuch a Manner, as that they ſhall not be oblig'd to repair and go to the Mother Church for Hearing of Divine Service, or Receiving the Sacraments: and for this end, they ſhall have a Pariſh-Prieſt particularly aſſign'd and appointed to them †, as in our Chapels of Eaſe here in *England*. And ſuch a Church is often called a *Chapel*, to diſtinguiſh it from the Mother Church, on which it depends ||; but yet a Chapel has not a proper Pariſh aſſign'd; nor can it be built and erected in prejudice of the Mother Church, nor without the Biſhop's Authority. For it only belongs to the Biſhop of the Dioceſs to conſtitute ſuch a Church or Parochial Chapel: And, I think, this is true in all thoſe Chapels, wherein any Perſon has Inſtitution as a perpetual Curate thereof, tho' ſuch Chapel ſhould depend on

† Lindw. lib. 3. Tit. 23. c. 10. v. *Capellis Paroch.*

|| Lindw. lib. 3. Tit. 23. c. 5. v. *Capellis.*

on the Superior or Mother Church *; and such Chapels may prescribe to Tithes and other Spiritual Rights, in opposition to the Mother Church. But tho' in such a Chapel there be no perpetual Curate instituted peculiarly thereunto, but such Curate is removeable at the Will and Pleasure of the Rector of the Mother Church †: yet even in such a Case, such a Chapel may have the *Jura Parochialia, viz.* by Custom prescrib'd; since Custom prevails very much in transferring the Right of one Church unto another ‖. And in the like Manner, this may be done by Composition *, Prescription †, and by Privilege ‖‖.

* 16 Q. 1. 54.

† X. 2. 26. 10.

‖ X. 3. 30. 31.

* X. 3. 30. 3.

† X. 3. 30. 23.

‖‖ X. 30. 30.

Every dependant Chapel shall pay to the Bishop a particular and single Procuration, if it has a Congregation of People, and a Sufficiency to pay the same: for the Bishop ought to visit, and have a respect to every Member and Part of his Dioceſs *. But what I have here said, ought only to be understood as true, *viz.* when the dependant Church or Chapel has a peculiar Curate of its own, that is to say, a Minister or Curate distinct from the Minister or Curate of the superior Church. But 'tis otherwise, when the Rector or Prelate of the superior Church is the Curate of them both, though he there exercises the Cure of Souls by a Vicar, that is not perpetual, but only temporal and removeable at Pleasure: for such a Minister is not a certain Curate, which is necessary in order to oblige him to undergo a Visitation, and to pay Procurations *in loco Capellæ* †. If the principal Church be of one Dioceſs, and the Chapel united and annex'd to it, or dependant on it, be of another Dioceſs; then, by such Union or Dependency, the former Ordinary shall have the Power of visiting such Chapel united, and consequently receive Procurations due on the account of Visitation, if the Ordinary of the Place, where the Chapel dependant stands, did visit the same before such Union, and receive Procurations from thence on the score of Visitation *. And it is to be noted, that several Chapels may be dependant on one Church; as we find by Experience in several Places of *England*. In the Case of Baptism, tho' the Mother Church be in Law called the *Baptismal* Church; yet if the Mother Church be at a great distance, and the dependant Chapel be near at hand, it is sufficient if the Infant to be baptiz'd, be carry'd to the said Chapel without regard had to the Mother Church, provided there be a Font or *Baptisterium* in the said Chapel, and the Child's Parents be Parishioners belonging to such Chapel in respect of Baptism. See *Lindwood*'s Gloss on the Provincial Constitutions †.

* X. 1. 31. 13.

† 3. 29. 27.

* X. 3. 36. 2.

† Lib. 1. Tit. 6. cap. 2. v. *ad Ecclesiam.*

There are some Chapels which adjoin to, and are Part of the Church, and these are such as were built by Persons of Honour and Distinction for Burying-places for themselves and their Families. And there are Chapels in the Universities belonging to particular Colleges, and these are consecrated, and have the Sacraments administred therein: But they are not liable to the Bishop's Visitation, but to that of their Founder only. *Domestick Chapels*, which were built by Noblemen and others, for the private Service of God in their Families, without the Bishop's Leave, are such as are not consecrated; and because these were built without the Bishop's Consent, and had no Consecration, 'tis probable for this Reason, that they are exempted from the Bishop's Jurisdiction. *Free Chapels*, are such as were founded by the Kings of *England*; and this appears by the Writs of Prohibition, when the Privileges of such Chapels have been invaded by Abbots and others: For the Recital is ‖, *cum Ecclesia*, &c. *per Progenitores nostros, quondam Reges* Angliæ *fundata*, &c. *Capella libera à primæva suâ fundatione fuerit.* Where the Word *libera* imports, that it is free from all Episcopal Jurisdiction, and only to be visited by the Founder * and his Successors, which is done by the Lord Chancellor. But yet the

‖ Reg. 40, 41.

* F. N. B. 42.

King may licenſe any Subject to build and endow a Chapel, and by his Letters Patents exempt it from the Viſitation of the Ordinary.

There were, when *Popery* prevail'd here in *England*, ſome Perſons that were called *Parochial* Chaplains; others that were ſtiled *Chauntry-Prieſts*, or Chaplains; and a third ſort that were term'd *Anniverſary-Prieſts* or Chaplains. The firſt had Parochial Chapels; the ſecond had Chauntries; and the third celebrated *Annats* either for the Dead or the Living: and all theſe Perſons were bound by an Oath to exhibit due Obedience to the Curate of the Mother Church, and not to be guilty of any Detraction againſt him. And the Chapels wherein theſe Prieſts celebrated divine Service, *Lindwood* * ſtiles Chapels *ex Gratiâ* and not *ex Debito*. And the ſame Thing may be underſtood of a Chapel, which is a Part of the Mother Church, or dependant on it, or annex'd to it; becauſe it is a Cure of Souls. And *thirdly*, The like may be underſtood of a Chapel that has a Dignity, as in the Chapels Royal, and ſeveral others in *England*. For in what Senſe ſoever the Word *Chapel* is uſed, the Chaplains miniſtring therein are always obliged to yield Obedience to the Preſident thereof, in thoſe Things that relate to his Office.

* Lib. 1. Tit. 15. cap. un. v. *Capellarum.*

Chapels of Eaſe are ſuch as are commonly built in very large Pariſhes, where all the People cannot come to the *Mother Church*; and in theſe *Chapels* the Cure is uſually ſerved either at the Charge of the Rector, or of ſuch, who by Cuſtom or Compoſition are to provide a Miniſter to officiate there; but generally the Sacraments are to be adminiſtred in the Pariſh Church, and not in thoſe *Chapels* †. 'Tis true, in ſome particular Diſtricts, where ſuch *Chapels* are, they may baptize and adminiſter the Sacraments, and may have *Chapel*-Wardens; but theſe Chapels are not exempt from the Viſitation of the Ordinary, nor thoſe that reſort thither, from contributing to the Repairs of the *Mother-Church*, eſpecially if they bury there. For tho' ſome Part of the Pariſh have always repair'd the *Chapel*, yet 'tis ſtill the ſame Pariſh, and they are Part thereof: And, therefore, of *common Right*, ought to contribute to the Repairs of the Church; and the rather, becauſe ſuch *Chapels* were built for their Eaſe. But more of this hereafter under another Title.

† Lindw. lib. 3. Tit. 23. cap. 10. v. *Capellis Parochialibus.*

Of a Church, and other Matters relating thereunto.

THE Word *Church*, in *Latin* ſtiled *Eccleſia*, has ſeveral Names in Law, and is taken in divers Senſes: For it is ſometimes in *Latin* call'd *Oratorium*, or in *Engliſh* an *Oratory*; ſometimes *the Houſe of God*, or of Prayer *; ſometimes *a Temple*; ſometimes the *Lord's Tabernacle*; and ſometimes in *Latin* it is termed *Baſilica* †. But then by the *Canon* Law, as it is ſtiled *Baſilica*, it is an Edifice erected for the Service of a Church, which has not yet had Conſecration beſtow'd on it, as a Chapel in a Gentleman or Nobleman's Houſe, and the like: and that is in *Latin* properly call'd *Eccleſia*, according to *Joh. Andreas* on the *Decretals* ||, which has receiv'd Conſecration. It is called a *Tabernacle*, becauſe it is made and framed *de Tabulis*, or in *Engliſh* of Planks and Boards:

* Mat. cap. 21. Joh. cap. 2.
† Dd. in c. 1. X. 3. 40.
|| X. 3. 38. 25. X. 3. 50. 9.

Boards: But, according to the Arch-deacon *, a *Tabernacle* is ſometimes uſed and put to ſignify the whole Church. But under the ſimple Appellation of the Word *Church* or *Eccleſia*, the *Canoniſts* only mean a Cathedral Church ||. The Word *Church* is alſo taken for any particular Congregation or Aſſembly of Men, as the Church which was at *Corinth* †; and likewiſe in theſe latter Days, according to the Pride of ſome *Men*, it is put for the Perſons that are ordain'd for the Miniſtry of the Goſpel, that is to ſay, the Clergy; and for this they quote the 5th Book of *Moſes* ||, where 'tis ſaid, *A Baſtard ſhall not enter into the Congregation of the Lord*, or (in other Terms) he ſhall not be promoted to the ſacred Order and Function. I ſhall not here take the Word *Church* in the Senſe of ſome Divines, *viz.* for an Aſſembly or Congregation of Chriſtians whereſoever diſpers'd or exiſting, but for the Houſe of God wherein divine Service is perform'd, and wherein Clergymen do adminiſter Holy Things: And of this kind there are four ſorts of Churches, *viz.* *Cathedral*, *Collegiate*, *Conventual* and *Parochial* Churches; but ſome make a *Collegiate* and a *Conventual* Church to be one and the ſame Thing. A *Cathedral* Church is that, wherein there are two or more Perſons, with a Biſhop at the Head of them, that do make as it were one Body Politick: And in the like manner, *Collegiate* Churches were ſuch as were built at a convenient Diſtance from the *Cathedral* Church, wherein a number of Preſbyters were ſettled and lived together in one Corporation; and theſe were liberally endow'd by the Devout and Great Men of thoſe Times wherein they were built, for the better attending the Service of God therein, and in the Limits round about them; for the State of an Itinerant Clergy being found very inconvenient, Encouragement was therefore given to the Building of theſe Churches, as Chriſtianity began to increaſe and prevail more and more in the World. A *Conventual* Church is that, which is appropriated to ſome Religious Houſe; and over which an Abbot or Prior preſides: For in theſe Churches of *Regulars*, there ought not to be any ſecular Clerks for the Government or Adminiſtration thereof; and if there be, they ought to be remov'd *. A *Parochial* Church is that, unto which all the Inhabitants of ſuch a Diſtrict or Pariſh ought to reſort for hearing divine Service; and herein it differs from a *Cathedral* or *Collegiate* Church, becauſe it does not conſiſt of a Chapter, as not being a Corporation aggregate; and from a *Conventual* Church, becauſe it is of a ſecular Nature.

* 16 Q. 7.

|| X. 5. 40. 19.

† 1 Corinth cap. 1.

|| Deut. cap. 23. v. 2.

* X. 1. 6. 27.

At firſt there was only one Church in each Dioceſs, *viz.* at the Place where the Biſhop and his Clergy reſided, and perform'd all divine Offices: And ſo it was here in *England*, as at *London*, *Canterbury*, and the like; and from hence, as Neceſſity requir'd, Clergymen were ſent out to preach and baptize in the remoter Parts of the Dioceſs; and this was ſtiled the Cathedral Church. But afterwards in Proceſs of Time, ſome other Places of Worſhip were built here and there, in the Days of the *Britiſh* Chriſtians, as at *Glaſtenbury*, *Eveſham*, and the like; and theſe were called *Collegiate* and *Conventual* Churches. In the *Saxon* Times, Noblemen began very early to build and erect Churches for their own Convenience †, which yet were not to be made uſe of, till conſecrated by the Biſhop; and hence (according to ſome) began the Diviſion of Churches: But when the *Parochial* Diviſion of Churches began here in *England*, we cannot preciſely ſay; and ſo far is it from being true, that *Honorius* Archbiſhop of *Canterbury* ſettled this Work all at once ||, that it does not appear to be then thought on. And yet this Work advanced ſo far in King *Edward the Confeſſor*'s Reign, that 'tis complain'd of in his Laws, That in ſome Places there were three or four Churches, where formerly there had

† Bede, lib. 5. cap. 4.

|| A.D. 636.

† Vid. Spelm. had been but one †, by which means the Maintenance of the officiating Prieſt was much leſſen'd.

In the greater Church of the City of *Conſtantinople*, and in other Churches adjoining and ſubject thereunto, the Number of the Clergy was to be ſtated and certain, according to the reſpective Eſtates of ſuch Churches; and leſt that ſuch Churches ſhould be reduced to Poverty, this Rule of Law was to be obſerved under a ſevere Penalty to be inflicted on ſuch Perſons as ſhould act contrary hereunto. And it was ordained both by the *Civil* and *Canon* Law, That whenever a Church is built, ſuch an Endowment ought to be ſettled thereon, as ſhall be ſufficient to ſupport and maintain the Prieſts, Deacons, and other neceſſary Perſons in the ſaid Church: For unleſs the Perſon will in the firſt Place thus endow the ſame, he ſhall not be allowed to erect and build a Church. And the Law moreover requires, That ſuch an Eſtate be ſettled thereon, as will maintain Hoſpitality, and ſufficiently diſcharge all Epiſcopal Dues. But if an Endowment be not ſettled thereon at the Time of founding the Church, the Biſhop ought to ſee the ſame ſettled thereon at the time of its Conſecration, otherwiſe the Church ought not to be conſecrated.

A *Cathedral* or *Collegiate* Church ought not to be void or without a Prelate above the ſpace of three Months: For if they, to whom the Election belongs, ſhall neglect or refuſe to chuſe a Prelate for ſuch *Cathedral* or *Collegiate* Church for above three Months, the Choice there-
‖ X. 1. 6. 41. of ſhall devolve to the next immediate Superior †; and if he ſhall not chuſe within three Months more, he ſhall be puniſh'd according to the Canon. But a Church may be called a *Collegiate* Church, tho' it has no Prelate placed therein; yet this of a Prelate is generally reckoned one of the chief Badges of a *Collegiate*, or *Conventual* Church. For every College or Convent ought to have theſe particular Badges, *viz.* A common
* X. 2. 28. 48. Seal, and the Uſe thereof *. 2*dly*, The Election and Choice of a Prelate
X. 3. 39. 30. regularly ſpeaking. 3*dly*, The Liberty of treating and debating Matters in common, as in a Chapter or Common-Council †. 4*thly*, They ought
† X. 2. 19. 5. X. 3. 24. 8. to have a common *Area*, or *Scite* belonging to it. And, 5*thly*, They
D. 47. 22. 1. ought to have a *Refectorium* and a *Dormitory*, if they be of a Reli-
‖ X. 3. 35. 6. gious Order ‖.

A Church is ſaid to be ſubject, and belongs to a Perſon *Pleno Jure*, when the Biſhop exerciſes no Epiſcopal Right or Juriſdiction therein, but the whole Juriſdiction belongs to an Abbot, or ſome other Prelate: And therefore the Preſentation, Inſtitution, and Deprivation do belong to him, that has ſuch a Church *Pleno Jure*. Thus in Churches belonging to Religious Houſes, the Preſentation of the Rector is not made to the Biſhop, but the Religious themſelves do give him Inſtitution, and may afterwards deprive him (if occaſion be) without the Biſhop: yet this is only to be underſtood where the People, that is to ſay, the Pariſh, is of an exempt Juriſdiction; for otherwiſe in reſpect to the Cure of Souls, Recourſe ought to be had to the Biſhop. The Cuſtody or Guardianſhip of a vacant Church does of *Common-Right* belong to him, who has the
* Abb. in c. 3. X. 5. 31. N. 3. Right of Collating or giving Inſtitution thereunto *: And ſuch vacant Church during its Vacancy, ought to be governed by its own *Oeconomus* till ſuch time as the Patron or Collator has made a Proviſion for it within the time aſſigned them by Law.

Churches and Temples have many Immunities in Law; ſome of which are in common with other Things Eccleſiaſtical; and ſome of them are proper and peculiar unto Churches and Temples alone. As that no Tumultuous Aſſemblies or Conventicles ſhall be held in Churches and

and Temples, or ſuch things as may diſturb divine Worſhip: Nor ought Civil Courts of Judicature to be held therein *, though it was look'd upon by the Antients to be a Matter of Religion not to begin any Councils, or hold any Senate, unleſs it was in ſome Temple or Grove. And ſo ſacred was the Church unto ſome, that it had the Right of an *Aſylum*, or Sanctuary, as it has at this Day in ſome *Popiſh* Countries †, for protecting the greateſt Offenders againſt the State; and ſo Holy was the Ground thereof, that we alſo read, that heretofore no one was bury'd in the Church of the Martyrs. And this was alſo peculiar to Churches, *viz.* That though a Church was not conſecrated, yet if Divine Service was perform'd therein, it enjoy'd the ſame Immunities as a conſecrated Church; for we ought to ſhew our regard to the Divine Worſhip therein perform'd, and not to the Walls thereof.

* X. 3. 49. 5.

† X. 3. 49. 6.

When the Prebends of Cathedral Churches are ſo ſmall as to induce Poverty, Chapels might be annex'd to them: yet a ſuitable Proviſion or Allowance was to be reſerv'd to the Miniſters or Presbyters of ſuch Chapels. For before the Council of *Lateran*, the Canons of a Cathedral Church might have Chapels or Parochial Churches annex'd to their Prebends for their better Subſiſtence, if they could not be commodiouſly ſupported on the Revenues of the greater Church, reſerving a due Portion to the Chaplains or Parochial Miniſters: But, by a Proviſion of this Council, Chapels or Pariſh-Churches were taken away and deny'd to Canons. There are ſome Churches, that are not ſubject to the Archdeacon, tho' they are placed and ſituated within the Precinct and Diſtrict of the Archdeaconry: As *Regular* Churches; and, ſuch are the Monaſteries of Monks, *Regular* Canons and Nuns. And 'tis the ſame Thing, if an Archbiſhop has ſpecially reſerv'd ſome particular Church unto his own Juriſdiction, ſo that the Archdeacon cannot exerciſe any Juriſdiction over thoſe Churches: For in this Caſe ſuch Churches ſhall not be ſaid to be ſubject to the Archdeacon; as it appears in many Places, where Archbiſhops and Biſhops exerciſe immediate and peculiar Juriſdiction. When two Churches are united together, they make but one Church in Law; and *à Modo* are ſaid to be but one: And in this Senſe, a Perſon ſhall not be ſaid to have a Plurality of Benefices, but only one Benefice. If a Perſon bequeaths a Legacy to the Church in general Terms, when there are ſeveral Churches in the ſame City, he is underſtood to leave it to his Pariſh-Church, or to the Church where he is bury'd.

The Word *Church* is ſometimes taken for the material Body or Fabrick thereof, as for the Walls, Windows, Covering and the like; and in this Senſe, it comprehends the whole Church, *viz.* the Nave or Body of the Church, together with the Chancel, for the Chancel is even included under the Word *Church* ‖. Churches and Chapels in the Country, and even ſuch Pariſh Churches as are in a City, are in our Books ſaid to be *Minores Eccleſiæ*, in Reſpect of Cathedral Churches, which are there ſtiled *Majores Eccleſiæ*, to which the Prieſts ought, on Rogation-Days, to go and ſay their Litanies *. But the word Church ſometimes ſignifies the general Government and Adminiſtration of the Spiritualties and Temporalties of the Church; and ſometimes 'tis taken for the Prelacy thereof †.

‖ Lind. lib. 1. Tit. 10. cap. 4. v. *Fabricam Eccleſiæ.*

* Lindw. lib. 1. Tit. 1. cap. 2. v. *Minorib. Eccleſiis.*

I have before obſerved, that an *Oratory* is ſometimes taken for a *Church*, but properly ſpeaking an *Oratory* ſignifies a private Place, which is deputed and allotted for Prayer alone, and not for the general Celebration of divine Service: And hence, according to *Andreas*, an *Oratory* differs from a *Church* in the ſtrict Acceptation of the two Words. For in a Church the Law has ſettled a certain Portion or Endowment meet for the Rector and other Neceſſaries *; but an *Oratory* is not built for the general Celebra-

† X. 3. 26. 12. 2.

* Con. 1. Diſt. 40.

tion of divine Service, or for ſaying Maſs †, in the Phraſe of the *Romiſh* Church. Nor is it endowed, but only ordained for Prayer alone (as aforeſaid) without the miniſtration of the Sacraments: And any Perſon may build ſuch an Oratory without the Biſhop's Conſent, though a Clerk cannot celebrate divine Service therein without the Biſhop's Licence. And tho' the Biſhop may not grant ſuch a Licence for the Celebration of divine Service therein on the greater Feſtivals of the Church * regularly ſpeaking; yet becauſe *Oratories* of this kind are ſometimes built on the account of Neceſſity, the Biſhop ought to grant the ſame, when there is no Church in the Neighbourhood; and divine Service may be adminiſtred therein on the ſaid Feſtivals, and not otherwiſe †. But Bells ought not to be put up in the ſaid *Oratories* without the Biſhop's Authority ‖. And thus theſe *Oratories* are *ad orandum*, and not *ad celebrandum*, without the Intervention of the Biſhop's Authority, or ſome other Privilege obtain'd from the Apoſtolick See: And as Churches are ſtiled *publick* *, ſo theſe are termed *private* † Oratories.

† Con. 1. Diſt. 33.

* Con. 1. Diſt. 34 & 35.

† Con. 1. Diſt. 33.

‖ X. 5. 33. 10.

* vi. 5. 7. 4.

† X. 5. 33. 10.

Of Church-wardens, and their Office.

THE Office of Church-wardens, is not only to take Care of the Eſtate and Rights of the Church, and to demand and ſue for Debts and Legacies belonging thereunto, but alſo to preſent and denounce all Hereticks, Schiſmaticks, Whoremongers, Adulterers and Inceſtuous Perſons, unto the local Ordinary; and all Perſons guilty of Perjury, Simony, Defamation, and other Infamous Perſons living or offending within their Pariſh †; and alſo all ſuch as Scold or Brawl in the Church or Church-yard; and ſuch as on Sundays or Holidays refuſe to attend divine Worſhip, and the holy Myſteries of Religion: provided, they are not hindred by any legal Impediment. Moreover, 'tis the Duty of all Church-wardens to preſent the Dilapidations of the Chancel and Manſion Houſe belonging to the Rector or Vicar; and to ſignify the Negligences and Errors of Curates and Miniſters unto the aforeſaid Ordinary. *Thirdly*, Their Buſineſs is likewiſe to take care of the *Nave* and *Tower* of the Church; and of the Bells, Books, and other Goods and Ornaments belonging thereunto; and out of the Moneys of the Church to repair the ſame whenever need requires, or (at leaſt) they ought to ſee the ſame done; and alſo to ſee that the Church-yard be fenced in with a decent Rail or other Incloſure. And if the Moneys of the Church ſhall not be enough for compleating the Premiſes, they may, with the Conſent of the Pariſhioners duly ſummon'd hereunto, impoſe a Rate, and levy a Tax on each Pariſhioner, according to the Meaſure and Proportion of their Eſtates ‖. And if any of the Pariſhioners ſhall refuſe to pay this Rate or Tax at the day appointed for the Payment of it, or ſhall defer the ſame, the Church-wardens ſhall preſent or denounce him to the local Ordinary; who, in the Spiritual Court, ſhall by Eccleſiaſtical Cenſures compel him to pay the ſame, and condemn him alſo in Coſts of Suit.

† Can. Jac. 115.

‖ Vid. Poſt. Tit. *Repairs.*

The Church-wardens themſelves, whoſe ancient and undoubted Office it is to make Preſentments, do not take a particular Oath upon all Preſentments they make; but they do it by virtue of their general Oath as Churc h-

Church-wardens. And Miniſters of Churches do the ſame, or rather by virtue of their general Oath of Canonical Obedience. It is the conſtant Courſe of Proceedings in the Eccleſiaſtical Court, that when a Preſentment is made, they form Articles thereupon, but they never recite or mention the Preſentment in the Articles; and it need not appear in them. But if there be no Preſentment made, it is an error in not proceeding according to the Rules of the Court Chriſtian, that is to ſay, according to the Rules of the *Canon* Law: And the proper Method for ſuch a defect is by an Appeal, and not by a Prohibition at Common Law. For the common Law Courts will not take Cognizance whether the Eccleſiaſtical Courts obſerve their Laws or not: Prohibitions being only granted, when the Common Law is invaded or interfered withal.

It is not the Courſe of the Spiritual Court now to examine the Perſon preſented upon Oath, that Oath being now aboliſh'd by Act of Parliament †: But they may ask him *ore tenus*, whether he will confeſs or deny the Preſentment or the Articles exhibited. If he denies the Articles, then there is a negative Conteſtation of Suit; and it is proceeded to examine Witneſſes to prove the ſame; and if it be not proved, a *voluntary* Promoter is condemned in Coſts or Expences of Suit. *Sed Quære* of a Church-warden, who is a neceſſary Promoter. Church-wardens are not ſpiritual Perſons, tho' their Office be a kind of Eccleſiaſtical Office *. Tho' Church-wardens may have their Action for ſuch of the Pariſh Goods as are taken away, yet they cannot diſpoſe of them without the Conſent of the Pariſh; and a Gift of ſuch Goods, made by them without the Conſent of the Sides-men or Veſtry, is void †: And tho' the Goods of the Church do belong to the Pariſhioners, yet they cannot have an Action of Account againſt the Church-wardens for waſting any of them, but muſt make new Church-wardens, and thoſe new Church-wardens may bring an Action of Account againſt the former ||. And though they ſhould preſcribe to chuſe two Church-wardens, and that the Perſons ſo choſen ſhall continue in that Office for two Years, yet the Pariſh may (notwithſtanding the Preſcription) remove ſuch Church-wardens at their Pleaſure, and chuſe new ones; for otherwiſe the Pariſh might ſuſtain great Loſs, if the Church-wardens ſhould continue ſo long in their Office contrary to the Will of the Pariſhioners; becauſe in that Time they might waſte all the Pariſh Goods belonging to the Church *.

Tho' the Free-hold of the Body of the Church be in the Incumbent thereof, and the Seats therein be fix'd to the Free-hold; yet becauſe the Church is dedicated to God's Service, and is for the Uſe of the Inhabitants, and the Seats are erected for their more convenient Attending on divine Service, the Uſe of them is common to all the People that pay to the Repair thereof: And, therefore, if any Seat, tho' fix'd to the Church, be taken away by a Stranger, the Church-warden (and not the Parſon) may have their Action againſt the Wrong-doer †. If the Goods of the Church be ſtolen or taken away, it is Robbery and Sacrilege; and the Church-wardens may have an Appeal of Robbery ||; and a Libel may alſo be exhibited in the Spiritual Court againſt the Offender *pro ſalute animæ*, &c. * *Syderf. Rep. pt.* 1. *p.* 281. but not to recover Damages. The Church-wardens may juſtify many Acts, in order to appeaſe any Irreverence or Diſorder in the Church or Church-yard in Time of divine Service, as to whip Boys, or take off the Hats of thoſe that would irreverently keep them on †; and, laſtly, they ought to preſent the Names of ſuch Perſons as do behave themſelves irreverently in the Time of divine Service.

† 17 Car. 1. cap. 11. 13 Car. 2. cap. 12.

* Rolls 1. Abr. p. 653. Rolls 2. Rep. 107.

† Bulſtr. Rep. pt. 3d. p. 264.

‖ 8 E. 4. 6. 4 E. 4. 6.

* 26 H. 8. 5. b. 13. Cok. Rep. p. 70.

† 8 H. 7. 12.

‖ 37 H. 6. 39.

* Kebl. Rep. pt. 2. p. 23.

† Saund. Rep. pt. 1. p. 13. Syd. Rep. pt. 1. p. 301.

Of

Of Church-yards, &c.

AS we have a ſure and certain Hope of a future Reſurrection, and that the Soul being Immortal, will, at ſome Time or other, reſume its Body again in a glorify'd Manner; a decent and religious Care has therefore been taken at all Times, and almoſt among all Nations, about burying the Bodies of the deceas'd in ſome ſacred and religious Place, tho' the Worſhip of the true God has not been among them. And therefore, the Places where dead Bodies are bury'd, are in *Latin* call'd *Cæmiteria*, and in *Engliſh*, *Dormitories*; the *Latin* Word *Cæmiterium* being deriv'd from the *Greek* Verb Κοιμάω, which imports *the laying a Man to ſleep*. And *Chriſt* himſelf, in St. *John*'s Goſpel *, calls Death itſelf by the Name of ſleeping: *viz. our Friend* Lazarus *ſleepeth*; but *I will go, that I may awake him out of Sleep* †. And in another Place he ſaith, *the Girl is not dead, but ſleepeth* ‖. And ſuch like Expreſſions we meet with in ſeveral Places of Holy Writ. And 'tis likewiſe uſed in the ſame Senſe and Manner among profane Authors: For a Perſon is ſaid to be dead to us, becauſe we cannot raiſe him from the Grave; though he only ſleeps unto God, who can raiſe him from the Chamber of Death.

* Cap. 11. v. 11.
† Mat. cap. 9. v. 24.
‖ Pſalm. 56. Job. cap. 7. & 11. 14. & 21. 1 Cor. cap. 11. &c.

According to the Papal Law, Church-yards are ſaid to be conſecrated for ſeveral juſt and weighty Reaſons; among which (I think) ſome of them ought to be treated with the utmoſt contempt, *viz. Firſt*, Becauſe (as *Chryſoſtom* obſerves in his *Homilies* †) Dæmons uſually reſorted to the Sepulchres of Perſons deceaſed: But this rather ſavours of Prieſtcraft than of any Truth or Fact, and was an Invention of the Clergy to get Money by Prayers for the Dead. Indeed, we read in St. *Matthew*'s Goſpel ‖, that the Demoniack dwelt in Sepulchres; and, coming out from thence, beſieged and ſtopped up the Way: But this was effected by God himſelf, for the ſake of Chriſt's working a Miracle. And *Franciſcus Venetus* likewiſe, to magnify the Power of the Clergy, does, in the *ſecond Tome of his Problems*, give us a ſtrange Account of this Matter, ſaying, That the Bodies of Perſons were frequently haunted by unclean Spirits; and that tho' the dead Bodies themſelves did not ſtrike a Fear and Terror into Men, yet the Spirits that ſurrounded them did; and that, a greater Terror into a Man that was ſolitary and alone, than into one attended with a Companion. And, therefore, it was uſual to burn Lights about the Bodies of the deceas'd, in order to keep off and drive away thoſe Powers of Darkneſs, which they dreaded ſo much, as is pretended. And hence it was that Church-yards were conſecrated, beſprinkled with holy Water, and ſcented with burning Frankincenſe, according to the Fopperies of the *Romiſh* Church. A ſecond Reaſon, why Church-yards were conſecrated, was, becauſe the Clergy would keep this Ground to their own Behoof and Advantage; and as their own Property. For having perſuaded the People into a fooliſh Opinion, that the Souls of the departed hover'd about their Bodies after Death, they could not be laid at Reſt without the Help of the Prieſt; and that this could not be obtain'd unleſs they were bury'd in holy Ground, whereon the Prieſt exerciſed his Office: and thus they made

† Tom. 2.
‖ Mat. cap. 8. v. 28. Mark cap. 5. v. 2.

made the Church-yard a Place neceſſary unto Reſt after Death, and made an immenſe Profit to themſelves thereby. Beſides, as Church-yards were ſeparated and divided by Conſecration from other profane and impure Places *; ſo the Biſhops who conſecrated this Ground, were wont to have a Spill or Sportule for the ſame from the credulous Laity. And thus, in Time, a Church-yard became a Place appointed and ſet aſide for Chriſtian Burial.

* 13 Q. 1. 1. in prin.

By the *Civil* Law heretofore, the Corpſe of Perſons deceas'd were buried out of the City in the Fields †; and the Place, into which any dead body was brought, immediately became Religious of divine Right; and was ſo far exempt from all human Uſes, that ſuperſtitious Antiquity did not believe it to be in any Man's Property ‖: But at this day 'tis not lawful to bury the Bodies of Perſons deceas'd in any other Places than the Church or Church-yards *, unleſs it be the Corps of Perſons capitally puniſh'd for any Crime, which are uſually hung up on a Gibbet, and expos'd to publick view as a Terror and Example unto others. But we have ſo far departed from the ancient Law of the *Romans* in burying their Dead in Fields, that we have always made Church and Church-yard Burial neceſſary unto Salvation for the ſake of the Prieſt. And ſo great a Regard have Men in theſe days for this Rite of Burial in Churches and Church-yards; that, according to the modern Law, a Real Action by Right of Property, or a *Quaſi* Right of Property will lie for ſuch Sepulchres as are in Churches †; and they may be ſold and given by way of Diviſion to one of the Heirs. Formerly when Mens Bodies were buried out of the City in the Fields, every one had a free Right and Power of erecting Statues, and ſetting up Monuments over the Grave of the Perſon bury'd, if he made the Sepulchre in his own Ground or proper Burying-place ‖: But now ſince it has been uſual to bury in Churches, it is not lawful to erect Statues and Monuments there without the leave of the Ordinary *. But yet every one may, *ſuo Jure*, ſuperadd ſome certain kind of Memorial or Inſcription to ſuch Sepulchres, and have the ſame engraven thereon †.

† C. 3. 44. 12.

‖ C. 3. 44. 2 & 9.

* C. 1. 2. 2.

† C. 3. 44. 4.

‖ C. 3. 44. 7.

* C. 3. 44. 7.

† Ibid.

As the Church-yard ought to be divided from other profane Places *; ſo it ought to be fenced in and railed, in order to keep out Hogs and other noxious Animals, that may annoy and defile the ſame. And every Church-yard about the Cathedral Church ought to contain forty Paces of Ground in Circuit from the ſaid Church, and about a Parochial Church thirty Paces, unleſs it be in ſmall Cities and Burroughs where they are ſtraiten'd in point of Ground †. And, moreover, 'tis to be obſerved, by the *Canon* Law, that no other Buildings ought to be erected in the Church-yard, but ſuch as do belong to the Clergy: But, by the *Civil* Law, no Houſe at all ought to be built near the Church-yard; and if it be, it may be pull'd down and deſtroy'd ‖. By the *Canon* Law, the Church yard ought to enjoy the ſame Privilege and Immunity as the Church itſelf, *viz.* to ſave a Criminal that flies thereunto for Sanctuary againſt the Law: But tho' the Puniſhment of Death, according to the Papal Law, ſhall not be inflicted on a Perſon flying to the Church or Church-yard for Refuge, or any other corporal Puniſhment; yet even by this Law, ſuch Sanctuary ſhall not ſave him from a pecuniary Puniſhment *, becauſe it brings Money to the Clergy, who ſhare with the Civil Magiſtrate herein.

* 13 Q. 1. 1. prin.

† 17 Q. 4. 6.

‖ D. 11. 8. 3.

* Dd. in c. 6. X. 49.

By a Provincial Conſtitution in *Lindwood* †, all ſuch Perſons as ſhall fell or grub up any Trees, or mow and cut down any Graſs growing in the Church-yard, or gather and carry away any Fruit growing therein, ſhall incur the Sentence of the *greater* Excommunication, and be ſhut out of the Communion of the Church, till ſuch Time as they ſhall make Satisfaction and Amends for the Offence committed. Nor can the Parſon

† Lib. 3. Tit. 28. cap. 6.

himſelf, cut down Trees growing in the Church-yard, tho' the Freehold, according to the *Common* Law, be in him, except it be for the neceſſary Repairs of the Chancel *; becauſe they are planted, and grow there for the Ornament and Shelter of the Church. This is the ancient Common Law of this Realm: And, therefore, the Statute made in *Edward* the Firſt's Reign † is but declarative of that Law, and the Rectors, that cut down Trees in the Church-yard for any other Purpoſe, may be indicted on that Statute, and fined; or may be proſecuted at Law; and the Courts at *Weſtminſter* have granted Prohibitions in ſuch Caſes to ſtay any farther Waſte. But it has been a Queſtion, where the Rectory is impropriate, and the Vicaridge endow'd, to whom the Trees in the Church-yard do belong ‖. If to the Vicar, 'tis only becauſe he is to repair the Chancel; and if the Impropriator cuts them down, and the Vicar libels againſt him in the *Spiritual Court*, a Prohibition ſhall go; becauſe if he has a Right to the Trees, he may bring an Action of Treſpaſs againſt the Impropriator for felling them.

* 1. Roll. Rep. p. 235. 255.

† 35 E. 1.

‖ 1. Roll. Rep. p. 255. Roll. Abr. 311, 337.

But tho' the Church-yard be the Freehold of the Parſon (as aforeſaid) yet 'tis the common Burial-Place of the Dead; and for that Reaſon 'tis to be fenced at the Charge of the Pariſhioners, unleſs there be a Cuſtom to the contrary, or for a particular Perſon to do it in Reſpect of his Lands adjoining to the Church yard *, and that muſt be try'd at the Common Law. None ſhall uſe chiding Words in the Church or Church-yard, in pain of Suſpenſion for ſo long a Time as the Ordinary ſhall think fit. *viz.* of a Layman *ab ingreſſu Eccleſiæ*, and of a Clerk *à Miniſterio Officii* *.

* 2. Roll. Abr. p. 287.

* 5 & 6 E. 6. cap. 4.

Of a Citation, and the Force thereof.

AFTER the Action has been enter'd with the Judge or Regiſter, which we in *Latin* ſtile *Editio Actionis*, the Defendant ought to be ſummon'd into Court to give an Anſwer by his Appearance to the Plaintiff's Action or Libel. Now the ſummoning of a Perſon into Court, is nothing elſe but the citing or calling him before the Judge, or ſome other Perſon that has Juriſdiction, for the ſake of trying the Cauſe of Action commenced againſt him †. Heretofore, by the *Civil* Law, the Plaintiff or Perſon bringing the Action, had the Power of citing his Adverſary into Court himſelf, who, unleſs he preſently appear'd, or promiſed to give Bail by Surety, for his Appearance, might be forced into Court by Compulſion, or (as the *Civilians* ſay) *obtorto collo* ‖. The Reaſon of this was, becauſe the Judge or *Prætor* was wont to grant an Action againſt ſuch as by Force reſcu'd any Perſon that was cited into Court, that is to ſay, againſt ſuch as deliver'd him out of the Hands of the Perſon that thus cited him *. But ſo great a Power granted to private Men ſeeming in no wiſe ſafe, but rather contrary to Humanity, this Power of citing and dragging the Defendant into Court, was, by degrees, taken away, and a more gentle way of Summons was introduced; *viz.* That the Suit commenc'd againſt him ſhould, by the Order and Authority of the Magiſtrate, be denounced to him by ſome publick Miniſter, either by way of Edict, or by Letters affix'd up in ſome publick Place †. Therefore, ſince this antient way of ſummoning was thought ſo cruel, the Judge did forbid every one preſuming to cite his Father, Patron, and his Patron's Children into Court, or any others to whom the like Honour was due, without Leave and Per-

† D. 2. 4. 1.

‖ D. 2. 8. 5. in fin.

* D. 2. 7. 1 & 4.

† Nov. 53.

Permiſſion firſt obtain'd, under the Penalty of 50 *Aurei* or Crowns to be inflicted on ſuch as did impugn this Edict *. Nor did it import any Thing, whether ſuch Children were emancipated or not †: For, by natural Reaſon and Equity, there is the like Honour and Reverence due to Parents, tho' we are not under their Power and Command. For the ſame Reaſon, an adopted Son cannot cite his adoptive Father into Court without his Leave. For tho' ſuch a Son be *in alienâ Familiâ*; yet he owes Reverence and Honour to his adoptive Father. But he who is properly in the Father's power, owes ſtill a greater Reverence; becauſe, by the *Civil* Law, he cannot try a Cauſe againſt his Father, even with the Judge or *Prætor*'s Permiſſion, unleſs he has a *Peculium Caſtrenſe*; becauſe he is, in this Reſpect, then deem'd to be a *Pater-familias*.

* D. 2. 4. 24 & 25.
† D. 2. 4. 4.

Citations then after the Action is entred and given in, are the Foundation and Beginning of all Judicial Proceedings †: Therefore, in ſpeaking of them here in this Place, I ſhall, *Firſt*, Conſider when the Perſon cited ought to appear, and when he may abſent himſelf; *Secondly*, I will ſhew what Exceptions may be made againſt Citations; *Thirdly*, I will point out the Interſtices of Time which ought to be between one Citation and another; *Fourthly*, I ſhall diſcourſe of a Peremptory Citation, and how a Citation is to be made *vivâ voce*, and how by Letters in Writing; *Fifthly*, I ſhall treat of the Puniſhment of a Perſon cited, and not appearing; and, *Sixthly*, I ſhall make ſome Remarks on the whole.

† Gail. 1. Obſ. 48. N. 1.

As to the firſt Point, it is a known Rule in Law, That a Perſon ought to appear, on whatever Account, or in whatever Cauſe he is ſummon'd before the Judge: and if he has any Exceptions either againſt the Judge or his Juriſdiction, he may then alledge the ſame under a Proteſtation *de non conſentiendo in Dominum Judicantem, &c.* and then it ſhall be argued by Counſel, whether he be oblig'd or not, to abide by the Perſon or Juriſdiction of the Judge *. And hence ariſes the Practice of Perſons pleading their Privilege, whether they be Soldiers, Scholars, or the like; but a Privilege cannot be alledged and pleaded, unleſs it be with a Proxy or Warrant of Attorney (a thing well known!) tho' the Abſence of the Fact may be alledg'd and pleaded without ſuch a Proxy or Letter of Attorney: as an Allegation of Sickneſs, Infirmity, or any other the like Matter is ||. Hence it is, That if no Privilege ſhall be alledg'd or pleaded, the Court may proceed againſt the Perſon; and ſuch a Proceſs is valid, becauſe the Juriſdiction of the Judge is not yet everted and overthrown. *Baldus* is very large and copious hereupon, and ſo are other of the Doctors.

* X. 2. 28. 7.
|| Innoc. in lib. 15. X. 5. 1.

If a Judge ſhall decree himſelf to be a competent Judge that is not ſuch, an Appeal will lie: But if no Objection ſhall be made againſt him, the Proceſs ſhall remain always valid, unleſs an Appeal ſhall intervene. But this Rule which ſays, That a Perſon ought to appear, has an Exception thereunto, *viz. Firſt*, Unleſs ſome Caution be given by Sureties *de Judicio ſiſtendo*, and theſe Sureties do engage for the Defendant's Appearance, *&c.* and that they will wave and renounce all their Privileges if they have any *. See *Bartolus* and *Baldus* hereon. For though a Surety or Sureties do promiſe and ſtipulate for the Defendant's Appearance, and that he ſhall ſtand to the Judgment of the Court; yet Sureties cannot be cited out of their own proper Juriſdiction, unleſs they wave and renounce the Privilege of their own Juriſdiction †. *Secondly*, 'Tis otherwiſe, if it be certain and notorious, That the Perſon citing me is not my Judge, as being a Perſon out of his Territory; or, who is otherwiſe a Judge notoriouſly incompetent ||; as, according to the Papal *Canon* Law, a Lay Judge is over a Clerk: who, though he ſhould not be known to be a Clerk,

* D. l. 1. h. t.
† Gloſs in D. l. 1. h. t.
|| X. 1. 29. 29

Clerk, yet he cannot be moleſted by a Lay Judge *: For a Lay Proceſs a-
gainſt a Clerk is null and void by that Law †.

* X. 2.1. 17.
† X. 2. 1. 8.

It has been already ſaid, That a Citation is the Beginning and Foundation of every Law-Suit or Judicial Proceeding: ſo that every Judicial Act exerciſed againſt a Perſon not cited, is null and void, *ipſo Jure* ‖: For a Citation, or Monition, is required in every Judicial Act, yea, even in Acts which are notorious *. Therefore in point of Practice, the Advocates ought diligently to conſider, whether a Citation labours under any Flaw or Defect in ſuch a manner, as not to oblige the Party cited to appear: For a Citation that is not valid, produces no Effect; nor does it conſtitute any one to be *in Mora*, and is, as it were, no Citation at all. So that if a Proceſs be upon ſuch a Citation, the Sentence is null and void of courſe: Becauſe it is the ſame thing, whether a thing be not done at all, or if it be done not according to Law. But 'tis otherwiſe, if the Party appears on ſuch a Citation of his own accord. For then an invalid Citation receives Force and Strength by his Appearance, ſince the Preſence of the Party without any Citation at all, is ſufficient; becauſe a Perſon preſent regularly cannot be cited *.

‖ Dd. in c. 2. Cl. 2. c. 10.

* Mynſ. cent. 6. obſ. 6. & cent. 2. obſ. 4.

* Gail. lib. 1. obſ. 58. n. 2.

I ſhall in the ſecond Place proceed to ſhew in a more eſpecial Manner, what Exceptions will lie againſt a Citation. And, firſt, a Citation ought to be certain in reſpect of the Perſon cited: For if ſuch certainty be therein omitted, a good Exception lies againſt the ſame, and ſuch Citation is rendred invalid; as 'tis in many Caſes hereafter to be remembred. 2*dly*, A Citation ought to be made *ad locum honeſtum & tutum* †; For if it be otherwiſe made, it does not † oblige the Party cited: And an Appeal ſurely lies, if a ſafe Place be not aſſigned in the Citation for the Appearance of the Party cited, altho' ſuch Citation be made with an *Appellatione remotâ* ‖. For if a Judge ſhall cite any one to a Place to which he cannot come with ſafety to his Perſon, he may freely appeal, having firſt propounded an Exception *de loco ſuſpecto* *, though an Appeal be inhibited in the Letters Citatory, unleſs the Judge ſhall afterwards think fit to aſſign him a ſecure Place for his Appearance: And this Place of Judicature ought not only to be ſafe to the Client himſelf, but even to ſuch Perſons as intervene in his Behalf, as Proctors, Advocates, and the like †. And 'tis moreover to be noted, That whenever a Perſon is cited to a Place that is not ſecure, he may always Appeal, tho' it be in the *ſecond* or *third Inſtance*; becauſe the Grievance is as often repeated, as the Perſon is cited *ad locum non tutum*. *Pope Innocent*, indeed, maintains, That 'tis well enough if the Place be ſafe and ſecure to the Proctor, tho' it be not ſo to the Client; becauſe he may ſend a Proctor: But *Hoſtienſis* holds the contrary, concluding, That it is not ſufficient, that the Place be ſafe and ſecure to the Client or principal Party, unleſs it be alſo the ſame to the Proctor. And ſo *vice verſa*, if it be ſafe to the Proctor, and not to the Client. For in Civil Cauſes, a Perſon cited may either appear perſonally by himſelf, or elſe by his ſufficient and lawful Proctor ‖.

† D. 4 8. 21. 5.
† X. 2. 6. 2.
‖ X. 2. 28. † 7.
* Gloſs. in c. 4. 33. Q. 2. v. *Loco.*
† X. 2. 28. 47.
‖ X. 1. 38. 10.

3*dly*, A Citation ought to be made by a competent Judge, or (at leaſt) in virtue of the Decree and Order of ſuch a Judge, and affix'd up in ſome publick Place, if the Party cannot be perſonally cited: And in every Citation, the Judge's Name ought to be expreſs'd therein *; and an Error in his Name, vitiates the Citation. And if a Citation be uncertain in reſpect of Place, where the Perſon cited ought to appear; or if it exceeds the Limits of the Judge's Territory, 'tis a juſt Cauſe of Exception, and is null and void *ipſo Jure*.

* Cl. 2. 10. 2.

4*thly*,

4*thly*, A Citation ought to be decreed at the Inſtance of the Party, and not *ex officio Judicis:* For a Citation made by a Judge, without any Motion or Petition from the Party litigant, is null and void *ab initio* †; ſince a Judge ought not even *verbally* to cite or admoniſh any one to appear, unleſs it be at the Requeſt and Inſtance of the Party in Suit ‖; and if he does thus preſume to act, his Monition or Citation is unjuſt and invalid, and as ſuch, it binds not the Party to appear: But a Perſon cited in a doubtful Caſe ought to appear. Nor is the Party cited bound to appear, if the Citation be evidently peccant in point of Form or Matter. See *Innocent* *, where he ſays, That a Perſon is not bound to appear before a *delegated* Judge, unleſs ſome Evidence of his Commiſſion does appear in the Citation †: But if the Party does appear, then his Appearance ſhall give Strength and Force to ſuch an invalid Citation.

† Abb. in c. 9. X. 2. 19. N. 16.

‖ Abb. in c. 4. X. 2. 14. N. 19.

* In cap. 6. X. 2. 14. 4. & in cap. 5. X. 1. 29. verb. *venire.*

5*thly*, A Perſon ought always to be cited at the Place of his Dwelling-Houſe, which he has in reſpect of his Habitation and uſual Reſidence, and not at the Houſe, which he has in reſpect of his Eſtate, or the Place of his Birth: For if he does not dwell there, he ought not to be cited there ‖. And a Citation affix'd and put up at the Doors of a Man's Dwelling-Houſe (with us called a Citation *viis & modis*) ought to be affix'd and placed there at a fit and convenient Hour, and not in the night-time; and ought to remain there till ſuch time as it may come to ſome Perſons knowledge *: For, in the Abſence of a Perſon, a Citation may be made and affix'd up at his Dwelling or uſual Place of Reſidence †; and if it be affix'd there at an unſeaſonable Time (as aforeſaid) it is invalid as liable to an Exception, as it is if the Perſon be not cited at his Dwelling; for the Law is not ſatisfy'd with it.

† D. 2. 12. 4. 1.

‖ D. 50. 1. 27. 1.

* Abb. in c. 4. X. 2. 15. N. 2.

† Abb. in c. 5. X. 2. 6. N. 6.

6*thly*, The Term of a Citation ought to be fit and convenient, and not too narrow and ſtreight for the Party's Appearance. If a Citation be made for the Appearance of a Perſon on a Day certain, or at an Hour certain, and ſuch an Act or Appearance ought to be made at ſome other Time or Hour, or in ſome other Manner than is deſcribed and ſet forth in the Citation, ſuch Citation ſhall not be valid; nor ſhall that Act, which is done in any other Manner, be obliging *. But if a Party cited to a certain Cauſe does appear, he ſhall be obliged to anſwer unto other Cauſes, whereunto he was not cited, becauſe an Appearance is the chief effect of all Citations. And hence it is not neceſſary to cite him *de novo*, if he be preſent in Court: And the more ſo, becauſe regularly, the Plaintiff, before Conteſtation of Suit, may change his Libel, and the nature of his Action †. If a Party ſummon'd or cited, be ſo hindred that he cannot appear, he ought to ſend a Perſon to excuſe his Appearance to the Judge, and to make Proof of ſuch his Impediment: and a Sentence pronounced againſt a Perſon thus ſummon'd and hindred to appear, is null and void, if ſuch Impediment appear'd to the Judge before Sentence read; for otherwiſe it ſhall not be void. Now Sickneſs, or any bodily Infirmity, is a lawful Excuſe or Impediment for the Non-Appearance of a Perſon cited ‖: and ſuch Sickneſs or Infirmity may be eaſily proved, either by ſending a Phyſician to prove the ſame, or elſe by ſuch Phyſician's Certificate. When I ſay Sickneſs or Infirmity, I mean ſuch an Indiſpoſition of Body, as is a real Impediment to his coming to the Court: for a light Feveret, or an old Quartan Ague, is not a ſufficient Excuſe for his Non-Appearance *. A Perſon cited to appear at a Day certain, ought to appear at the uſual Hour of that Day aſſign'd for Judicial Matters, that is to ſay, when there is no determinate Hour mention'd in the Citation for his Appearance †. If a Canon of a Church be cited to come to an Election at a Day certain, he ought to appear in the Morning, becauſe the Election uſually

† Marant. Spec. p. 6. Tit. de citat.

‖ D. 42. 1. 60. Jaſon in l. 1. D. 2. 5. N. 4.

* Abb. in c. 5. X. 2. 6. N. 19.

† Abb. in c. 24. X. 1. 29. N. 5.

uſually begins at that Time, and at ſuch an Hour by reaſon of Maſs-Service in the *Romiſh* Church, which is celebrated in the Morning; and, according to the Cuſtom and Practice of that pretended Church, ought to precede ſuch Election.

And this is obſerv'd in all College Elections here in *England*, in the Choice of the Heads and Governors of Colleges in our two Univerſities, where the Sacrament of the Lord's Supper is celebrated before they proceed to an Election, inſtead of the *Romiſh* Maſs. But a Perſon cited to a *Judicial* Act, may appear at any Time on the Day appointed for his Appearance at his own Pleaſure, provided he appears before the darkneſs of the Night comes on, ſo that the Judge may perfect the Act whilſt it is day-light; for a Perſon cited or admoniſh'd to appear on ſuch a Day, ought to come at ſuch an Hour as is fit for the diſpatch of Buſineſs, or of that Act for which he was cited *. Whence it follows, that if that Act be uſually diſpatch'd in the Morning, he ought, according to the Doctors, to appear then: Therefore a Perſon thus cited to appear, in order to make an Election, ought to appear before Dinner on account of the Sacrament or Maſs, as aforeſaid †. But if the Act may be diſpatch'd either in the Morning or Evening, the Party cited may, in ſuch a Caſe, defer his Appearance until the Evening.

† Abb. in c. 19. X. 1. 6. N. 11.

A Citation *ſine Termino*, is a valid Citation; and in ſuch a Caſe, a Perſon cited ought to appear as ſoon as poſſibly he can *: yet this ought to be conſider'd *cum quodam Temperamento*, with ſome grains of Allowance or kind of Equity, ſince he is not obliged to appear immediately thereupon. If a Perſon cited does not appear at the Time aſſign'd for his Appearance on the ſcore of ſome legal Impediment (as aforeſaid) yet he ought to appear as ſoon as poſſibly he can after the Removal of ſuch Impediment ||: But if a Perſon, on a Summons, ſets out ſo late in his Journey, that probably he cannot reach the Place to which he was cited for his Appearance, he ſhall not be excuſed on the ſcore of ſuch Impediment afterwards intervening *. And thus, in other Caſes, if a Man coarcts himſelf to the Extremity of an Act, he muſt blame and impute it to himſelf, that he has thus coarcted or ſtreighten'd himſelf ſo far in point of Time relating to an Act †. If a Perſon, cited to appear within twelve Days, ſhall ſay, *That he will not come*; yet the Judge ought to wait and expect the Lapſe of that Term, and when the twelve Days are paſt, and not till then, his Contumacy may be accuſed; becauſe he may, in the *interim*, change his Mind and Reſolution. But a Perſon thus cited, and declaring he will not appear, need not be cited again, tho' otherwiſe he ought to be cited a ſecond Time *. *Chaſſan. Conſ.* 41. N. 2. *Alex. Conſ.* 81. *Vol.* 4. For the Judge, in the former Caſe cannot proceed *niſi poſt terminum*: And the Day of the Term is not reckon'd in the Term, becauſe the Day aſſign'd is underſtood *de Diebus proximis*, without computing the Day for which the Citation was made †.

* Abb. in c. 19. X. 2. 28. N. 6.

|| Abb. in c. 6. X. 2. 14. N. 1. & 12.

* Abb. in c. 52. X. 1. 6. N. 9.

† Abb. ut ſupra.

* Bald. in l. 7. c. 4. 6.

† D. 40. 8. 3.

7thly, By the *Civil* and *Canon* Law, a Citation is not valid, if it be made and decreed on a Holiday, becauſe ſuch a Day is not a Law-day ||: But though a Citation ought not to be decreed on ſuch a Day; yet it may well enough be ſerv'd and executed on ſuch a Day, and no Exception ſhall lie againſt the Execution thereof, as it will againſt the Decreeing of it *. Nor ought a Prieſt by the *Canon* Law to be cited during the time he is officiating at Divine Service, or at the time of ſolemnizing Marriage, or at the time of his being at, and leading a funeral Proceſſion; For in all theſe Caſes, according to that Law, a juſt Exception lies.

|| D. 2. 5. 2. X. 1. 9. 5.

* X. 2. 28. 19.

I ſhall lay my *third* and *fourth* Conſideration together; and in diſcourſing of a *Simple* and *Peremptory* Citation, I will endeavour to point out

but the Interſtices of Time, which ought to be between one Citation and another. Now among Citations, ſome are ſtiled *Simple*, and others called *Peremptory* Citations in the *Civil* and *Canon* Law. *Simple* Citations are thoſe, when and where there are more Citations than one made out: And theſe are made with certain Intervals and Intermiſſions of Times and Seaſons, obſerv'd between the emitting and iſſuing out one Citation and the other; theſe being made *trinis vicibus*, or at three ſeveral Times *: But this is not practis'd here in *England*. *Peremptory* Citations, are thoſe, which cite the Party (as we ſay) *ſimul & ſemel*: And by means of ſuch a Citation alone, the Party cited or convened ought to exhibit his Preſence *Judicially* in Court without more ado †. And theſe are call'd *Peremptory*, becauſe, after ſuch a Citation executed, no other Citation ought to be expected: For it annihilates and perempts all other *Simple* Citations, which might otherwiſe be expected, with their Cauſes of Exceptions. So that if a Perſon ſummon'd by the Means of ſuch a *Peremptory* Citation, does not appear according to the Tenor thereof, he ought to be reputed Contumacious, unleſs he has a juſt Excuſe, or ſome warrantable Exception againſt ſuch a Citation. *Peremptory* Citations are, therefore, made three ways; *Firſt*, When no *Simple* Citation has been previous thereunto. And this *Peremptory* kind of Citation, the Judge, by virtue of his Office, takes care to have expedited, when he requires the Party's Appearance to ſome Action or other upon Advice or Premonition thereby; obliging him to exhibit his Preſence *cum primâ evocatione*; and not to expect any other ſubſequent Citation. *Secondly*, A *Peremptory* Citation is granted, if only one *Simple* Citation has been previous thereunto: But tho' this may be ſaid to be a *Simple* Citation in point of Order, yet 'tis *Peremptory* in reſpect of the Force and Efficacy thereof, becauſe the Judge does, in expreſs Terms, declare it to be *Peremptory*, that is to ſay, the laſt Citation. But then this ſecond ought to include as much Time as three *Simple* Citations ſhould contain ‖. When a Judge cites a Perſon *cum literis ſecundis*, he acts according to his own Prudence and Diſcretion; having a due Regard to Things, Perſons, Times and Diſtances of Places, before he emits a *Peremptory* Citation *cum literis ſecundis*; becauſe he cannot ſo eaſily interrupt a third Citation, and make a ſecond Citation *Peremptory* without a good Reaſon, and an urgent Neceſſity for ſo doing. *Thirdly*, That a Citation ſhould have the Force of a *Peremptory* Decree or Edict, the Word *Peremptorie* ought to be therein inſerted and made uſe of, elſe it is not ſufficient. But when a Citation is made by the Judge, who admoniſhes the Party *ore tenus*, to appear on ſuch a Day, 'tis not neceſſary to uſe and inſert the Word *Peremptorié*, becauſe the Judge's Monition has the Force of a *Peremptory* Decree or Citation *.

* D. 5. 1. 68.

† X. 2. 8. 1.

‖ Abb. in c. 1. X. 2. 8. N. 9.

* Abb. in c. 14. X. 1. 29. N. 3.

The fifth Thing to be conſider'd in this Chapter, is the Puniſhment of a Perſon cited and not appearing; for it is the Duty of a Perſon cited not to contemn the Authority of the Judge, but to give his Appearance: And a Perſon cited is then ſaid to make a legal Appearance, when he appears during the ſitting of the Court. And this is ſo true, that even a Perſon exempt from the Juriſdiction of a Court ought, in a doubtful Caſe †, to appear and plead his Privilege of Exemption before a foreign Judge. Now a Perſon cited and not appearing, may be reputed ſo Contumacious as to be arreſted, fined, excommunicated, condemn'd in Expences, and likewiſe have his Goods put under a Sequeſtration: But in reſpect of an Excommunication and a Sequeſtration, we muſt diſtinguiſh and conſider whether he anſwer'd, *That he would not appear and obey the Summons*; for then the Judge may proceed againſt him as a contumacious Perſon ‖:

† Abb. in c. 7. X. 2. 28.

‖ Abb. in c. 10. X. 2. Or, 14. N. 8.

or, whether he anſwer'd nothing, or ſaid, *That he would deliberate thereon*, and the like ; for then he ought not to be proceeded againſt to Excommunication, *&c.* For if a Perſon cited, ſays, *That he will not appear*, he ſhall be hereupon deem'd and taken as a Perſon *manifeſtly* Contumacious ; ſo that he is not to be cited any more, *manifeſt* Contumacy requiring no other Citation : But 'tis otherwiſe, if his Contumacy be not what we call *manifeſt* Contumacy. But an invalid Citation, does not render the Party cited guilty of Contumacy, it having no Operation or Strength in Law at all *.

* Gloſs. in lib. 4. cap. 9. 2. Gloſs. in c. 4. X. 1. 29.

In my ſixth and laſt Conſideration, I ſhall make ſome proper Remarks and Inferences upon what has been already ſaid. And, *Firſt*, It is noted, that a Citation is a Matter of natural Right, introduced *ab origine Mundi* † : For God cited our firſt Parent, ſaying, *Adam ! Adam ! Where art thou* ‖ ? Now a Citation is ſometimes made by Edict or Proclamation, and ſometimes by a Meſſenger : when a Citation is made by way of Edict or Proclamation, it is neceſſary that it ſhould come to the Knowledge of the Perſon. To receive and admit Witneſſes, to publiſh Depoſitions, and to pronounce a Sentence, either three *Simple*, or one *Peremptory* Citation is neceſſary. In the *Imperial* Chamber, this Practice is obſerv'd in reſpect of a Sentence, but not in regard of other Judicial Acts : for, in ſuch Acts as theſe, the Monition of the Judge is ſufficient, as 'tis practis'd here in *England*, a monitory Citation being required to every *Judicial* Act.

† Abb. in c. 1. X. 2. 12. N. 5.

‖ Gen. cap. 3. v. 9.

Secondly, It is to be known, that a Citation cannot be proved unleſs it be by the Oath of the Meſſenger or his Certificate * : nor is a Perſon preſum'd to be cited, becauſe the Notary of the Cauſe, writes in the Acts of Court, *that ſuch a one was cited* ; unleſs it appears by ſome other Means †, or unleſs there be a Certificate of ſuch Citation, as aforeſaid. Yea, if the Judge pronounces the Perſon to be Contumacious, before the Mandatory or Apparitor has made his Return of the Citation, either upon Oath, or with a Certificate annex'd, ſuch Act or Sentence is null and void *ipſo Jure*, tho' the Judge ſhould afterwards receive the Return of the Meſſenger or Mandatory thereupon accordingly : For there ought to be firſt had a *Conſtat* of ſuch Citation executed by the Return of the Mandatory or Apparitor upon Oath, ſince this is a ſubſtantial Act ‖. A Perſon denying himſelf to have been cited, cannot prove the ſame : For a Negative of Fact cannot be prov'd either *directly* or *indirectly*, unleſs it has ſome Determination in point of Time, Place, and other Circumſtances annex'd thereunto ; and then it only admits of an indirect Proof *.

* Abb. in c. 23. X. 1. 6. N. 17.

† Bald. in lib. 6. c. 7. 52.

‖ Marant. Spec. Tit. 6. de citat.

* Abb. in c. 23. X. 1. 6. N. 8. 16 & 17.

Thirdly, 'Tis to be obſerv'd, that in all *Extra-judicial* Acts, one Citation, Monition, or *Extra-judicial* Interpellation is ſufficient : As when thoſe Perſons that have an Intereſt in the Goods of the deceas'd, are cited to appear at the making of an Inventory ; for ſuch a Citation is not properly made *ad Lites*, but only to be preſent at a certain kind of *Extra-judicial* Act or Proceeding. For all Perſons agree, that Creditors, Legatees, and Truſtees ought to be cited, and that ſpecially by Name too, if they be certainly known ; for if they be not certainly known in particular, they ought then to be cited by a general Edict or Proclamation propounded and fix'd up in the publick manner †.

† Ant. Capy e Deciſ. 101.

Fourthly, To the end that a Citation be valid, it ought to be decreed and emitted by the Judge's Authority, and at the Inſtance of the Party too in all Civil Cauſes ; for the Judge ought not to interpoſe his Office for the Advantage of a private Perſon, unleſs he be deſired and requeſted thereunto. But if a Citation be iſſued out in Writing, and a proper Return thereof made, we ought to preſume, that this was done at the pre-

previous Requeſt of the Party: I ſay, That *a Citation ought to be decreed and made out at the Inſtance of the Party.* For though *Antonius* ſays, That a Citation is preſum'd to be made out at the Inſtance of the Party: yet *Aretinus* ſays, that this Concluſion was diſallow'd of; becauſe the Praying of a Citation is an extrinſick Solemnity, which is not preſum'd, unleſs it does appear. But in three Caſes, a Citation is not made out at the Inſtance of the Party ‖. Firſt, When the Party on ſuch a Citation appears and makes no Exception hereunto. Secondly, When the Judge perceives that the Inſtance of the Party periſhes; becauſe then the Judge may cite the Party *proprio motu*; for that it is a detriment to the Publick Weal to have the Inſtance of the Party periſh. The third Caſe is, when the Cauſe concerns the Good of the Publick, as in ſome Election or in a criminal Cauſe; becauſe in ſuch a Cauſe, the Judge or Magiſtrate may, by virtue of his Office, cite the Defendant and the Promoter thereof *.

‖ Abb. in c. 1. X. 2. 1. N. 4.

* Abb. in cap. 60. X. 1. 6. & in cap. 19. X. 2. 2.

My fifth Obſervation is, That by the *Canon* Law, a Citation is not valid, if there be more than four Perſons thereby cited to appear: And by the ſame Law, an Extra-Provincial Citation is not valid *ultra duas diætas*, above two days Journey †; nor is a Citation valid, that contains many Conditions, if the ſame are manifeſtly inconvenient ‖. A Proceſs may be carry'd on againſt a Perſon, that is maliciouſly or blameably abſent even to a definitive Sentence, if the State and Quality of the Cauſe will ſuffer this without any Inconvenience, after Conteſtation of Suit; or if it be ſuch a Cauſe wherein it may be proceeded without Conteſtation of Suit, notwithſtanding the Abſence of the Party. And thus may a Judge alſo proceed againſt an abſent Perſon without citing him, if there be an evident and notorious *Conſtat*, that ſuch abſent Perſon can make no Defence for himſelf *; and the Proceſs ſo made, ſhall be valid, tho' regularly 'tis null and void without citing ſuch Perſon. A vagabond Debtor may be cited in whatever Place or Juriſdiction he is found: And a Delinquent ought to be cited in the Place or Juriſdiction where the Delinquency was committed by him. A Citation may have a Beginning from the Plaintiff's Proctor; but to cite a Perſon unduly, is adjudg'd an Injury. A Citation, and the exhibiting of a Libel, are ſaid to be a kind of Preparatory Acts to a Suit in a *Judicial* Proceſs; and a Citation perpetuates the Juriſdiction of the Judge †, tho' the Act of the Citation itſelf be not a *Judicial* Act. A new Citation is not neceſſary, when the Judge prorogues the Hour prefix'd with the Knowledge of the Party: nor is a Judge bound to cite a Perſon *de novo*, if ſhe expects the Appearance of the Contumacious Perſon the Day following.

† X. 1. 3. 28.

‖ X. 2. 6. 2.

* Alex. in c. 5. X. 2. 28.

† X. 1. 29. 20.

Sixthly, 'Tis to be obſerv'd, That no Infant, Madman, or Pupil, ought to be cited, nor ought a Wife to ſummon her Husband into Court; ſince this appears to be againſt that receiv'd Reverence, which ſhe ought to exhibit to her Husband. And hereunto, the Reſcript of the Emperor *Alexander Severus* ſeems to have a View; wherein he ſays, Let not the Wife of the Patron be ſummon'd into Court without the Judge's Permiſſion, and Cognizance had of the Cauſe. A Citation deſcrib'd and regiſtred in the Acts of Court, is preſumed to be made and fram'd with all its proper Solemnities ‖. As a Perſon's own proper Infirmity and bodily Indiſpoſition excuſes him from Contumacy on a Citation, if he does not appear *: ſo alſo does the Indiſpoſition of his Friends and near Relations excuſe his Non-Appearance, if he ſhall not appear.

‖ Abb. in c. 1. X. 2. 1. N. 4.

* D. 42. 1. 60.

Having thus far conſider'd what the *Civil* and *Canon* Law ſays touching Citations, I ſhall conclude this Chapter with the Law of *England* in relation thereunto; which is chiefly grounded on the Statute of

* 23. H. 8. cap. 1. *Henry* VIII. * By which Act, no Perſon ſhall be cited out of the Dioceſs or Peculiar Juriſdiction, where he or ſhe dwells: except it be by ſome Eccleſiaſtical Judge or other Perſon within the Dioceſs or other Juriſdiction, whereunto he is ſo cited for ſome Crime or Offence contrary to Right and Duty; or upon an Appeal, or other lawful Cauſe; or when the Inferior Judge dares not cite him; or at the Inſtance of the Inferior Judge made to the Superior, when the *Civil* and *Canon* Law allows the ſame; or where the Inferior Judge will not cauſe the Party to be cited, or is any ways a Party to the Suit: And all this under the Pain of forfeiting double Damages to the Party grieved, and a Fine to the King, to be divided between him and the Proſecutor. But the Archbiſhop may cite for *Hereſy* in any Dioceſs within his Province, upon Conſent or Neglect of the Biſhop or Judge there. Again, This Act ſhall not reſtrain the Juriſdiction of the Prerogative Court for Probates of Laſt Wills and Teſtaments, *&c.* And, *thirdly*, an Eccleſiaſtical Judge ſhall receive but three Pence for a Citation, under the Penalty aforeſaid. So that 'tis plain, the Purpoſe of this Statute was rather to provide for the Eaſe of the Subject, than for the Juriſdiction of the Judge or Ordinary; which appears, in that there is an Action given to the Subject, and a Penalty to the King for his Vexation, but none to the Ordinary. Again, the Archbiſhop is hereby reſtrain'd, to two Caſes of Neceſſity, much fewer than he had in his power before, *Nolente Ordinario*; which ſhews, that that Parliament regarded the Subjects Quiet, more than it did the Archbiſhop's Juriſdiction. This very Clauſe of *referring*, after it begins with referring *generally*, checks it with this, *viz.* That *to be done in Caſes only*, &c. which was a vain Correction, if it were left as general as before, that is to ſay, if it were lawful or tolerable in all Caſes, without Cauſe ſhewn: and doubtleſs this Statute was not made, without the Advice and hearing of *Canoniſts* hereupon; and therefore, cannot be ſuppos'd to be ignorantly penn'd, as ſome imagine. Note, That a Prohibition will lie on this Statute, notwithſtanding the Penalty annexed; becauſe it has Words Prohibitory, as well as a Penalty annex'd to it, for the Breach of ſuch Prohibition; but it had been otherwiſe, if the Penning had been only thus, *viz. If any one cites* another out of his Dioceſs, he ſhall forfeit ten Pounds ‖: ſee the Caſe of *Jones* verſ. *Jones*. But he that will have the Benefit of this Act, muſt pray a Prohibition before a Sentence in the Eccleſiaſtical Court. * A Prohibition was granted on this Statute in the Caſe of *Smith*, againſt the Executors of *Pendreils*, for ſuing in the Prerogative Court for a Legacy of ten Pounds, whereas the Parties liv'd in another Dioceſs. But becauſe the Will was prov'd in that Spiritual Court, and the Suit was in the ſame Court with the Probate, and Sentence given there for the Legacy; and afterwards an Appeal from the Sentence to the Court of Delegates, where it was affirm'd, and Coſts tax'd, and Excommunication upon this Sentence; and becauſe no Endeavours were uſed to ſtay this Suit by the Statute during this whole Time till after Sentence on the Appeal: Therefore having allow'd the Juriſdiction of the Court for ſo long a time, he came now too late to have a Prohibition. And tho' a Prohibition was before granted, becauſe, the Party had not Notice to oppoſe the ſame; yet the Court wou'd not compel the Party to appear and plead thereunto (as the uſual Courſe is in ſuch Caſes) but upon Motion granted a Conſultation. †

‖ Hob. Rep. p. 187.

* Vent. Rep. pt. 1ſt.

† Crok. Rep. pt. 3d. p. 69.

If a Suit be begun before an Archdeacon, where the Ordinary may licenſe the Suit to an higher Court by Letters of Requeſt according to the Statute of *Henry* VIII. * the Archdeacon cannot, in ſuch a Caſe, diſappoint

* 23 H. 8. chap. 9.

appoint and baulk his Ordinary by ſending the Cauſe immediately into the Arches ; for he has no Power to give a Court Juriſdiction, but only to remit and wave his own Court, by leaving the Suit to the next: For ſince his Power was derived from the Biſhop to whom he is Subordinate, he muſt yield it to him, from whom he has receiv'd it: And it was ſaid, that it was ſo ruled heretofore *. By the *Canon* Law, in the Beginning, there was but one Biſhop, who, having ſole Juriſdiction, was the immediate Ordinary throughout the Dioceſs. Afterwards Suffragan Biſhops were made under him, which induced a Reſtraint of the Archbiſhop's Power in their Dioceſſes: but, in ſpecial Caſes, agreeing with our Law, an Adminiſtration granted by an Archbiſhop is but voidable. The Juriſdiction is open'd (for that is the Phraſe of the *Civilians*) ſometimes by himſelf, *nolente Ordinario*, as in the Caſe of his Viſitation; and ſometimes by the Party, in Default of Juſtice from the Ordinary, as by Appeals or Nullities. Again, it is ſometimes open'd by the Ordinary himſelf, without the Party or Archbiſhop, as where the Ordinary ſends the Cauſe to the Archbiſhop. For tho' the Archbiſhop (as *Panormitan* obſerves) is Ordinary of the whole Province †, yet he has not the Exerciſe of Juriſdiction, unleſs it be in certain Caſes: where, among the reſt of the Caſes thus ſet down, this is one, *viz.* when any Queſtion ariſes, or when the whole Cauſe is referr'd to him. And 'tis certain, according to *Hoſtienſis* ||, that the Metropolitan, whether we call him the Ordinary of the whole Province or not, cannot exerciſe his Juriſdiction over the Subjects of his Suffragan Biſhops, unleſs it be in the following Caſes, reckoning up one and twenty ; *viz.*

* Hob. Rep. p. 16, & 186.

† Abb. in cap. 6. X. 3. 10. N. 2. & in c. 11. X. 3. 31. N. 8.

|| in c. 19. X. 1. 31.

Firſt, Where the Metropolitan Church differs in divine Service or Worſhip from the Church of his Suffragan. 2*dly*, Where the Suffragan complains of his Biſhop. 3*dly*, If an Appeal be made to the Archbiſhop. 4*thly*, When there is any Criminal Cauſe or Queſtion in agitation between the Biſhop and another Perſon. 5*thly*, In Reſpect of ſome Crime committed in his Dioceſs. 6*thly*, When he finds a Perſon ſubject to the Biſhop to be juſtly charg'd, and ſuch Subject refuſes to make Satisfaction to his Biſhop, being commanded ſo to do by the Metropolitan. 7*thly*, In Reſpect of ſome Matter that concerns the Biſhop's Dioceſs itſelf. 8*thly*, When a Cauſe or Queſtion is referr'd to him, the Archbiſhop, by the Way of Conſultation. 9*thly*, In thoſe Things that concern the whole Province in general *. 10*thly*, In Reſpect of aſſembling a Provincial Council. 11*thly*, In notorious Injuries inflicted on himſelf or his Subjects. 12*thly*, When the Dioceſan is negligent in the Adminiſtration of Juſtice. 13*thly*, When the Canons refrain from giving their Attendance on divine Service in contempt of their Biſhop. 14*thly*, When it is notorious, that the Biſhop's Sentence is not binding or valid. 15*thly*, In Reſpect of a yearly Viſitation. 16*thly*, Archbiſhops may grant a Faculty or Indulgence all over their Province. 17*thly*, The Archbiſhop has Guardianſhip of the Goods belonging to the Biſhop's Table, if idoneous Canons do not ſurvive their Biſhop. 18*thly*, In Reſpect of a Privilege granted to him. 19*thly*, In Reſpect of a Cuſtom. 20*thly*, If there be any Permutation between the Biſhop and his Chapter. And laſtly, When the Biſhop wholly refers the Cauſe to him by ſending the Parties thither; the being recus'd either as a ſuſpected Judge, or on ſome other Account. I ſhall only here conſider the Eighth Reaſon, *viz.* When a Queſtion or Matter is referr'd to him on the Score of Conſultation. Now a Judge may, according to *Speculator* †, thus refer the Matter as often as he ſhall think fit, *viz.* either before the Suit, in the midſt of it, or at any Time whatſoever. And *Baldus* writing after *Hoſtienſis*, refers himſelf to him, ſaying,

* Abb. in c. 6. X. 3. 10. N. 2.

† Tit. de Relation.

ing, That tho' the Archbiſhop be Judge of the whole Province; yet his Juriſdiction is ſealed up and ſign'd; and is not open'd, unleſs it be in ſome certain Caſes. But though the Law reſtrains an Archbiſhop from calling a Cauſe from the *Ordinary* Juriſdiction, *nolente Ordinario*, unleſs it be in the ſaid Caſes; yet the Law left it in the abſolute Power of the Ordinary to ſend the Cauſe to the Archbiſhop *abſolutely* at his own Will, without aſſigning any ſpecial Reaſon for ſo doing. And herein *Hoſtienſis* and *Dominicus* do agree touching a competent Juriſdiction.

Of Clerks, the ſeveral Orders thereof, their Privileges, &c.

HAVING already treated of Archbiſhops and Biſhops under their proper Titles, I ſhall here proceed to ſpeak of *ſimple* Clerks, or *Clergymen*, which, as they are dedicated to God's Service at the Altar for the Adminiſtration of divine Service in ſome Church or other †, and are therefore ſtiled Eccleſiaſtical Miniſters ‖: ſo, ſurely, they ought to be Miniſters of the Chriſtian Religion, and of a pure Orthodox Faith. They are in *Latin* call'd *Cleri* or *Clerici* from the *Greek* Word Κλῆρος, which ſignifies a Lot or an Inheritance; becauſe (as they pretend) they are God's peculiar Lot or Inheritance: For, by the *Canon* Law, though all Chriſtians may well enough be term'd God's Portion and Inheritance; yet, according to that Law, only thoſe Perſons among Chriſtians are in a peculiar manner ſtiled the *Lord's Portion*, whom God has ſeparated and ſet apart from common Uſe to his Service, to be as it were his Domeſtick Servants; and (if we may believe the Text of that Law) the Perſons thus ſet apart have been ſo ſtiled from the very beginning of Chriſtianity itſelf. But ſome think they were ſo called from the ſame *Greek* Word, which ſignifies *Election by Lot* *; becauſe *Matthias* was, by Lot, choſen to the Apoſtleſhip; being the firſt we read of, that was ordain'd thereunto †. And in this Senſe, Biſhops, as well as ſimple and inferior Clerks, may be ſtiled *Clerici*: for in the general Acceptation of the Word, according to the antient *Canon* Law, all Perſons were ſtiled *Clerks*, that ſerved in the Church of Chriſt; whether they were Biſhops, Prieſts, or Deacons. But now in the *Romiſh* Church, if we may call that the Church of Chriſt, wherein there are ſo many Corruptions and Abominations, the Word *Clerk* is confin'd to the ſeven Degrees thereof, according to the following Names of Diſtinction, *viz.* the *Oſtiarius* or Door-keeper, the *Acolythiſt*, *Reader*, *Exorciſt*, *Sub-deacon*, *Deacon* and *Presbyter* ‖: For ſome in that Church exclude a Biſhop; and others therein make nine Orders, by including the *Biſhop* and *Pſalmiſt*. But in the Church of *England*, we only allow of three Orders, *viz.* *Biſhops*, *Prieſts*, and *Deacons*.

† C. 1. 3. 2.
‖ C. 1. 3. 10, & 27.
* 12 Q. 1. 7.
† 21 Diſt. c. 1.
‖ 21 Diſt. c. 1.

The *Romiſh* Church diſtinguiſhes theſe into the *Higher* and *Lower* Orders of the Church; and as ſhe reckons *Sub-deacons*, *Deacons*, and *Prieſts* among the firſt, ſo ſhe reckons the *Oſtiarius*, *Exorciſt*, *Acolythiſt* and *Reader*, among the latter. The firſt the *Canon* Law (by way of Diſtinction) ſtiles *ſacred* Orders; and the latter by the Name of the *leſſer* Orders, which ſerve only as a Gate or Initiation unto the others. And no one ought to be promoted to any of theſe ſeven Orders *per Saltum* *; nor ought

* X. 5. 29. 1.

ought any one to be initiated into the leſſer or inferior Orders, unleſs he be recommended as duly qualify'd by his Studies, and by a Proſpect of future Knowledge, for the higher Orders in the Church. And 'tis for this Reaſon, that both the *Civil* and *Canon* Law have appointed certain Ages proper for the Aſſumption of theſe ſeveral Orders. By the *Civil* Law, no one was to be ordain'd a Presbyter, till he was thirty five Years of Age †: tho' by a later *Novel*, 'twas ſufficient if he was above thirty. And no one by this Law could be ordain'd a Deacon or Sub-deacon under the Age of twenty five Years ‖; nor a *Lecturer* or Reader under eighteen Years of Age. What were the Ages preſcrib'd by the antient Canons, *Gratian* ſhews in his *Decretum* *. But touching this Matter, we have a freſher Canon in the *Clementines* †, which requires a Sub-deacon to be only eighteen Years of Age, a Deacon twenty, and a Presbyter twenty five Years of Age before Ordination. To which Time the Council of *Trent* has added ſomewhat ‖, requiring a Sub-deacon to be twenty two, a Deacon to be twenty three Years of Age; and as to a Presbyter, this Council adheres to the Conſtitution of Pope *Clement* aforeſaid. And 'tis enough for them to have arrived at theſe reſpective Years, tho' they have not compleated the ſame. But this Council has preſcrib'd no Age for receiving the *Prima Tonſura*; nor for the leſſer Orders in that Church.

† Nov. 123. cap. 13.

‖ Nov. 37. cap. 2.

* 28 & 77. Diſt.

† Cl. 1. 6. 3.

‖ Seſſ. 23. c. 12.

For the loweſt Degree of Clerks in the *Romiſh* Church, as they are *ſimply* ſo called, is that on which the *Prima Tonſura* is confer'd, when a Perſon firſt enters and regiſters himſelf in the Service of the Church, by having the Top or Crown of his Head ſhaved, either by the Biſhop of the Dioceſs; or elſe by the Abbot, whoſe Monk he is *: And, according to the *Canoniſts*, this *Prima Tonſura* ‖, is the entrance into all other Orders in that Church; ſo that a Perſon without the ſame, is incapable of all Eccleſiaſtical Benefices; becauſe whenever he becomes a Clerk, he ought to prove his *Tonſura*. For, according to *Dominicus* †, 'tis not enough to have the Habit, unleſs he can prove himſelf a Clerk *de literis Tonſuræ*. And that Church likewiſe ſtiles this *Tonſura*, the Seminary from whence all other Clerks proceed, as from the *Trojan* Horſe. And on this ſcore (perhaps) 'tis, that *Divines* ſeem not to reckon this Order, regularly ſpeaking, among Eccleſiaſtical Orders. And herein the *Canoniſts* and *Divines* in that Church diſagree, the latter rejecting the *Tonſura*, and the Order of Biſhops, whereas the former hold theſe two laſt Orders; and, conſequently, make nine Orders in that Church.

* X. 1. 14. 11.

‖ In Cle. 1. 2. X. 1. 14. 11.

† Conſ. 91.

So that from what has been already offer'd, we may, under the Appellation of *Clerks* (in a large Senſe of the Word) reckon all Eccleſiaſticks, in what Dignity ſoever they are placed; provided, they are choſen for the Miniſtry in the Church. And hence it is, according to this Notion, That all Perſons that are not *Laicks* may be ſtiled *Clerks* ‖: And thus, according to the *Canon* Law, there are two Diſtinctions of Chriſtians, *viz.* *Clerks* and *Laicks* *. And in this general Senſe of the Word *Clerks*, a Privilege *ſimply* granted to Clerks, comprehends and takes in all Clerks, of what Order, Denomination, or Dignity ſoever they be: for if he, to whom ſuch Grant is made, be a Biſhop; he is, therefore, a Clerk; *& ſic de ſimilibus*. But in a ſtrict Acceptation of the Word, and likewiſe in an odious Matter (I think) by the *Canon* Law, Biſhops are not included under the Appellation of *Clerks*: And in this Reſpect, the ſame ſeems to hold good in other Clerks, that are Dignitaries or Canons of Cathedral Churches *. And the Reaſon of this, is, becauſe they have a diſtinct Quality in themſelves, which is ſuperior to and not be met with in *ſimple* Clerks: But, in a Matter of Privilege granted to the *People* of this or that Place, by the *Canon* Law even *ſimple* Clerks are included; becauſe 'tis for the Good of the Church †.

‖ X. 3. 5. 16.

* 12 Q. 1. 7.

* X. 5. 40. 18.

† X. 2. 2. 17.

The *Juſtinian* Code gives us an ample Account of the Office and Duty of Clergymen, whereby they are commanded to give aſſiduous Attendance to divine Service, and to perform the Holy Liturgies in their own Perſons and the like, leſt they ſhould be deceived by others; entirely forbidding them to ſubmit their Thoughts to the Proſecution of worldly Intereſts and Emoluments *. They are thereby likewiſe commanded to abſtain from all Conventicles of Men whatſoever, even out of the Church †, to have nothing to do with State-Affairs and publick Buſineſs, in no wiſe to meddle with any Employment in the Law ‖, or take on themſelves the Buſineſs of Regiſtring and Engroſſing of Laſt Wills and Teſtaments. For ſays the Law, 'tis not only abſurd, but very opprobrious, for Clergymen to meddle and ſhew themſelves skill'd in the Deciſions of Law-Suits *: And yet we have ſeveral Clergymen with us here in *England*, that ſit as Judges in our Eccleſiaſtical Courts, and determine Law-Suits without any Knowledge of the Law; thinking they are excuſed in this Reſpect, becauſe they have no skill therein. They ought likewiſe, by the Civil Law, to abſtain from all Gaming, and refrain idle Shews and Theatrical Plays and Paſtimes, and not to have any Converſation with ſuch as appear and play at them, under the Pain of Suſpenſion *à ſacro Miniſterio*, and of three Years Baniſhment and Confinement to a Monaſtery †. But this Puniſhment ought not to be inflicted by any Biſhop, under Pain of Excommunication, without full Proof had of the Matter againſt ſuch Clerk ‖. And *à fortiori*, Clergymen ought to forbear the Converſation of Women in no wiſe related to them, being only impower'd to keep their Mothers, Daughters, or Siſters, within the Limits of their Houſes; becauſe the Law of Nature will not ſuffer us to think, that they can commit any lewd Act with theſe Women.

* Nov. 133. cap. 2.
† C. 1. 3. 15.
‖ C. 1. 3. 17, & 18.
* C. 1. 3. 41.
† Nov. 123. cap. 10.
‖ C. 1. 3. 30.

The Privileges of the Clergy, are both by the *Civil* and *Canon* Law very eminent and remarkable. For, firſt, by the *Civil* Law, they are free from all mean and extraordinary Offices *, but not from Patrimonial Incumbrances. For, by the *Civil* Law, their Predial Eſtates are liable to Fiſcal Payments and Taxes, as not being appropriated for the Service of divine Worſhip, but for profane Uſes alone. Yet in reſpect of all perſonal Offices, they have been and ſtill are exempted; as from Guardianſhips, Curatorſhips, and the like, unleſs it be in Right of Kindred: And ſuch Guardianſhip they may undertake at this Day, unleſs they are Biſhops or Anchorets.

* C. 1. 3. 2. & 6.

By the Papal *Canon* Law, Clerks have this particular Privilege; That, in Criminal and Civil Cauſes, they cannot be convened before any other than an Eccleſiaſtical Judge †: and this Privilege was not deem'd ſo much a perſonal Privilege, as a general one; becauſe it was publickly indulged to the whole Order of Eccleſiaſticks. This was indeed an Indulgence granted to Clerks even in *Juſtinian*'s Time, but then this Exemption was not ſo much founded on the *Civil* Law, or on natural Right, as they pretended afterwards, as it was on the Privileges granted them by the Favour of weak Princes and Emperors; as *Theodoſius* ‖, *Juſtinian* *, and *Frederick* the Firſt. And ſo long did the *Canoniſts* extend this Indulgence, that *Covarruvias* ſays †, That when ſuch a Privilege is granted to Religious and other Eccleſiaſticks, it cannot be diminiſh'd, infring'd, or taken away by any ſubſequent ſecular Conſtitution, though it may be, by Cuſtom, reſtrain'd for certain Reaſons, and in ſome Caſes, as here by Law in the *Juſtinian* Code. Clerks coming heretofore out of the Provinces to the City, and being conven'd there, were oblig'd to defend themſelves before the *Prætorian Præfect* ‖. This Privilege, the Clergy here in *England* formerly contended for with all might and main, under that

† X. 2. 2. 12.
‖ C. Th. h. t.
* Nov. 79. c. 1. Nov. 123. c. 8. & 21.
† Pract. Qq. c. 31. N. 5.
‖ C. 1. 3. 33. 1.

that haughty Prelate Archbiſhop *Becket*, but the ſame was ever deny'd them by the Wiſdom and Courage of our Kings. And ſo far does the Papal Law extend this Privilege, that he who pleads his Cauſe before a Lay Judge, does not only incur the Puniſhment of Excommunication ‖, but alſo the Guilt of Sacrilege; becauſe he acts contrary to the Liberty, which is granted to Eccleſiaſticks. But (I think) this ought to be underſtood, when one Clergyman convenes another before a Lay Judge: But 'tis otherwiſe, in reſpect of violating the Liberties of the Church, if he convenes a Layman; for a Layman thus convened, repreſents the Perſon of the Defendant, and is conſequently ſubject to a Lay Power; becauſe the Defendant ought to obſerve his Court and Juriſdiction. Note, That a Lay Judge, by the Papal Law, who judges and puniſhes Eccleſiaſticks, does not only incur the Crime of Sacrilege by ſuch an Injury done to Eccleſiaſticks, but likewiſe the Excommunication *Bullæ cœnæ* reſerv'd to the Pope alone for Abſolution, as appears from the Words of that Bull.

‖ X. 5. 39. 49.

It has been ſaid, That by the Papal Law, Clerks are exempt from all Lay and Temporal Juriſdiction, not only in *Spirituals*, but even in *Temporals* too. In reſpect of *Spirituals*, all the *Canoniſts*, who were the Pope's Penſioners, do agree in this Doctrine, and think the Matter clear enough: For, ſay they, as the ſpiritual Power is one Thing, and the temporal Power is another, it cannot be doubted, but that the ſpiritual Power was granted to ſpiritual Places; ſince Chriſt only ſet his Apoſtles and their Succeſſors over the Church, and not Kings and other ſecular Princes, if we may believe the perpetual and conſtant Traditions of the *Romiſh* Church: And this (ſay they) is inferr'd from the Council of *Conſtance**. And the *Spaniſh* Caſuiſts and Divines do likewiſe hold, that Clerks are not ſubject to the temporal Laws and Power of the Laity, *quoad vim coactivam*, but only *quoad vim directivam*; ſaying, That theſe Men are not only exempt from all Lay Power by the Law of Man, but even by the Law of God: But in this Point there is a great Diſpute and Controverſy among the Lawyers. Some will have it, that they are exempt by the *Civil* and *Canon* Law, but not by the Law of God. That they are exempt by the *Civil* Law, appears from the *Novels*: And in this Matter there is little Diſagreement among *Popiſh* Lawyers; and that they are exempt by the *Canon* Law, both in ſpiritual and civil Cauſes, appears from the Councils of *Conſtance* †, and *Chalcedon* ‖, and likewiſe from the third Council of *Carthage* *, the Council of *Trent* †, and from ſeveral other Texts of Law. But in anſwer to all theſe Arguments, it is well known, that in the Beginning of Chriſtianity, and in the early Times of the Church, they were ſubject to Lay Princes, as appears from the 13th Chapter to the *Romans*, where 'tis ſaid, *Let every Soul be ſubject to the higher Powers*, &c. written by St. *Paul*, on purpoſe to put the Chriſtians in mind of their Duty, to Civil or Lay Magiſtrates: And, therefore, St. *Paul* ſuppoſes, that not only Laymen, but even Clergymen too, are ſubject to the Lay Power; for that Particle (*all* or *every one*) excludes no one. And in the 25th Chapter of the *Acts*, 'tis ſaid of *Paul*, that he ſtood at *Cæſar*'s Judgment-Seat, where he ought to be judg'd. So that if we do not regard the Teſtimony of the Fathers, nor the written Traditions of the Church, yet we have this Aſſurance from Holy Writ, that the Clergy are not exempt, by the Law of God, from the Civil Power, either in Spirituals or Temporals.

* Seſs. 8.

† Seſs. 8.
‖ Can. 9.
* Can. 9.
† Seſs. 25. cap. 1.

By the Laws of this Realm, the Clergy have certain Privileges indulg'd them, in reſpect both of their Perſons and Eſtates which the Laity have not, tho' not ſo ample as the *Canon* Law gives them. As for inſtance, They are diſcharg'd from Purveyance, and are not to ſerve in any

any Temporal Office againſt their Will: And, therefore, where a Clergyman was made *Expenditor* by Commiſſioners of Sewers, he had his Writ of Privilege, for *militans deo non implicetur Sæcularibus Negotiis*; and ſo is the antient Law of this Kingdom ‖, *Quod Clerici non ponantur in officia.* They pay no Toll for Goods which they have in Right of the Church, and were formerly by the common Law diſcharg'd from Pontage and Murage, but this Privilege has been abridg'd them ſince by ſeveral Statutes: For though it has been held, that they do not come under the general Words of the Statute, for repairing Bridges, which Enacts, that decay'd Bridges ſhall be repaired by the *Inhabitants*; yet it has been ſince adjudg'd otherwiſe, as appears by the Words of other Statutes *, that do concern the People in general: for by latter Judgments and Authorities in Law, they are made liable to all publick Charges impos'd on the People in *general* by Act of Parliament, unleſs they are expreſly exempted by Name, and particularly for mending the Highways. Then as to their Perſons, in an Action of Accompt, the Sheriff cannot have a *Capias* to take the Body; but he muſt return, *Quod Clericus eſt Beneficiatus nullum habens laicum Feodum:* And in ſuch a Caſe, he ſhall have a Writ to the Biſhop to ſummon him to appear. Nor can his Body be taken in Execution on a Recognizance upon a Statute-Staple; for he is exempted by the very Writ, *viz. Si laicum capias*; which implies, that if he be not a Layman, he muſt not take him †.

‖ 1. Vent. Rep. p. 105.

* 22 H. 8. cap. 5. 22 H. 8. c. 8. 2 & 3 Ph. & Mar. c. 8. 33 H. 8. c. 2.

† 2 Inſt. c. 4.

Of Collation, and the Diviſion thereof.

THE Word *Collation*, according to *Rebuffus*, in his Rubrick *touching Collations*, is a Term of a large Signification, appertaining to other things as well as to Matters concerning Benefices: But here I ſhall uſe it in a reſtrain'd Senſe, to denote a Donation or Grant made of ſome vacant Dignity or Benefice in the Church, eſpecially when ſuch Grant or Donation is liberally and freely beſtow'd without any Proſpect of an evil Remuneration. And thus a Collation is either free or not ſo. The firſt is, when the Perſon that has the Power of Collating does collate *ſponte & libere* ‖: And ſuch a Perſon may prefer one Man to another, provided he be a perſon fitly qualify'd; and ſuch a Collation is either made at the proper Motion of the Perſon that grants it, or elſe at the Requeſt of the Perſon that obtains it. A Collation, according to the Senſe of the *Canon* Law, is ſometimes made by Laymen, Chapters, Abbots, Biſhops, Patriarchs, and ſometimes by the Pope himſelf *: but a Collation, as we uſe the Word here in *England*, is another way of conferring Benefices than by the previous Preſentation of any Patron, but only by the Authority of him, who has the Right and Power of granting Inſtitution, either *from his own Gift*, or elſe on *the Refuſal of the lawful Patron to preſent*, and this Perſon of *Common Right* is the Biſhop. I ſay *from his own Gift*, becauſe Biſhops, with us, have a Right of Patronage unto Benefices, as Laymen have, and may diſpoſe of them by their own Gift alone without any Preſentation had or made, if ſuch Benefices lie within their own Dioceſſes, and on the lawful Patron's refuſal to preſent for ſix Months: becauſe

‖ Hoſtienſ. Sect. Exqui- ſita. X. 3. 8.

* X. 3. 8. 14, & 15.

becauſe if ſuch Patron does not preſent within ſix Months from the Avoidance thereof, the Biſhop may collate thereunto. And thus a Collation from its efficient Cauſe may be underſtood to be twofold, *viz. Ordinary* and *Extraordinary*. The firſt is ſaid by the *Canon* Law to happen, when a Biſhop or Chapter, who have the Right of conferring Benefices either by Law or Cuſtom, do grant ſuch Benefices to any one qualify'd thereunto *pleno Jure* *. And the ſecond is ſaid to be, when it is made either by the Pope's Reſcript, or elſe by the Biſhop's conferring the ſame on a Lapſe or Devolution. So that Collation is ſaid to be that Act, which is done by him that has the Power of conferring and beſtowing an Eccleſiaſtical Benefice, on whom he pleaſes, without the Act of another: And it differs from Preſentation, becauſe Preſentation belongs to the Patron in virtue of his Right of Patronage alone, whereas Collation does not belong to him, though he be an Eccleſiaſtical Patron, but it appertains entirely to him, that has the Right of Admiſſion and Inſtitution into a vacant Benefice, as the Biſhop of the Dioceſs, or the Archbiſhop of the Province has, in Caſe of a Devolution. But *Hoſtienſis* ſays †, That a Collation is the granting of a Prebend, which is free and exempt from all Right of Patronage, by him who has the Right and Power of conferring the ſame: which Grant ought to be made openly, freely, purely, and without any Diminution caus'd by him, who has this high Preheminence veſted in him, and by him who has the Right and Power of conferring Benefices.

* X. 3. 8. 15.

† X. 3. 5.

Where the Biſhop refuſes to give Inſtitution, becauſe the Clerk is not qualify'd, he may Collate by way of Lapſe or Devolution (as aforeſaid) if the Patron does not preſent another within ſix Months from the Avoidance, and not ſix Months after notice of the Biſhop's Refuſal: but Notice ought to be given by the Biſhop to the Patron immediately, or within as convenient time as may be. But in the Biſhop of *Peterborough*'s Caſe againſt *Catesby*, the Queſtion was, whether the Time *within ſix Months*, for the Patron's Preſentation, and likewiſe for the Biſhop's Collation, ſhall be reckon'd according to twenty eight Days to the Month, or according to half a Year, dividing the whole Year into Days; and 'twas adjudg'd ‖, That the Biſhop could not collate till after the half Year, according to the Diviſion of Days, and not at the end of ſix Months, reckoning twenty eight Days to the Month. For the Court held, that *Tempus Semeſtre* in the Statute of *Weſtminſter* *, is meant of Half a Year according to the days of the Year, in the whole containing three hundred ſixty five Days, *which* being divided, is one hundred eighty two Days; and that Time the Patron has to preſent, who is the Perſon chiefly regarded in Law. And there is a Precedent in *Edward* the Iſt's Time (which was ſoon after this Statute) wherein it was reſolv'd, That the *Tempus Semeſtre* ſhould be taken for half the Year, and not for ſix Months only. And it was further reſolv'd; That the Metropolitan may not collate till the Year be fully ended after the avoidance of the Church: And for the ſame Reaſon the Ordinary may not collate till the half Year ended †.

‖ Com. Ban.

* Chap. 5.

† Crok. Rep. An. 5. Jacob.

If an Infant or Feme-Covert does not preſent within ſix Months as aforeſaid, the Biſhop may collate by way of Lapſe: but the Biſhop ſhall not have this Advantage, where the Church becomes void by Reſignation or Deprivation, without giving Notice thereof to the Patron; for theſe two are Acts, to which the Biſhop is privy. Nor ſhall the Biſhop collate where he refuſes the Patron's Clerk for Non ability, or for a Crime, unleſs he gives Notice of it to the Patron: But after ſix Months, the Patron ſhall have a Writ to the Biſhop, if the Church remains void, and the Biſhop ſhall collate thereunto. I ſhall ſpeak more of *Collation* to Benefices hereafter under the Title of *Lapſe* or *Devolution*, unto which Title I muſt refer the Reader for a fuller Account hereof.

Of Commemorations, Annals, Anniverſaries, &c.

IN the Beginning of Chriſtianity, there was an honourable mention made in the moſt ſolemn Offices of the Church, and an expreſs Recital of the Names of ſuch Perſons (under each Parochial or Dioceſan Diſtrict) who had departed this Life in the Fear of God, and in Communion with the Church: But as Converts multiply'd, and grew too numerous to admit of ſuch a Practice in general for all Men, it was reſtrain'd in After-Ages to Perſons of a more eminent Sanctity, whoſe Names were recited at the Altar in the Diptychs of the Church. And theſe Names were recited with a kind of Prayer of Thankſgiving, and an Oblation made for them, as *Tertullian* atteſts in his Book *de coronâ Militis**. And tho' this was done Yearly on the Day of their Death, yet it was for the ſake of the Living, as a Teſtimony of their Faith, Hope, and Charity, and to keep up a Senſe of a future State; rather than with any Proſpect of leſſening the Pains of the departed, or of praying them out of any Purgatory. For thoſe, who *moſt* wanted the Benefit of ſuch Prayers as theſe, were ſtruck out of the Privilege, as Criminals and wicked Men: And they, who had leaſt occaſion or need of them, *viz.* they of whoſe Condition a better Hope was entertain'd, had the moſt unqueſtion'd Title to them, as well as the largeſt Share of them.

* Cap. 3.

But *Annals*, *Anniverſaries*, *Obits*, and the like, were the Off-ſpring of After-Ages, as they are now practis'd in the *Romiſh* Church by the Prieſts, for the ſake of filthy Lucre, and of getting Money to maintain an idle Clergy. For they did not come into the Church till after the Invention of Purgatory: And then, as Commemorations were formerly made with Thankſgiving, in Honour of good Men departed this World, they changed theſe pious Offices into Prayers for the Dead, erected Chauntries for Maſſes, Shrines for Adoration, and Altars for Oblations; and thus came *Annals*, *Anniverſaries*, *Obits*, *Altarage*, and *Oblations* into the Church. *Annals* are Maſſes ſaid in the *Romiſh* Church for the Space of a Year, or for any other Time, either for the Soul of a Perſon deceas'd, or for the Benefit of a Perſon living †. And the Perſons that were deputed for the Celebration of theſe Maſſes or Offices, were neither Titularies, nor perpetual Curates; but Perſons entirely conductitious, and removeable at Pleaſure, or (at leaſt) as ſoon as the Time was expired. An Anniverſary, in *Latin* ſtiled *Anniverſarium*, is a certain Office in that Church, which is celebrated not only once, *viz.* at the end of the Year, as an *Obit* is, but ought to be ſaid every day throughout the whole Year for the Soul of the deceas'd ‖: And if the Perſon, who ought to perform the ſame, be lett and hindred in his Duty by any reaſonable Impediment, as Blindneſs, Sickneſs, or any Infirmity, he ſhall be excus'd the Omiſſion thereof; but then in other Reſpects he is bound to make a Recompence for the ſame, as by Pſalms and private Prayers. *Trentals* or *Trigintals* were alſo a number of Maſſes, to the Tale of thirty, ſaid on the ſame Account, according to a certain Order inſtituted (as pretended by St. *Gregory*): And to the Perſon performing the ſame, ſomething certain is paid; for nothing is to be done without Money to the Prieſt. And thus much of the *Romiſh* Superſtitions for the preſent. Our

† Lindw. lib. 3. Tit. 23. cap. 2. v. *Annalia*.

‖ Lindw. ut ſup. v. *Anniverſaria*.

Our Obſervation of Saints Days may eaſily be deduced from this early Cuſtom of *Commemorations*; and may derive a pretty clear Defence and Vindication from hence, if we confine them to the Feaſts of the Apoſtles: But if we increaſe them to the Number of *Romiſh* Saints, we ſhall diminiſh the religious Eſteem, which Men retain for proper *Commemorations*. To what I have ſaid before, I wou'd here add, that the Cuſtom of the Church in her *Diptychs*, had its Riſe from the Cuſtom of Cities in making Perſons free, whoſe Names were upon that Occaſion inſerted in the publick Regiſters, and kept in the City Archives: Thus when any were made free of the Chriſtian Community by being admitted into Chriſt's Church, their Names were alſo inſerted in her Regiſter, which was a two-leav'd Book of Record; one Page of which contained the Names of her living, and the other of her deceas'd Members. In our two Univerſities, it is uſual for Colleges to obſerve a *Commemoration* of their Founders and other famous Men, by whoſe Beneficence the College has been endow'd; and it is ſo far from being condemn'd by our Church, that a Service is approv'd for that End, and uſed accordingly: And this is ſurely a laudable Act of Gratitude, as long as they avoid *Popiſh* Obits, Anniverſaries, and the like.

Of Commendams, and of their Riſe and Diviſion.

AN Eccleſiaſtical Benefice is ſometimes granted to a Perſon not only by way of *Title*, but ſometimes to hold the ſame *in Commendam*. 'Tis ſaid to be granted by way of *Title*, when 'tis aſſigned and given to any one, as his own, according to the legal and ordinary way of obtaining Benefices: And from hence a *Title*, in this Place, is taken for any legal Method of obtaining an Eccleſiaſtical Benefice; tho' the Word *Title* has ſeveral other Significations in our Law-Books. But a Benefice is ſaid to be granted *in commendam*, properly ſpeaking; when 'tis granted to any one *in cuſtodiam* as a *Depoſit*: For the Word *Commendare* * ſometimes imports the ſame as *deponere*; ſo that in this Senſe a *Commendam* is nothing elſe but the Care and Cuſtody of a vacant Church granted to ſome Perſon or other for the Benefit of the next Incumbent. For in former Times, when a Proviſion cou'd not be made for the perpetual Cure of a vacant Church ſo ſoon as it ought to be, either through occaſion of Wars, Peſtilence, and ſuch other Cauſes, the Biſhop recommended the ſaid Church to the Care of ſome honeſt and worthy Man to govern it, beſides his own Care, till a Rector was provided, who then had nothing to do with the Revenues, but was to govern them, and conſign them afterwards over to another. But in Proceſs of Time *Commendataries*, by divers Pretences of Honeſty and Neceſſity, made uſe of the Fruits themſelves; and, to enjoy them the longer, ſought out Means to hinder the Proviſion: And for a Remedy hereof, an Order was then made, that the *Commenda* ſhou'd not laſt longer than for ſix Months. But the Popes, by the Plenitude of their Power, exceeded theſe Limits, and granted the *Commenda* for a longer Time; and at laſt for the Life-time of the *Commendatary*, giving him Power to uſe the Fruits, beſides the neceſſary Charges. And hence came *Commendams* then to be two-fold, *viz.* Temporal, or for a Time only; or elſe perpetual and

*D. 16. 3. 24. D. 50. 16. 186.

and for Life. The firſt was for the Advantage of the Church, and the latter for the Advantage of the *Commendatary*, with a Power of diſpoſing of the Fruits thereof as a true Beneficiary †. And thus this Invention, which was well deſign'd at firſt, then ſo degenerated, that a *Commenda* was uſed in the corrupt Times of the Church, as a Cloak for Pluralities: the Clergy obſerving the Words of the Law, to give but one Benefice to one Man, contrary to the Senſe thereof; for that a *Commendatary* for Life is the ſame in Reality with a Titulary Clerk.

† Suar. de Relig. Tract. 3. Lib. 4. c. 1. & Dd. omn.

Afterwards *Commendams* were of a threefold kind. The one was ſtiled *ſemeſtris*, which was for ſix Months only; a ſecond was *perpetual*, and for Life; and a third was intermediate and *diuturna*, but yet limited to a certain Space of Time. The *Commenda ſemeſtris* grew out of a natural Equity, that in the Time of the Patron's Reſpite given him to preſent, the Church ſhould not be without a proviſional Paſtor, which was a Law of Neceſſity, agreeable to the Law of Nature. And this might upon the ſame Reaſon be continued with Revenues as long as the Patron's Reſpite laſted; as to ſix Months after Notice, in this Caſe and the like. But after the Lapſe juſtly incurr'd, the *Commendam* was to ceaſe, and the Biſhop might collate: And in this Senſe a *Commenda* was nothing elſe but holding the Living by way of Sequeſtration. The Council of *Chalcedon* under *Leo* ‖ ordain'd, That no one Clerk ſhould be regiſtred or enrolled in the Churches of two Cities at one and the ſame time; that is to ſay, he ſhou'd not be admitted to Pluralities*. But then the *Canon-Law* immediately diſtinguiſhes, ſaying, That he who retains more Churches than one, ought to hold one by way of *Title*, and the other by way of *Commendam* †. In the ſecond Council of *Nice*, under *Adrian*, that Synod forbids a Clergyman to be reckon'd in two Churches. *Negotiationis enim eſt & turpis lucri proprium, & ab Eccleſiaſticâ conſuetudine penitùs alienum*, ſays the Canon. We have heard from the Words of our Lord himſelf, *That no one can ſerve two Maſters, but that he will love the one and deſpiſe the other*: which is the ſame Caſe in a Plurality of Benefices. But yet in Country Villages Pope *Leo* VII. indulg'd this Practice thro' the thinneſs of the Inhabitants, which open'd a Way for Pluralities; but then it was with ſome Appearance of Modeſty, ſince one of thoſe Churches was to be only a Church *Sub commendatione*, as the Law phraſes it ‖: and the Curate thereof was not the Rector, but no more than a Proctor or Guardian, and he that granted the *Commendam*, might revoke it whenever he pleas'd. But this was but an Evaſion of that good Law above mention'd, unleſs it be taken as a *Commenda Semeſtris*.

‖ A. D. 451.

* 21 Q. 1. 2.

† 21 Q. 1. 3.

‖ 21 Q. 1. 3.

By the Papal *Canon* Law, none cou'd obtain more than one Parochial Church, unleſs one Church depended on another; or unleſs he held one by way of *Title*, and the other *in Commendam* †. And in the Council of *Lyons*, 1275, 'tis ſaid, "Let no one henceforward preſume to grant a Parochial Church unto any one in *Commendam*, unleſs he be of lawful "Age, and in Prieſts Orders, nor ſuch without evident Neceſſity and for "the Benefit of the Church; and ſuch *Commendam* ſhall not laſt beyond "the Space of half a Year: And whatever ſhall be attempted contrary "hereunto, ſhall be null and void *ipſo jure*; nor ſhall any one hold "more than one Church in *Commendam* *." Note, this is the laſt *Decretal*, which gives leave to *Commendams*. And in the Gloſs on this Law, 'tis ſaid, That the Conſent of the Patron, and of all that may be injured thereby, muſt be had; and that he is not a *Rector*, but a Proctor, Adminiſtrator, *&c.* It does not make the Revenues his own, but points them out as a Proviſion for the Miniſters of the Church, and the Surpluſage was to be apply'd to the Benefit thereof, but it does not oblige him hereunto,

† X. 1. 6. 54.

* vi. 1. 6. 15.

unto, ſince the Pope cannot bind himſelf; and, therefore, ſays the Gloſs, the Pope may grant a *Perpetual Commendam.*

Having thus given ſome Account of the Riſe and Reaſon of a *Commendam*, I will next proceed to make ſome Obſervations thereon. And, firſt, 'tis to be remark'd, that a *Commendam* ought not to be granted (according to the firſt Intention of it) *unleſs ſome evident Neceſſity*, or *the Advantage of the Church requires it*; and even then it ought not to be extended *beyond Six Months**, and the *Patron's Conſent was to be had too* †: For the Practice of granting *Commendams* beyond that Form, and without the Patron's Conſent, was introduc'd firſt by Papal Uſurpation; and as it was an Act of diſpenſing with the Law in that Behalf, no one could grant an *Intermediate* or a *perpetual Commendam*, but the Pope himſelf, though any Biſhop or Chapter, *ſede vacante*, could grant the *Commenda Semeſtris*. 2*dly*, That a *Commenda* cannot be made to any Church that is full, no more than a Preſentation can: For there is no more difference betwixt a *Commendam* and a Preſentation, but that in one Caſe the Patron preſents the Clerk to the Church, and in the other the Church is committed to the Parſon, both being incompatible when the Church has its proper Rector or Husband already, and therefore cannot be marry'd or betroth'd to another. And the *Canon* Law, when it ſpeaks of *Commendams*, relies upon *vacant* Churches ‖, and on the *Neceſſity* and *Benefit* of a vacant Church, as aforeſaid. 3*dly*, 'Tis to be obſerv'd, That *Commendams* were not in antient Times made in general Terms to any Churches uncertain, but to ſome certain Church then void. And, 4*thly*, 'Tis to be noted; that a *Commenda*, defective in the Grant or Conſtitution of it, cannot afterwards be made good by the Execution of ſuch Grant: And, therefore, if a *Commenda* was granted for any longer Term than the Church was provided for, the ſame was void by the ancient Canons. But afterwards, the *Canoniſts* found out a new Diſtinction for the Benefit of the Pope, and ſuch as deſired Pluralities; which was that of *Commendam capere* and *Commendam retinere*, tho' the laſt is no *Commendam* in propriety of Speech, according to the firſt Deſign of *Commendams*: for the difference between a *Commendam capere* and a *Commendam retinere* is no more than holding and retaining that which ismine own already, tho' the firſt is commonly uſed to ſignify the taking of that, which is another Man's. And, therefore, take the Caſe, that I am already in a Benefice by Preſentation, or according to the ordinary Form, and I would alſo take a Biſhoprick, which of its own Nature would avoid the Benefice; and hereupon I obtain a Diſpenſation, that I may hold this Benefice for three Years together with the Biſhoprick: This, I ſay, we call a *Commendam retinere* in reſpect of the Benefice, ſince I remain the ſame Parſon ſtill of the ſame Benefice, in no leſs a manner than I had it before. But ſurely this was contrary to the original Deſign and Nature of *Commendams*, however we may explain it away: And 'tis not in any Man's power to create new Natures in Law, according to new Inventions; unleſs they be conſiſtent with *common Right*, which is an univerſal Nature. The firſt mention, that is made of the Word *Commendam* in the Books of the Common Law, according to *Hobart* *, is in the 27th Year of *Henry* the VIIIth, where the Archbiſhop is ſaid to be *Commendatory* of St. *Alban*'s, which might either be in the *retinere*, or elſe by an abſolute Taking. The next mention is in the 28 *H.* 8. cap. 16. where the Statute mentions divers Papal Bulls and Briefs, and (among other Things) ſpeaks of *Commendams*; and enacts, That the Party ſhall enjoy the Benefit of ſuch of them only, as the Archbiſhop might grant by the Statute of the 25 *H.* 8. as the Pope's Legate

* Lindw. Lib. 3. Tit. 5. c. 2. v. *modum illum.*

† Otho. con. Tit. 30. v. *commendare.*

‖ Otho. ut ſupr. v. *vacantes Eccleſias.*

* Hob. Rep. p. 156.

born. And, therefore, in ſhort, ſince *Commendams* came ſo lately into the Knowledge of the Common Law, being till *Henry* the VIIIth's Time matters entirely of ſpiritual Cognizance, (I think, with the utmoſt Submiſſion to the Sages of that Law) the Expoſition of them ſtill remains with the *Canoniſts*, and ought to be founded on the true and original Nature of them, according to the beſt Times of the Church, and the Senſe of the *Canon* Law in thoſe Days: For though the Pope's Chair be no Court of Parliament with us here in *England*, to make Laws touching *Freeholds*; yet as there is no common or ſtatute Law with us to define the Nature of *Commendams*, they ought ſurely to be underſtood, according to their firſt and pureſt Deſign in the Law, and not as a means of encouraging Pluralities ſo miſchievous to the State of Learning, and the ſeeming Good of Religion itſelf. Our Parliaments, indeed, have wiſely guarded againſt all theſe fraudulent and enormous Practices of the Pope's in reſpect of Collations, Proviſions, Reſervations unto Benefices, and the like; and ſhall we ſtill, by far-fetch'd Conſtructions, be guilty of the ſame Colluſion with the Law againſt Pluralities, under a colour of Diſpenſations, *Non Obſtantes*, and by granting *Commendams retinere*, even contrary to the Senſe and Nature of a *Commendam* in former Ages? Which the more honeſt *Canoniſts* themſelves did acknowledge to be a leaping over the antient Walls of the Church; and, therefore, (ſay they) the Buſineſs of *Commendams* ought to be interpreted in the ſtricteſt manner. I will not deny a diſpenſing Power to the Crown in this Reſpect, ſince the Pope (by Uſurpation) had it before the 25th of *Henry* VIII. But if the King ſhould uſe it no better than the Pope did, only to aggrandize covetous Church-men, it cannot be called a Jewel in his Crown.

Of Conſecration of Churches, Biſhops and the like.

Conſecration, according to a Definition of the *Canoniſts*, is a Rite or Ceremony of dedicating and devoting Things to the Service of God with an Application of certain proper Solemnities, antiently introduced into the Church, and continued by the Inſtitution of the Primitive Fathers *. The *efficient* Cauſe thereof (as they will have it) is not only the Text of the *Canon* Law †, but the Word of God itſelf: and the Perſon, that has the Power of Conſecration, is the Biſhop or Dioceſan; and, by the *Canon* Law, the Pope. For no inferior Clergyman can exerciſe this Power, though it be by the Biſhop's Commiſſion or Delegation; becauſe though a Biſhop may delegate thoſe Things to an inferior Clerk, which relate to Juriſdiction; yet a Clerk of an inferior Degree, is not permitted to do ſuch Things as relate to Orders ‖, and the like. For the Subject of Conſecration is either a Thing or a Perſon; as a Church, Church-yard, Biſhop and the like *; and the contrary to Conſecration is Pollution, which is ſaid to happen in Churches by Homicide, even without Bloodſhed, as well as by the effuſion of human Blood, and the burying of an excommunicated Perſon in the Church or Church-yard †; and likewiſe by the ſhedding of human Seed therein: But this Pollution is purged and done away by Reconciliation ‖; the Form of which I ſhall hereafter conſider. At the Time of Conſecration, a Tax or *Cenſus* is impos'd as a Token of Subjection to be paid and perform'd by the Church conſecrated; ſo that nothing is to be done without Money, even in Conſecration

* X. 1. 15. c. unic. §. 2.
† Ut ſupr.
‖ Abb. in c. 5 & 6. X. 3. 6.
† X. 3. 40. 7.
‖ X. 3. 40. 4.

ſecration itſelf, tho' this be Simony alſo by the *Canon* Law, unleſs in the Caſe of a Procuration: And, as in the Church of *Rome*, no Conſecration of a Church or Biſhop can be perform'd without the Celebration of the Maſs *; ſo, in the Church of *England*, ſymbolizing with that Church in this Reſpect, ſuch Conſecration ought not to be ſolemniz'd without the Celebration of divine Service, and receiving the holy Sacrament.

* X. 1. 6. 28.

In the *Romiſh* Church, by the *Canon* Law, Churches and Altars cannot be conſecrated without the Reliques of Saints †; and whenever this grand Ceremony is perform'd, the Corpſes and Funerals of Perſons deceas'd, and (eſpecially) of Infidels, ought to be remov'd and caſt out from thence, before the Conſecration of any Church happens: For whilſt the Corpſe or Body of any Pagan or Infidel lies bury'd there, it defiles the Church-ground, according to the *Papiſts* ‖; and the ſame ought not to be conſecrated, till the Ground is purify'd. By the *Canon* Law likewiſe, a Church ought to be endow'd before Conſecration thereof *, which (among ſome Men) ſeems to be the beſt Reaſon for the Conſecration of it: And a Biſhop ought not to conſecrate a Church, which the Patron has built for filthy Gain and Lucre to himſelf, and not for true Devotion †: But if there be large Revenues ſettled thereon for the Maintenance of a ſufficient number of the Clergy, it may be conſecrated, whether divine Service be ever celebrated therein or not, according to *Popiſh* Divines as well as *Canoniſts*. If a Church be in any Caſe injur'd and damag'd by Dilapidations and the like, it ought not to be conſecrated again, if the Walls thereof that were conſecrated do remain ſtanding ‖: But if a Church ſhall be conſumed by Fire, it ſhall, in ſuch a Caſe be re-conſecrated *; and 'tis the ſame Thing, if the Walls ſhall be re-built and repair'd from the very Foundation thereof †. And ſo devout are the *Romaniſts* about this outward Shell of Religion, that if an Altar thereof be mov'd, or a Stone of it broken, it ought to be re-conſecrated; but not on the Score of having the Edgings of it broken. If neither antient Writings, nor Witneſſes can be found to prove the Conſecration of a Church, in a doubtful Caſe it ſhall receive Conſecration again ‖. And 'tis ſaid, that a conſecrated Thing ought not afterwards to be apply'd to profane and human Uſes *: Nay, ſo great has been the Superſtition of ſome Men, that Laymen were forbidden to touch the ſacred Veſſels, wherein the Euchariſt is made and conſecrated. See *Bellarmin* in his third Tome of Controverſies †. But among us, there is no Sanctity aſcribed to Things neceſſary unto divine Religion, when they are not in ſacred Uſe: And, therefore, in *Holland*, and other *Proteſtant* Countries, Things of this kind are made Uſe of in the ſame manner as other Veſſels, when they are not in the Service of Religion; and may be ſold, if occaſion be. Churches may be rightly and well enough conſecrated upon Feſtivals and Holidays; and the Biſhop may demand a Procuration for the Conſecration thereof. And thus much of the Conſecration of Things.

† Con. 1. Diſt. 24.

‖ Con. 1. Diſt. 27. & 28.

* X. 3. 40. 8. 16 Q. 7. 26 Con. 1. Diſt. 40.

† 16 Q. 7. 26, 27, & 28. Con. 1. Diſt. c. 10.

‖ Con. 1. Diſt. 19.

* Con. 1. Diſt. 20.

† Con. 1. Diſt. 24.

‖ Con. 1. Diſt. 16.

* Con. 1. Diſt. 38.

† Lib. 3. cap. 16. Con. 1. Diſt. 41.

I come next to ſpeak of the Conſecration of Perſons. And here 'tis firſt to be obſerv'd, that a Biſhop ought to be conſecrated on ſome Lord's-day, by three other Biſhops (at leaſt) with the Archbiſhop's conſent being had thereunto ‖; for an Archbiſhop may delegate and commit the Conſecration of a Biſhop elect unto ſuffragan Biſhops. 2*dly*, 'Tis to be remembred, that whenever any Biſhop is conſecrated, he be conſecrated to ſome certain and determinate Church, to which he was betrothed, or became a Spouſe at the Time of his Confirmation. Hereby it ſeems, that if any Perſon be conſecrated a Biſhop to that Church, whereunto he was not before betrothed, he ſhall not receive the Habit of Conſecration, as not being Canonically promoted to it. 3*dly*, Every Biſhop, before Conſecration,

‖ X. 1. 11. 7. 75. Diſt. 1.

ſecration, ought to oblige himſelf by Promiſe to keep and defend the Catholick Faith with a pure and ſincere Heart, and that he will conform himſelf to the Diſcipline of the Church, and pay a Canonical Obedience to his Metropolitan *: But if a Biſhop be conſecrated by a Perſon that has not the Right of Conſecration, he ſhall be conſecrated again †, and otherwiſe he ought not to be re-conſecrated. Yet ſome think, that a Biſhop in ſuch a Caſe as this ought not to be re-conſecrated, but a Pennance ought to be enjoin'd him. A Perſon elected to be an Archbiſhop or Biſhop, ought to receive Conſecration within three Months after Confirmation; and if he ſhall keep his Church a Widow more than five Months by his Negligence, he ſhall loſe the Gift of Conſecration then. At the Conſecration of an Archbiſhop, all his Com-provincials ought to give their Attendance ||.

* 23 Diſt. 6.

† 68 Diſt. 1.

|| 66 Diſt. 1.

Of Contumacy, and the ſeveral Kinds thereof.

PERSONS *Judicially* cited, are ſometimes wont, by a Non-Appearance in Court, to contemn the Judges Authority; and thereby to render themſelves *contumacious*: wherefore, I will conſider theſe Perſons under the following Heads. And *firſt*, Enquire what is neceſſary to render a Man contumacious. 2*dly*, Examine how many *Species* or Kinds of *Contumacy* there are. And 3*dly*, Conſider the Puniſhments due by Law to contumacious Offenders. And *firſt*, In order to render a Man contumacious, he ought to be lawfully ſummon'd either by three *ſimple* Citations, or elſeby a *Peremptory* one *: And this is a Matter of *common Right*, as 'tis founded on the common Law. 2*dly*, The Plaintiff on the Return of a *Peremptory* Citation ought to accuſe the Contumacy of the Perſon ſummon'd, otherwiſe he ſhall not be adjudg'd contumacious †. But if the Plaintiff appears not on this *Peremptory* Summons, the Citation may be *circumducted* in Judgment, tho' the Defendant ſhould not appear; and the Defendant muſt be cited *de novo*, as a *Circumduction* requires ||. And the Practice is in the *Imperial* Chamber, as well as other Courts for the Defendant, if he appears, to accuſe the Plaintiff's *Contumacy* on his Non-Appearance; and, after three Court-days, from a Proclamation firſt made for the Plaintiff's Appearance, to pray a Diſcharge from any further Obedience to the Tenor of ſuch Citation iſſued out and return'd *: for the Term is hereby *circumducted*, and a Diſcharge from the Force of the Citation ought to enſue. But the Citation, though *circumducted*, ſhall not be renew'd, if the Plaintiff ſhall, on the Lapſe of three Court-days, then appear, and alledge juſt Cauſes of Impediment for his Non-Appearance: But the Citation being once extinct, there will be need of a new one; becauſe a *Judicial* Proceſs ought not to be in a *pending* Condition †. For tho' a juſt Cauſe of Abſence excuſes a Man from Contumacy ||, yet it does not exempt him from a *Circumduction* of the Term, in ſuch a manner, as the ſame ſhould remain in ſuſpence. But in Cauſes of Appeal, ſuch a *Circumduction* is no Hindrance, when neither Litigant appears at the Term prefix'd, but that the Cauſe may afterwards be proceeded in without a new Summons: And thus a *Circumduction* of the Term, obtains not in Cauſes of Appeal, but in Cauſes of firſt *Inſtance* and

* D. 42. 1. 53.

† C. 3. 1. 13. 2. Bart. in l. 8. c. 7. 1. 43.

|| D. 5. 1. 73. 1.

* Gail. lib. 1. Obſ. 59. N. 1.

† D. 22. 1. 1. 1:

|| D. 42. 1. 53.

and *ſimple Querele* only. If the Plaintiff has once, on a *judicial* Appearance, exhibited a *Libel*, and then before Iſſue join'd, through Contumacy, ſuffers the Suit to die, it ſhall, in that Caſe, be in the Defendant's power, after Proclamation made, and a Lapſe of three Court Days, either to pray a Diſcharge from the Citation, or on the Plaintiff's Contumacy, to conteſt Suit *Negatively*; and to proceed in the principal Cauſe, even to a Sentence: For the Defendant may take the *onus probandi* on himſelf, and at the Defendant's Inſtance (tho' no Iſſue join'd) Witneſſes may be examin'd, and a Sentence pronounc'd on the Merits of the principal Cauſe; and this Practice is admitted in pain of the Plaintiff's Contumacy. But 'tis otherwiſe on the Defendant's Contumacy; becauſe then no definitive Sentence can be had without Conteſtation of Suit, or joining of Iſſue *: For the Plaintiff's Contumacy far exceeds that of the Defendant, as the Plaintiff is not bound to bring his Action, but the Defendant on a Citation, ought of Neceſſity to appear. Yet the *Imperial* Chamber, in point of Contumacy, makes no Diſtinction between Plaintiff and Defendant: But in each Caſe, on exhibiting of a *Libel*, Iſſue is join'd *in Pœnam Contumaciæ*, and a definitive Sentence is at length pronounc'd †. And this Practice likewiſe obtains in a Cauſe of Appeal in reſpect of the *modus procedendi*, on the Score of Contumacy.

* Marant. Spec. aur. par. 6. de Contum. N. 37.

† Gail. lib. 1. obſ. 59. N. 4. &c.

But the Defendant ſhall not be deem'd contumacious, if the Court ſits not on the Return of the *Peremptory* Citation aforeſaid thro' the Judge's Abſence, tho' the Defendant does not appear ‖: But yet he ought to appear the Court-day following, on the Judge's return and ſitting without a new Citation. Again, a Man is alſo excuſed from Contumacy on the ſcore of his Poverty, *viz.* When he is ſo poor, that he cannot appear without ſhame and confuſion of Mind for his naked and ragged Condition *, being, in ſuch a Caſe, compar'd to a Perſon in Priſon: But then (I think) he ought to ſend his Excuſe and Readineſs to appear upon mending his Habit. 3*dly*, When any one is hindred from appearing by ſome Indiſpoſition of Health, it is ſuch an Excuſe as that he cannot be decreed contumacious †. In *Sicily*, a Perſon thus hindred ought, on a Citation, to ſend his Excuſe by an *Affidavit* made on the Oath of ſome Phyſician or Midwife, if the Woman cited be big with Child, and near her time of delivery: and ſo it has been practis'd with us ‖. And the Defendant ſhall, in the like manner, be excuſed from Contumacy in reſpect of the Sickneſs of their near Relations and Kindred. And, laſtly, 'Tis the ſame Thing when the Defendant is cited before a Superior or any other Judge; for then he is excuſed from any Contumacy to an inferior Court *. So that we may define Contumacy to be a wilful Contempt and Diſobedience to any *lawful* Summons, or *judicial* Order; and 'tis the higheſt Crime that can be committed againſt the Judge's Authority and Juriſdiction.

‖ Gloſ. in l. 2. D. 2. 5.

* Alex. in. l. 2. D. 2. 11. §. 3.

† X. 1. 3 §. 2.

‖ Clark. Prax.

* 14 Q. 5. 12 D. 42. 1. 54.

As to my ſecond Conſideration, it is of a twofold Kind or *Species*, *viz.* a *real* and a *feign'd* Contumacy*. He is ſaid to be guilty of the firſt, who being cited either *perſonally*, or elſe at his Houſe (as we ſay) *viis & modis* refuſes to appear, tho' the Citation came to his Knowledge †. A Man is ſometimes ſaid to be guilty of a *real* Contumacy in an *exiſtent* and *apparent* manner, ſometimes in an *apparent* manner only; and ſometimes in an *exiſtent* manner only. A *feign'd* Contumacy is ſuch by a Fiction of Law; and he is guilty thereof, who being cited at his dwelling Houſe, it is a doubt, whether the Citation reach'd his Knowledge or not ‖: yea, ſome divide Contumacy into a threefold *Species*, *viz. real*, *evident*, and *preſumptive* Contumacy.

* C. 3. 1. 13. D. 5. 1. 73.

† 24. Q. 3. 6. X 2. 6. 52. D 42. 1. 53. Dd. ibi.

‖ Cardin. in 9 Q. de dol. & cont.

In reſpect of my third Conſideration, 'tis to be noted, that the Laws have introduced ſeveral Puniſhments againſt contumacious Offenders. By

the *Civil* Law, the Plaintiff may proceed three ways (at leaſt) againſt ſuch a Defendant, *viz.* either by Outlawry, which *Civilians* ſtile *Pœna Banni*; or elſe by admitting the Plaintiff into Poſſeſſion of the Defendant's Eſtate, otherwiſe called a *Sequeſtration*; and, laſtly, by a Proceeding in the principal Cauſe even to a definitive Sentence, and a Deciſion of the Matter in Controverſy. And in ſome Places, a Mulct or Fine may be impos'd on him for his Diſobedience, and this is alſo agreeable to the *Civil* Law *. But then this Mulct or Fine is never impos'd on any one for Contumacy by a Fiction of Law, according to the receiv'd Opinion of the Doctors on the Law, quoted in the Margin †, but only for *real* Contumacy. And touching theſe ſeveral ways of puniſhing for Contumacy, the Plaintiff has his Option, as being agreeable to the Common Law: For whenever the Law introduces ſeveral Remedies *alternatively*, the Party, and not the Judge, may chuſe which of them he pleaſes, even in that Caſe where the Words of the Law do not reſpect the Party, but the Judge. Some think, that if the contumacious Party comes of his own accord into Court, and offers himſelf ready to obey the Decrees thereof, before a Sequeſtration be decreed or made out againſt him, he ſhall not be fined for his paſt Contumacy, becauſe Juſtice does not ſuffer by this means; and, therefore, the rigour of the Law ought not to be obſerv'd. But the Abbot is of another Opinion, ſince the Text quoted for the foregoing Doctrine relates only to a Caſe wherein Contumacy is already puniſh'd in Effect. For that a Perſon order'd to be admitted to the Poſſeſſion of another's Eſtate, is deem'd as one admitted on the ſcore of ſome Fraud or Reſiſtance made by the adverſe Party. By the *Canon* Law, the uſual way of puniſhing Contumacy is by *Excommunication*, and ſometimes by *Sequeſtration* ‖, (of both which under their reſpective Titles hereafter) and ſometimes by proceeding to Sentence *.

* Dd. in l. 1. D. 2. 3.

† D. 2. 3. 1.

‖ X. 2. 14. 2.

* X. 2. 14. 4.

A contumacious Perſon may be compell'd to give *Juratory* Caution *de parendo Juri*, tho' ſome Judges extort this Oath in the Beginning of the Suit without any reaſon: And tho' Clergymen are ſo privileged by the *Canon* Law, that they are not bound to give Caution *de Judicio ſiſtendo*; yet they ſhall be oblig'd to *Juratory* Caution, if they have been once guilty of Contumacy. A Perſon contumacious in one Point, ought not to be cited in another, unleſs his Contumacy has been often repeated: But he need not be cited in a condemnation of Expences, occaſion'd by his Contumacy. He is in Law ſaid to be a contumacious Perſon, who, on his Appearance afterwards, departs the Court without leave: but a Minor or Infant cannot be ſaid to be contumacious*, becauſe he cannot appear as a Defendant in Court, but muſt appear by his Guardian or Curator. Contumacy is ſometimes ſaid to be in reſpect of a Perſon's not defending himſelf; ſometimes in reſpect of a Perſon's hiding himſelf, that the Citation ſhould not reach him; and ſometimes in reſpect of Perſons appearing without being well inſtructed in the Merits of the Cauſe.

* D. 42. 1. 54.

Of Courts Eccleſiaſtical, and their Juriſdiction.

ECcleſiaſtical Courts, are Seats of Judicature founded and eſtabliſh'd by Law for the Hearing and Determination of all Eccleſiaſtical Cauſes or Diſputes among Men, and wherein matters of Eccleſiaſtical Cog-

Cognizance are handled and diſcuſs'd according to the *Canon* Law, and the Eccleſiaſtical Laws of this Realm: And theſe Courts are either ſtiled *Supreme*, *Intermediate*, or *Inferior* Courts. The *Supreme* Courts relating to the Church of *England*, are thoſe which are immediately founded on the King's Authority, as the Court of *Delegates* from the King in *Chancery* now is, and the High-Court of *Commiſſion* formerly was, when it had Juriſdiction here in *England*. For as Secular Courts have in all Ages been eſtabliſh'd for the Deciſion of Temporal Cauſes, ſo in the like manner, by the Grant of Princes, Eccleſiaſtical Courts have been founded for the Determination of all Eccleſiaſtical Suits and Controverſies whatſoever, which may happen among Men in the Church: And, therefore, as the King is the Head of the Church upon Earth, it is fit that he ſhou'd have the Higheſt Preheminence therein in Point of Judicature. And thus for the Execution of Eccleſiaſtical Laws, all Judges have their proper Tribunals aſſign'd them from the higheſt to the loweſt, which in the Phraſe of the *Canon* Law, are called *Conſiſtories*; and to theſe, not only Clergymen, but even Laymen too are convened by Eccleſiaſtical Judges *, in all Cauſes which do of Eccleſiaſtical Right or Cuſtom appertain to ſpiritual Cognizance †: For in *Feudal*, and other Cauſes, which do of *common Right*, or by ſome Statute, belong to Secular Courts, they ſhall not be ſummoned by any Judge into an Eccleſiaſtical Court ‖. Nor ſhall any one, by the Laws of *England*, be called out of the Realm to any Court whatſoever on pretence of any Eccleſiaſtical Cauſe. For 'tis enacted by Parliament *, That all Cauſes ſhall be heard and determin'd in the King's Eccleſiaſtical Courts within his Juriſdiction, and not elſewhere, according to the Nature and Quality of them, as often as they ariſe within the Realm, or any Part of the King's Dominions; provided, the Cognizance of ſuch Cauſes does *ex Benignitate Principum*, and, according to the Laws and Cuſtoms of the Realm, belong to the Eccleſiaſtical Juriſdiction. And if any one ſhall procure a Citation, Inhibition, or Sentence in the aforeſaid Cauſes, from the Court of *Rome*, or from any other Court out of the Realm, or endeavour to procure the ſame, he ſhall incur the Penalty of a *Præmunire* inflicted by a Statute of *Richard* the Second †.

* X. 2. 2. 1, 2, 3, &c. Nov. 119 & 120.

† X. 2. 2. 5.

‖ X. 2. 2. 6. & 7.

* 24 H. 8. cap. 12.

† 16 Rich. 2. cap. 5.

Among theſe Courts, that has the firſt Place, which depends on the King's Commiſſion, as the Court of *Delegates* does, wherein all Cauſes of Appeal by way of Devolution from either of the Archbiſhops are decided. But in regard to the Juriſdiction of this Court, it has been enacted by Parliament ‖, That no Appeal ſhall be made in Cauſes begun within the Realm to the Court of *Rome*, or out of the Kingdom, for want of Juſtice in the two Archbiſhop's Courts, but that the Party may appeal to the King's Majeſty in his High-Court of *Chancery*: And after ſuch an Appeal is made, a Commiſſion is directed under the Great Seal to Perſons ſpecially appointed, who, by virtue of the ſaid Commiſſion, have Power to hear, and finally determine every ſuch Cauſe of Appeal. But a Review of the Proceedings, by the King's ſpecial Grace, may be had hereupon. Then as to the *High-Commiſſion* Court, which is now aboliſh'd by Parliament, it was ordain'd by the firſt of *Elizabeth* *, That the Crown might by Letters Patents under the Great-Seal of *England*, whenever it thought fit, name certain Subjects at pleaſure for the exerciſe of ſpiritual Juriſdiction throughout the whole Realm of *England*, and the King's Dominions thereunto belonging; and viſit, reform, and correct all Errors, Hereſies, Schiſms, Abuſes, Offences, and Contempts whatſoever, which might be corrected and reform'd by any Eccleſiaſtical Power; and that the Perſons thus named, ſhould have a full Power of Executing the Premiſes according to the Tenor of ſuch Letters Patents. And tho' this laſt

‖ 25 H. 8. cap. 19.

* 1 Eliz. cap. 1.

laſt Court was at firſt founded upon good Policy in the State, to ſtrengthen her Majeſty's Government againſt the *Romiſh* Incendiaries; yet it much wanted a proper *Baſis* to ſupport it, and was afterwards made uſe of as a means rather to deſtroy the Proteſtant Religion than to keep out Popery; and, therefore, it was aboliſh'd.

Intermediate Courts are thoſe, wherein Archbiſhops and Biſhops do exerciſe Juriſdiction by way of Appeal from inferior Ordinaries: for as the Court of *Delegates* now acts therein by virtue of the King's Commiſſion and a delegated Power; ſo under his Majeſty, Archbiſhops and Biſhops have the Power of Judicature, not only in Cauſes of the firſt *Inſtance* in their reſpective Dioceſſes, but alſo in Cauſes of Appeal by virtue of an ordinary Juriſdiction*; though Archbiſhops, in whoſe Courts Cauſes of Appeal interpos'd from any Courts whatſoever within the Province (even *omiſſo Medio*) are determin'd, have a larger Juriſdiction † herein than Biſhops; and wherein upon Letters of Requeſt ‖ obtain'd from the Ordinary, any Controverſies whatſoever, and between whomſoever, may be originally commenced. And among the Courts of the Archbiſhop of *Canterbury*, the chief is the Court of *Arches* ſo called *ab Arcuatâ Eccleſiâ* *, or from *Bow-Church* in *London* (which is dedicated to the Virgin *Mary*) by reaſon of the Steeple or *Clochier* thereof, rais'd at the Top with Stone Pillars in faſhion of a Bow bent *Arch-wiſe:* And the Judge of this Court, being the moſt ancient Conſiſtory of the Archbiſhop's Juriſdiction, is diſtinguiſh'd by the Title of *Dean* or *Official of the Court of Arches*, to whoſe *Deanery* or *Officialty* to the ſaid Archbiſhop, is annex'd the peculiar Juriſdiction of thirteen Pariſhes in *London* exempted out of the Biſhop of *London*'s Juriſdiction: Having all ordinary Juriſdiction in ſpiritual Cauſes of the firſt *Inſtance* within the Archbiſhop's Peculiars, and of Appeal too as the ſuperior Eccleſiaſtical Conſiſtory throughout the whole Province of *Canterbury* †. For my Lord *Coke* ſays ‖, That his Power to call any Perſon for any Cauſe out of any part of his Province within the Dioceſs of any other Biſhop (except it be upon Appeal) is reſtrain'd by a Statute of the Realm. Next unto this Court is the Court of *Audience* held in *Paul's* Church in *London*, which Court, though of equal Juriſdiction with the former, yet it is inferior thereunto in point of Dignity as well as Antiquity; and the Judge of this Court is ſtiled the *Auditor*, or *Official of Cauſes and Matters in the Court of Audience of* Canterbury. This was antiently held in the Archbiſhop's Palace, wherein, before he would come to any final Determination, his uſage was to commit the Diſcuſſing of Cauſes privately to certain Perſons learn'd in the Laws, ſtiled thereupon his *Auditors*. In the ſame Place, is alſo held the *Prerogative* Court of *Canterbury*, wherein all Controverſies touching Wills, if the Probate of which does belong to the Archbiſhop's Juriſdiction, and likewiſe touching the Adminiſtrations of the Goods of Perſons dying Inteſtate, which are of the ſame Cognizance, are examin'd and determin'd. But Biſhops, in reſpect of their ordinary Juriſdiction, held their Courts in their Cathedrals, over which their Chancellors do or ſhould preſide; and in remoter Places of their Juriſdiction, their Commiſſaries.

* X. 1. 30. 1.

† Antiq. Brit. de Priv. Sed. Cant.

‖ 23 H. 8. c. 9.

* Lindw. Prov. lib. 5. Tit. 2. cap. 1. v. *Officialis.*

† 24 H. 8. cap. 12.

‖ Inſt. pt. 4. 23 H. 8. cap. 9.

Inferior Courts, are thoſe which belong to Perſons that are inferior to Biſhops, as Archdeacons, Deans and Chapters, and ſuch as have peculiar Juriſdictions. For in regard of the great extent of ſome Dioceſſes beſides thoſe Courts which belong to Biſhops, Archdeacons have alſo their Courts *, and do either by Grant or Preſcription, ſome of them exerciſe concurrent Juriſdiction with the Biſhop within their Archdeaconries. And thus likewiſe do Deans and Chapters take cognizance of Cauſes in exempt Juriſdictions granted to their Cathedral Churches. And among ſuch

* 23 H. 8. cap. 9.

ſuch as have Peculiars in ſome certain Pariſhes, whoſe Inhabitants, within the Bounds of which, are ſometimes exempt from the Archdeacon's, and ſometimes from the Biſhop's Juriſdiction *.

It was reſolv'd in the Caſe of *Pickaver*, on the Statute of *Henry* VIII. † That if a Biſhoprick within either Province becomes void, and ſo conſequently the Juriſdiction devolves on the Metropolitan; ſuch Metropolitan muſt hold his Court in the inferior Dioceſs, for ſuch Cauſes as are, by the Eccleſiaſtical Law, to be try'd before the inferior Ordinary ||. The Style and Cuſtom of particular Courts ought to be obſerv'd and had in great Conſideration with all Judges: And, becauſe there is no Place ſo proper to treat of it as in this, I will here conclude this Title with it.

Now that is properly called the *Style of Court*, when any Practice or Cuſtom in relation to *Judicial* Matters is introduced by the Judge that has a power of ſo doing, that is to ſay, of making Rules and Orders of Court *: For it differs from Cuſtom, ſtrictly ſo called, in many Points †; becauſe it reſpects not only the Order and Method of Writing, but alſo the Judges Method in Proceeding, and Way and Manner of interpreting of a doubtful Law; nor is it inferr'd from the Uſage and Conſent of the People, nor from a plurality of Acts, as a Cuſtom is. And, therefore, the *Style of Court* is properly the Practice obſerv'd by any Court in its way of Proceeding, and is not a Law unto Cauſes and Perſons, but a Mode of Proceeding, as it is in the City of *Bologna*, the Style of Court for the Notary to read the Sentence given, which is valid becauſe ſo practis'd there: Becauſe of *common Right*, the Judge ought to read the Sentence. But if a Judge, that has the power of making a Rule of Court, introduces a Style of Court contrary to Law, 'tis not valid *, unleſs the ſame be founded on the Knowledge and Conſent of the People, and on Preſcription as Cuſtom is; or elſe is ſupported with the Approbation of the Prince, and reſpects the Order and Method of *Judicial* Proceeding alone. Again, regularly ſpeaking, a *Style of Court* has a relation to ſuch Things as are arbitrarily left to the Judge's Diſcretion: as that a Libel be exhibited in all but ſummary Cauſes; for of *common Right*, Cauſes of light Importance are arbitrary, in which laſt kind of Cauſes, a Judge may introduce a *Style of Court*; but he muſt be a Sovereign Judge to do it in ſuch Things as are contrary to the Common Law or Cuſtom †. But if the *Style of Court* be contrary to the Common Law, then it ought to be prov'd in reſpect of its Preſcription as a Cuſtom is. A *Style of Court* is introduced by ſuch uſual Clauſes as the Court is wont to inſert and make uſe of: and if the ſame be not obſerv'd in all Proceſſes emitted from thence, ſuch Letters of Proceſs ſhall be deem'd ſurreptitious ||. For the *Style of Court* is in the place of a *Judicial* Form of Proceeding; and whenever we depart from this common Style, it infers a Preſumption of Falſhood or Forgery †. When the *Style of Court* reſpects the Deciſion of a Cauſe, it requires full Proof that it has the Uſage and Conſent of the People: And therein, a Judge cannot inform himſelf in his own Chamber, but muſt do it in open Court *. By a *Style of Court*, a Sentence may be pronounced without publiſhing the Witneſſes, tho' ſuch Publication was moved for: And ſuch Sentence is not null and void, becauſe the Party ought to appeal from the Grievance immediately. And thus the *Style of Court* makes a Law in ſuch Caſes as are not decided by Law †: And, therefore, we ought not eaſily to depart from antient Practice, and that which has commonly been obſerv'd for Law.

* X. 5. 33. 1 & 3. VI. 5. 7. 1.

† 23 H. 8. c. 9.

|| Hob. Rep. 178.

* Cravet de ant. temp.

† X. 5. 20. 6.

*Alex. Conſ. 36. in fin. lib. 4.

† Alex. Conſ. 36. lib. 4. N. 9.

|| Abb. in c. 51. X. 1. 6.

† X. 5. 20. 6.

* Socin. Conſ. 36. N. 11.

† Anc. Conſ. 53. N. 2.

Of Cuſtom, and of the Nature and Force thereof, &c.

CUSTOM is defin'd to be a kind of immemorial Right, introduced by the *tacit* Conſent of the People *, and eſtabliſh'd by a long Courſe of Practice in ſuch matters only as the People are inabled to do by expreſly conſenting thereunto †: And this Practice or Uſage is in the place of a Law, when the Law is deficient in any Point. I ſay *by a long courſe of Practice*, becauſe in all Cuſtoms diuturnity and length of Time is as much to be regarded as the Conſent of the People, and Solidity itſelf. Now *Cuſtom* is twofold, *viz. General** and *Special*†. The firſt is a kind of Right initiated by the Manners and Uſage of the whole People of a State, or (at leaſt) by the greater part of them upon the Principles and Foundation of Reaſon; and, it being of a ſettled and continued Duration, it has the Authority of Law in that State. I ſay, by *the Manners and Uſage of the whole People*, or (*at leaſt*) *by the greater Part of them*; becauſe a Cuſtom cannot be introduced by particular Perſons: But 'tis otherwiſe in reſpect of a Preſcription, which may happen between a private Perſon, and a private Perſon. And *Geminius* avouches this to be a ſubſtantial Difference between Cuſtom and Preſcription, as a Cuſtom tends to introduce a general or univerſal Right; but a Preſcription has only Reſpect to an Acquiſition of Right in ſome particular Perſons: And 'tis ſaid in our Law Books, that the Publick acquires a Right by Cuſtom, but only private Perſons acquire it by Preſcription; which, according to the *Civil* Law, is eſtabliſh'd by a ten Years uſage ‖, and, according to the *Canon* Law, by forty Years continuance *. And thus a general Cuſtom is an unwritten Law, which conſiſts in the Uſage of the People alone, and being not obſerv'd in any one certain Place alone, it is indiſcriminately made uſe of by all Perſons alike, or (at leaſt) by the majority of them: but a ſpecial or local Cuſtom is that, which, being reſtrain'd to ſome particular Place, has the Force of a municipal Law only in that Place †.

* X. 2. 20. 26.

† D. 1. 3. 32.

* D. 1. 3. 32. 1.

† D. 8. 4. 13. 1.

‖ Bart. & Jaſ. in l. 3. D. 1. 3.

* X. 1. 4. 11. X. 2. 26. 4.

† Cyn. & Dd. in l. 2. C. 8. 53.

To introduce a Cuſtom, therefore, four things are principally required, *viz. Firſt*, A lawful Preſcription is neceſſary hereunto; for whenever any mention is made of a Cuſtom, 'tis always by the *Civil* and *Canon* Law intended of a Cuſtom preſcrib'd. *2dly*, A frequency or repetition of Acts is required hereunto; and 'tis the common Opinion of the Doctors, that by the *Civil* Law, two *judicial* Acts concurring with a Lapſe of ten Years, are ſufficient to ſettle a Cuſtom, tho' this (I think) ought to be underſtood with ſome Qualification of Law, and to proceed only when thoſe two Acts are Acts ſo notorious, as in all likelihood they will come to the knowledge of the People; otherwiſe two Acts are not enough, but ſo many are required as may infer the *tacit* Conſent of the People collected from thoſe Acts. And 'tis a receiv'd Doctrine likewiſe among the Lawyers, that not only *judicial*, but even *extra-judicial* Acts are ſufficient to introduce a Cuſtom, provided they are ſuch as the *tacit* Conſent of the People may appear from thence. But the *third*, and chief Thing neceſſary for introducing a Cuſtom, is the *tacit* Conſent of the People ‖, being the primary Cauſe thereof; and this Conſent is collected from a frequent Uſage and Re-

‖ D. 1. 3. 32. 1.

Repetition of Acts, as aforesaid. For Example; if the Acts be of such a Nature, that they may probably come to the Peoples knowledge. For 'tis not a Non-act, which introduces a Custom; a Custom being said to be as it were a common Usage: And, therefore, whenever such a Consent of the People may be had from Conjectures and the like, a Frequency of Acts is not regarded, since a Custom receives its principal Force and Vigour from this *tacit* Consent and Agreement. And hence I infer this Difference between a Custom and a Statute, *viz.* that a Statute has the *express* Consent of the People, whereas a Custom has only their *tacit* Agreement to it; and though it be reduc'd into Writing, yet it remains a Custom still. 4*thly*, 'Tis necessary that a Custom shou'd be adapted to, and founded on Equity; that is to say, it ought to be correspondent and agreeable to right Reason: For evil Customs cannot be confirm'd by any Length of Time, nor from a Continuance of such Usage; nor can a Custom be introduc'd through Error, so as to be valid *; because Error excludes this † tacit Consent, as its efficient Cause. Some Persons indeed do absolutely affirm every Custom to be valid, if the Observance thereof does not induce a Sin: But the general Opinion is, that tho' the Authority of a long-liv'd Custom be of no mean Strength and Force in Law; yet it has not always that Validity, as that it ought to prejudice even a positive Right, unless it be a very reasonable Custom, and such as is founded on a legal Prescription at least. But since no certain Doctrine or Determination can be given touching the Reasonableness of a Custom, it must therefore be left to the Determination of a discreet Judge to declare, whether a Custom be founded on Reason, and whether it ought to be allow'd or disallow'd of or not, *&c.*

† D. 1. 3. 39.

A Custom has several Effects. As first, it is an Imitation of Law; the Law saying, *Diuturni Mores (nisi legi sint adversi) consensu utentium approbati legem imitantur* *. 2*dly*, If it be introduc'd according to Law, it interprets and confirms a Law; for Custom, in this Sense, is the best Interpreter of all Laws †. 3*dly*, When a Law is written *in neutram Partem*, that is to say, neither permitting nor forbidding a Thing to be done, Custom has the Force of a Law, and is adjudged according thereunto ‖; which is not only true in Contracts, according to the *Civil* Law, but even in Punishments too, according to the *Canon* Law; nor ought a Judge to recede from such a Custom. As the efficient Cause of a Custom is the tacit Consent and Usage of our Ancestors or Forefathers having a Power of making of Laws *; so the material Cause thereof are Things incorporeal, as the Rights of Jurisdictions, Elections, and the like, which have some Species or Shew of Law. It has been said, that Length and Diuturnity of Custom, if it be approved of by the Consent of such as make use of it, imitates a Law: And, therefore, ancient Custom (provided it be not contrary to good Manners, or the Decrees and Canons of the Church) has, in all Ecclesiastical Cases, the Force and Vigour of a written Constitution; and whatever is done contrary to Length of Custom, shall be revok'd †. *Albericus* observes, that a Custom may be *conceiv'd*, *born*, *perfected* and *strengthen'd*. *First*, It is *conceiv'd* in Reason, as a Birth in the Womb of a Mother. 2*dly*, It is *born*, viz. when one or more Persons begin to do those Things, which right Reason advises and persuades to be done. 3*dly*, It is *perfected* by a multitude of the like Acts, whilst all Persons do by degrees imitate that which is begun by a few. And, 4*thly*, 'tis *strengthen*'d by a long Practice and Course of Time limited by the Laws.

† D. 1. 3. 37. X. 1. 4. 8.

‖ D. 1. 3. 35.

* X. 1. 4. 11. 1 Dist. 1.

† 12 Dist. 7.

He, who founds his Intention on a Custom, ought to prove that Custom; because a Custom is a Matter of Fact, and Facts are not presum'd

*12 Dist. 6.

ſum'd without due Proof thereof: And a Cuſtom ought to be prov'd with all its Requiſites, otherwiſe ſuch Proof will be defective. Therefore Witneſſes produc'd to prove a Cuſtom, ought to depoſe touching the Truth of all the aforeſaid Requiſites, with the Reaſon of their Knowledge: becauſe 'tis not enough to prove that ſuch a Cuſtom was extant, without ſaying, that they have ſeen it ſo obſerv'd in the like Caſes and Acts for a long time together, and that they have frequently heard it from their Anceſtors, in the publick Preſence of many Witneſſes, that it has been thus practis'd; ſo that from hence it appears, that the tacit Conſent of the People, or (at leaſt) of the greater Part of them, did intervene *. Moreover, the Witneſſes ought to agree in point of Time, and about the Identity of the Acts repeated: For if they depoſe touching different Acts, and as ſingle Witneſſes, their Depoſitions are no Evidence to prove a Cuſtom. But yet all this is otherwiſe in a general and notorious Cuſtom, which wants no Proof; though every notorious Cuſtom ought even to be alledg'd: Becauſe tho' it be notorious, and relieves the Perſon *ab onere probandi*; yet it does not eaſe him *ab onere proponendi*; and that I call a *notorious* Cuſtom, which is prov'd by the Inſpection of many Authentick Inſtruments or Writings. But in proving a Cuſtom, 'tis not neceſſary, that the Witneſſes ſhou'd depoſe, in what Caſes, and between what Perſons ſuch Cuſtom was obſerv'd; but it is ſufficient for them to ſay, that it has been thus obſerv'd of their own Knowledge for a long Courſe of Years ||, and they have thus heard it from their Anceſtors, *&c.* But for a better Knowledge of this Matter, the Witneſſes produc'd to prove a Cuſtom alledg'd, may obſerve the following Rules; *viz. Firſt*, If a Cuſtom corrects a written Law, the Cuſtom ought then to be fully prov'd: For 'tis not enough, in ſuch a Caſe, to prove a common Obſervation thereof, contrary to ſuch written Law; becauſe ſuch an Obſervance alone does not make a cuſtomary Law, according to *Albericus de Roſate* *. *2dly*, If a Cuſtom be to be prov'd by Witneſſes, two Witneſſes are ſufficient to prove the ſame, according to ſome of the Doctors †: But others think, we ought to diſtinguiſh herein. For, when the Matter in debate is touching the Proof of the Beginning of a Cuſtom, or if Witneſſes depoſe touching the Fame of a Cuſtom, then (ſay they) two Witneſſes are ſufficient ||. But if the Cuſtom itſelf be in queſtion, then (ſay they) it ought to be prov'd by all the Inhabitants where ſuch Cuſtom obtains *. But leſt ſuch a Proof ſhou'd be extended *in infinitum*, others ſay that the univerſal Term *omnes* is referr'd to the greater part of the People, according to the Law quoted in the Margin †; and, laſtly, others will have Ten Witneſſes to be ſufficient, ſince ſuch a Number makes a Multitude ||. But as a Cuſtom in contra-diſtinction to a Preſcription, is an immemorial thing, the beginning thereof cannot be prov'd by Witneſſes. *3dly*, Witneſſes produc'd to prove a Cuſtom, muſt give Evidence of three Things, *viz.* Touching the Uſage of the People; the Frequency of the Act; and the Length or Diuturnity of the Time. But, *4thly*, If a Cuſtom be contrary to an Eccleſiaſtical Law, or the Good of the Church, which is ſacred, then forty Years Preſcription is requir'd *: as in Cauſes ſpecially reſerv'd to the Prince's Cognizance, an immemorial Cuſtom is always neceſſary to eſtabliſh a Right againſt his Prerogative and Juriſdiction. *5thly*, This *legal* Time, which gives Force of Law to a Cuſtom, has, according to the Doctors ||, its Beginning from the firſt publick and notorious Act; which Acts ought either to be *Judicial*, or ſuch as are ſped in publick Places, or by publick Perſons in the common Aſſemblies of the People. And, *6thly*, The Currency of Time to eſtabliſh a Cuſtom, ought to be with a *Continuando* from the beginning to the end of the Term preſcrib'd, unleſs the *intermediate* Acts, or the greater part of them from the beginning to the end of the Time appointed, are conformable to the beginning.

Dd ibi. — *D. 1. 3. 34.

|| Guid. Pap. Conſ. 116. 164 & 171.

* In l. 2. C. 8. 53. N. 57.

† Guid. Pap. Conſ. 146 & 171.

|| D. 22. 5. 12.

* D. 22. 3. 28.

† D. 50. 1. 19.

|| D. 47. 8. 4. 3.

* X. 1. 4. 11.

|| In l. 32. D. 1. 3. 1.

Of

Of Deacons, Sub-deacons, and their Offices.

THO' *Deacons* were heretofore introduc'd into the Church in the Infancy thereof by the Apoſtles themſelves, in order to attend the daily Service and Miniſtry of the Tables; yet 'tis to be obſerv'd, they were elected and choſen both in Aid of the Presbyters and Apoſtles, that they might have the more Time and Liberty of applying themſelves to the diſpenſing of of God's Word. But the Deacons had the Care and Management of ſuch Matters as related to Temporal Concerns *. Therefore in thoſe Times the Office of a Deacon was nothing elſe but to aſſiſt the Prieſt in ſuch Things as requir'd Conſecration. Wherefore, they were to be always ready at Hand to aſſiſt him in the Adminiſtration of Baptiſm and the Euchariſt. And tho' the Council of *Arles* did forbid them to offer this Sacrifice themſelves; yet by the Council of *Carthage* † they might diſtribute the Euchariſt after it was conſecrated by the Prieſt.

* Act. ch. 6.

† Can. 28.

Deacons were anciently, as Archdeacons are at preſent, the Biſhops Eyes ‡, to inſpect and take Care of the Acts of the whole Church; and to report them to the Biſhop: And, therefore, theſe Archdeacons, in reſpect of the Biſhop's Perſon, to whom they are ſubſervient, are look'd upon as Perſons of greater Excellence than ſuch Presbyters as do not diſcharge this Office; but all other Deacons are deem'd inferiour to Prieſts; and being in Subjection to Presbyters, they ought to yield to them the Place of Honour and Dignity *. St. *Paul* in his firſt Epiſtle to *Timothy* † acquaints him very fully with the neceſſary Qualifications of theſe Deacons in reſpect of Life and good Behaviour ‡. In the Chriſtian Church the Office of Deacons ſucceeded in the Place of the Levites among the *Jews* *, who were by God's Command to be as Miniſters and Servants to the Prieſts in the Old Law †. And thro' a Neceſſity of the Churches, wherein they were ordain'd, and to which they might of Right be recalled by their Biſhops as to their proper Churches, under the Pain of Excommunication. An Example whereof we have in the Hiſtory of *Gregory* of *Tours* ‡, commonly called *Turonenſis*, touching *Theodolphius* a Deacon at *Paris*, excommunicated by *Ragnimundus* Biſhop of *Paris*, becauſe he refus'd to return to his own proper Church, being then in the Service of the Biſhop of *Angiers*; which was adjudg'd in the firſt Council of *Arles* *, during the Reign of the Emperor *Conſtantine*, and the Papacy of *Sylveſter* the Firſt; and likewiſe decreed in the Twenty third Seſſion of the Council of *Trent*.

‡ 93 Diſt. c. 6.

* 93 Diſt. c. 5. 14. 15. 17. & 20.

† Chap. 3.

‡ 32 Diſt. c. 11. X. 3. 2. 2.

* 20 Diſt. c. 1.

† Num. Ch. 8. 9.

‡ Lib. 10. cap. 14.

* Can. 2. & 22.

Beſides that Part of the Deacon's Offices which he bears in aſſiſting a Biſhop or Prieſt in the moſt ſolemn Miniſtrations of Divine Worſhip, his Buſineſs was in a more particular Manner to take Care of the Poor; and he had the Diſpenſation of the Churches Treaſure. He is to collect the Oblations of the People, and to diſpoſe of them on the Altar, to adjuſt and lay the Cloth on the Communion-Table, to preach the Goſpel, and St. *Paul's* Epiſtles; and if he be an Archdeacon, otherwiſe

called a Biſhop's Deacon, he ought to aſſiſt the Dioceſs, and to make a Report of all Matters amiſs unto the Biſhop.

In the *Romiſh* Church they have a Sub-deacon, who is the Deacon's Servant; and ſucceeded in that Communion in the Room of the *Nethanims* * in the *Jewiſh* Synagogue: But as this Order was not reckon'd among the Sacred Orders in the Primitive Church even in Pope *Urban*'s Opinion, that Pope decreed †, that no one from the Order of a Sub-decacon ſhould be promoted to a Biſhoprick of *Common-Right*; and ſo did Pope *Innocent* the Third do the ſame Thing for the very ſame Reaſon ‡: Yet it is at this Day in that Church, for the Sake of increaſing the Number of the Clergy, and of adding Strength to the Hierarchy, reckon'd among Holy Orders *. This Order of a Sub-deacon is a Degree or Step to that of a Deacon among the Papiſts; for no one among them ought to be a Deacon, till hē has been a Sub-deacon; and the Sub-deacon's Office is to hold the Baſon to the Biſhops and Prieſts, whilſt they waſh their Hands †, and the like.

* 1 Eſdr. c. 8.

† 65 Diſt. c. 9.

‡ 31 Diſt. c. 1. x. 1. 14. 9.

* X. 1. 18. 7.

† 25 Diſt. c. 1.

A Deacon anciently was ordain'd in a different manner from a Presbyter; for he might be ordain'd by the Biſhop alone, without the Aſſiſtance of Presbyters, and when ordain'd his Office was to take Care of the Ornaments and Utenſils of the Church, to receive the Oblations of the People, to diſtribute the Bread and Wine, to read the Goſpels in ſome Churches, to baptize in ſome Places, and to preach, tho' not without the Biſhop's Leave. 'Tis true, the Qualifications for both theſe Offices are the ſame, but there is ſome Difference in reſpect to their Age: For a Deacon may have a Diſpenſation for entring into Orders before he is Twenty three Years of Age, and 'tis Diſcretionary in the Biſhop to admit him to that Order at what Time he thinks fit; but regularly there can be no Faculty or Diſpenſation for entring into Prieſts Orders before Twenty four, tho' this is likewiſe done *Anno currante*, as they call it.

As in the Primitive Times a Deacon was to read the Goſpels, ſo with us his Office now conſiſts in catechiſing Children, reading Divine Service, Baptizing, burying the Dead, Marrying; and before the Act of Uniformity ‡ he might be incumbent on a Living with Cure of Souls, but not ſince: And the very Form of ordaining expreſly mentions, that it is his Office to aſſiſt the Prieſt in the Diſtribution of the Holy Communion. And from hence a Queſtion has ariſen, *viz.* That ſince by the Statute of *Charles* the Second, thoſe who are not Prieſts by Epiſcopal Ordination are prohibited to adminiſter the Sacrament of the Lords Supper under the Penalty of One hundred Pounds, one Moiety to the King, the other to be divided between the Poor of the Pariſh and the Proſecutor. But this Penalty does not extend to the Foreigners, nor Aliens of the Foreign Reformed Church allow'd, or to be allow'd by the King's Majeſty, his Heirs and Succeſſors: Nor to any Perſon diſſenting from the Church of *England* (except *Papiſts* and *Popiſh Recuſants*) in Holy Orders, or pretended Orders; nor to any Preacher or Teacher of any Congregation of Diſſenting Proteſtants, taking the Oaths, and making the Declaration as by the Act directed.

‡ 14 Car. 2. chap. 4.

It has been a Queſtion, Whether a Deacon doth not incur that Penalty by diſtributing Wine to the Communicants: But (I think) the bare Act of giving the Cup to them, without conſecrating the Wine, does not make him an Offender within this Law; becauſe the Prohibition is, That no Perſon ſhall preſume to conſecrate and adminiſter the Sacrament, *&c.* which Words comprehend the whole Solemnity of the Communion.

Of

Of a Dean and Chapter, their Power, Riſe, &c.

A *Dean* and *Chapter* is a Body Corporate Spiritual, conſiſting of many able Perſons in Law, *viz.* the Dean, who is the Chief, and his Prebendaries, who are his Collaterals, and they together make one entire Corporation or Body Politick: And as this Corporation may jointly purchaſe Lands and Tenements to the Uſe of their Church and Succeſſors; ſo likewiſe every one of them may ſeverally purchaſe Lands and Tenements to the Uſe of their Church and Succeſſors; ſo likewiſe every one of them may ſeverally purchaſe to the uſe of himſelf and his Heirs, according to the *Common-Law*, which he cannot do by the *Canon-Law* in this reſpect; for what he purchaſes he does by this Law only purchaſe to the Behoof of the Church. The Perſon preſiding over this Eccleſiaſtical Body of Men is ſtiled a *Dean*, from the *Greek* Word Δεκά, which in *Engliſh* ſignifies *Ten*; becauſe he was anciently ſet over ten Canons or Prebendaries (at leaſt) in ſome Cathedral Church; and as ſuch was Head of the Chapter, and in the Cathedral Church next unto the Biſhop in Point of Degree, and by the *Common-Law* is a ſole Corporation to ſome Purpoſes; ſince he repreſents a whole Succeſſion, and is capable of taking an Eſtate as Dean, and of conveying it to his Succeſſors: And, therefore, if Lands are given to him, the Inheritance paſſes without the Word *Succeſſors*; becauſe, in Conſtruction of Law, ſuch Bodies never dye. But *Chapters* are not capable to take by Gift or Purchaſe without the Dean *: Yet if a Biſhop makes a Leaſe with a Reſervation of Rent; and there is a *Proviſo*, that in the Vacancy of the *See* the Rent ſhall be paid to the Chapter *in Jure ſuo proprio*, this is good and valid, for they are Perſons of which the Law takes Notice, and are capable of receiving Rent, tho' it may be a Queſtion whether in their own Right or not.

*Mores Rep

The Word *Chapter* is ſometimes put to ſignify the Place, where Collegiate Perſons or Bodies Politick Eccleſiaſtical do uſually meet and aſſemble together in common, in order to treat of and tranſact the Affairs of the Community; and ſometimes this Word denotes the Place, where Delinquents receive Diſcipline and Correction according to the Orders of the Church; ſometimes 'tis uſed to ſignify a *Decretal* Epiſtle, or any particular Diſtinction of Holy Writ; and ſometimes the Word *Chapter* is put for a Collection of ſeveral Perſons, that do not live together in common, but only gather together in ſome certain Place for the ſake of debating Matters in common among themſelves, as in the general Chapters of Monks and other Regulars †; according to which Senſe of the Word a Collection of Rectors, Vicars, and other Eccleſiaſticks, aſſembled together for that end, are alſo called a Chapter: And becauſe theſe laſt kind of Chapters were commonly held in Places not very remarkable, *viz.* in the Country, they were called *Rural Chapters*. But, touching the ſeveral Acceptations of this Word *Capitu-*

† X. 3. 35. 7.

Capitulum or *Chapter*, this Verſe is made uſe of ſumming up the whole, *viz.*

Diſtinguit, Minuit, locat & collectio fertur.

The Chapter conſiſts of Canons or Prebendaries, which are ſome of the chief Men of the Church; and, therefore, are called *Capita Eccleſiæ*; and theſe, with the Dean, are the Biſhop's Council, with whom he may conſult in Eccleſiaſtical Affairs. They are a Spiritual Corporation aggregate, which they cannot ſurrender without the Biſhop's Leave, becauſe he has an Intereſt in them. 'Tis true, they might ſurrender their Lands, but they could not diſſolve their Corporation as appears in the Caſe of the Dean and Chapter of *Norwich* *, who conveyd all their Lands to *Edward* the Sixth, and he by Letters-Patents incorporated them who before were a *Prior* and *Convent*, by the Name of the *Dean and Chapter of Trinity Church in* Norwich, ex Fundatione, Edw. 6. and regranted their Lands to them. Upon which they made a Leaſe by their old Name, leaving out theſe Words *ex Fundatione Edvardi ſexti*; and the Leaſe was adjudg'd to be good, becauſe the Corporation was not diſſolv'd by the conveying all their Lands; for tho' they had none, they might ſtill exerciſe Juriſdiction in confirming Leaſes, and the like. A *Dean* and *Chapter* as a Corporation may ſue and be ſued; and if they commence an Action, the Defendant may challenge a Jury-man, who is of Kindred to a Prebendary, one of their own Body. They with the *Dean* are to conſent to every Grant made by the Biſhop in order to bind his Succeſſors; for the Law has not thought it reaſonable to place that Authority in the Biſhop alone. They are Guardians of the Spiritualties during the Vacancy of the Biſhoprick of *Common-Right* †; tho' the Uſage of *England*, is, That the Archbiſhop is the Guardian of Spiritualties, during ſuch Vacancy as to Matters of Juriſdiction: For as to Ordination (according to *Lindwood*) they may call in the Aid and Aſſiſtance of ſome Neighbouring Biſhop. And according to the 25*th* of *Henry* 8. *Ch.* 21. they have Power as a Dean and Chapter, in the Vacancy of an Archbiſhop, to grant Diſpenſations.

* Anderſ. Rep. N. 167.

† X. 5. 7. 9.

As to the Original of a Dean and Chapter 'tis certain (I think) that anciently Eccleſiaſtical Bodies of Men did reſide with the Biſhop in his Cathedral, tho' under the preſent Denomination of a Dean and Chapter; and thoſe Men were Part of his Family; and when he dy'd, they choſe another in his Room, but they had no peculiar Juriſdiction with us here in *England* during the *Saxon* Times. But afterwards, when they got Poſſeſſions by the Endowments of Biſhops and others, they then aſſum'd Titles of Dignity, and obtain'd peculiar Juriſdictions; and ſo they were ſtiled *Prior* and *Convent* in moſt Places, till King *Henry* the Eighth transform'd them to a *Dean* and *Chapter*; and, their legal Rights ſtill remaining, they became a *Chapter to the Biſhop*, or the *Biſhop's Council*. For 'tis ſaid in the Caſe of the *Dean* and *Chapter* of *Norwich*; That *in Chriſtian Policy it was thought neceſſary* (ſince Sects and Hereſies aroſe in the Church) *that every Biſhop ſhould be aſſiſted with a Council*, viz. *a Dean and Chapter*. Firſt, *To conſult with them in deciding difficult Controverſies in Religion, to which every Biſhop* habet Cathedram. And, Secondly, *To conſent to every Grant the Biſhop ſhall make to bind his Succeſſors*, as aforeſaid. At firſt all the Poſſeſſions were veſted in the Biſhop, but afterwards a certain Portion was aſſign'd to the Chapter: And, therefore, there was a Chapter, before they had any Poſſeſſions; and of *Common-Right* the

the Biſhop is Patron of all the *Prebendaries*, becauſe their Poſſeſſions were anciently deriv'd from him. So that as long as the Biſhoprick continues the Dean and Chapter (being his Council) remains and has a Being.

After the Death of a *Prebendary* or *Canon*, the Dean and Chapter ſhall have the Profits of his *Prebend* or *Canonry* *: And after the Death of a Dean of a Free Chapel belonging to the King, the King ſhall have the Profits of the Deanery; for 'tis at the King's Pleaſure, whether he will collate a new Dean to it or not †. 'Tis likewiſe held in our *Common-Law* Book, That *a Deanery is a Spiritual Promotion and not a Temporal*, by all the Judges: And if the Nomination and Patronage of a Deanery be at the King's Appointment, or of his Heirs and Succeſſors, and he appoints a Dean; yet it does not ceaſe to be a Spiritual Promotion. The King makes all Corporations of Deans and Chapters here in *England*: And as there are two Foundations of Cathedrals in *England*, the Old and the New, the New being thoſe which *Henry* the Eighth on the Suppreſſion of the Abbies, transform'd from *Abbot* or *Prior* and *Convent* to *Dean* and *Chapter*; ſo there are two ways of creating theſe Deans. For thoſe of the old Foundation were rais'd to their Dignity much like Biſhops: The King firſt iſſuing and granting his *Conge d'Eſlire* to the Chapter to chuſe them; and upon the Election, and the Royal Aſſent had thereunto, the Biſhop confirms him, and gives a Mandate for his Inſtallation. But thoſe of the new Foundation are by a much ſhorter Courſe inſtall'd by Virtue of the King's Letters-Patents without either Election or Confirmation.

* 33 E. 3. Ayd. del Roy. 103. per Thorp.

† Ibid.

The Chapter of a Cathedral Church may be conſider'd in a Two-fold Reſpect, *viz.* either as ſuch in the Biſhop's Life, or elſe as ſuch *ſede vacante*. 'Tis certain, that the Chapter cannot during the Biſhop's Life-time decree or ordain any Thing which has a Relation to any other Perſons than to the Chapter itſelf; becauſe, during his Life-time, the Chapter has no general Juriſdiction: But all the *Canoniſts* do agree, that the Chapter may during the Biſhop's Life make Decrees and Statutes which ſhall bind the Chapter itſelf, and all its Members or *Capitulars*. But yet the Doctors have doubted, Whether Chapters can make ſuch Statutes and Decrees of themſelves without the Biſhop's Concurrence. For as the Biſhop is the Head of the Chapter, it does not ſeem according to Law, that the Body ſhould do any Thing without the Head ‡. But in other Reſpects a Chapter ſeems to be a diſtinct Body, and to have the Dean as its *proximate* Head; and as ſuch the Chapter may of itſelf make Decrees and Statutes. And thus the Chapter is ſometimes in Law diſtinguiſh'd from the Biſhop; and in this Senſe the Biſhop is not ſaid to be a Part of the Chapter, tho' in other reſpects he is the Superiour *. But tho' by the *Canon-Law* a Chapter cannot introduce new Cuſtoms, or make new Statutes, nor alter the ancient Cuſtoms of the Church without the Biſhop's Conſent, if they relate to the whole Clergy of the Dioceſs, or the common State of the Church: Yet it is the receiv'd Opinion and Reſolution of the Doctors that the Chapter may make Decrees to bind themſelves, and do all other Things of leſs Moment, which relate only to the good Eſtate and Government of the Chapter without the Biſhop's Confirmation †: But in all Matters of great Importance which do concern the Advantage and Well-being of the Cathedral Church itſelf, and the Obſervance of ancient Cuſtoms, 'tis neceſſary that the Chapter ſhould have the Biſhop's Conſent, as aforeſaid ‡. And to eſtabliſh the Papal Power on a ſurer Foundation, ſome will have it the Confirmation of the Pope is requir'd. But to what has

‡ X. 3. 10. 4.

* Gloſſ. in c. 7. Clem 1. 3.

† X. 1. 2. 6.

‡ X. 1. 2. 8.

been here ſaid in relation to the Power of the Chapter in making Statutes touching Matters of light Conſequence, as after what Manner the Chapter ought to be aſſembled, or how their daily Diſtributions ought to be made, and the like, *Felinus* urges by way of Objection, that ſince a Chapter has no Juriſdiction either great or ſmall, it cannot make any Law at all, a Law being an Act of Juriſdiction in a very eſſential manner. But then *Felinus* himſelf ſolves this Scruple by ſaying, That tho' the making of Decrees in the Deciſion of Cauſes and touching ſuch Things as relate to Juriſdiction is properly a Matter of Juriſdiction; yet to make a Law or Statute is not a Matter of Juiſdiction, becauſe all Corporations and Bodies Politick may make Statutes in relation to ſuch Matters as do in a particular manner concern themſelves.

A Dean is ſaid to be of the Chapter, unleſs he be a Canon, or there be a Cuſtom that makes him ſuch; for otherwiſe only Canons and Prebendaries do make and conſtitute the Chapter. And the Dean and Prebendaries of a Cathedral Church ought diligently to preach the Word of God not only in their Cathedrals where they live, but even in other Churches of the ſame Dioceſs; and, eſpecially, in thoſe Places where they have yearly Revenues accruing to them; and if they ſhall neglect or omit to do this, they ſhall be puniſh'd by the Biſhop *pro arbitrio*, according to a Book of Canons publiſh'd in the Year 1571. And by the ſaid Canons every Dean ought to be Reſident (at leaſt) four times in the Year at his Cathedral Church, and keep an entire Months Reſidence every time (if poſſible) in preaching the Word of God, and maintaining Hoſpitality, unleſs he ſhall be hindred by great and urgent Cauſes to the contrary, of which he ſhall give Notice to his Biſhop upon every Occaſion and Time of his Abſence. Tho' a Perſon be a Dean *de Jure* as well as *de facto*; yet neither he, nor any other of the Corporation has a negative Voice, but Confirmations and other Grants are good, if they are made by the major Part of the whole Chapter or Corporation. For the Dean and major Part of the Chapter do make the Corporation tho' the reſt diſſent *. Before the Act of Uniformity in *Charles* the Second's Reign, Laymen were made Deans, as the Dean of *Durham*, but this was not common: And it was for this Reaſon that ſome Men were of Opinion, that a Deanary was not a Spiritual Promotion; but now no Man is capable of that Dignity but a Clergyman.

* 33 H. 8. c. 27. 21 E. 4. 27. 15 E. 4. 2. 9 H. 6. 32. 14. H. 8. 29.

A Deanery conſiſts of two Parts, *viz. Officium & Beneficium*; and the *Officium* has two Parts, the one is Dignity and Juriſdiction, and the other is Adminiſtration: But ſome Promotions are mere Adminiſtrations, as that of Prebendaries and Parſons, which are not properly Dignities, becauſe they have not Juriſdiction †, as an Archdeacon and a Dean has, to whom anciently (according to *Lindwood* ‡) the Canons made their Confeſſions; and as to the Cure of Souls, they were Subject to him. A Dean may make a Subſtitute as to Matters of his Juriſdiction, *viz.* for Corrections, Viſitations, and the like; but not as for the other Part of his Office, *viz.* the Adminiſtration: For which Reaſon he may not make a Deputy to confirm Leaſes, and the like *. So that in a *Cathedral Deanery* there ſeems to be firſt a Dignity and Juriſdiction. Secondly, an Office and Adminiſtration; and Thirdly, the Benefits and Profits thereof: Which ſeems very clear, for that a Parſon, Prebendary or the like has not a Dignity, but only the Office or Adminiſtration with the Profits; but a Dean, who has Adminiſtration as others, has alſo Juriſdiction and Dignity. A Dean ought to viſit his Chapter †; and if a Prebendary be made a Dean, the Prebend is void by Ceſſion ‡. The Dean is ſuch a Dignitary in the Church, that the

† 11 H. 4.
‡ Lib. 5. Tit. 16. c. 1. Gl. in v. *Decano* and in v. *Decanum & Capitu.*

* Latch. Rep.

† 5 E. 3. 7.
‡ 5 E. 2. F. Brieff. 800.

And

Canon-Law ſtiles him the *more Honourable Part of the Chapter* ‡: And in a large Senſe a Dean may be rightly ſaid to be the Chief of any that are of the ſame State and Order; and ſo the Canons of the Church of *Conſtantinople*, as being Men of greater Dignity, were by *Honorius* and *Theodoſius* in *Latin* called *Decani* *.

‡ X. 3. 8. 7. x. 1. 6. 18. & ibi Abb. & Gloſſ.

* C. 1. 5. 4.

Whenever the Dean and Chapter confirm any Act, to the end that ſuch Confirmation may be valid, the Dean muſt join with the Chapter in Perſon, and not in the Perſon of a Deputy or Sub-dean only, or in the Perſon of a Proctor, who is a Stranger and not one of the Chapter: For ſuch a Perſon is incapable of being a Dean's Subſtitute or a Proctor to the Dean: And 'tis generally ſaid, that the *Common-Law* will not ſuffer the Members of a Corporation to give their Aſſents by Proxies or Subſtitutes †. In a Compoſition for Tithes a Parſon granted an Annuity to *Battle-Abbey*, and this Grant was confirm'd by the Biſhop, and the Dean and Chapter being Patrons: But by the Deed of Confirmation it appear'd, That the Dean was abſent, and did not put his Seal thereunto, but that the Chapter as his Commiſſary did it for him. And herein it was held, that tho' the Dean might have a Deputy to exerciſe his Juriſdiction, yet that ſuch a Deputy cannot charge the Poſſeſſion of the Church ‡. And when the Caſe was that a Leaſe was made by the free Chapel of *Windſor* under the Common Seal, yet the Dean himſelf was not Party to the Leaſe, but in his Abſence the Deputy: And, to avoid the Leaſe, the Statute of the College was ſhewn, authorizing a Deputy to perform and exerciſe the Dean's Office in all Things; yet the Judges held the Confirmation to be void, becauſe the Deputy had no Authority to confirm the Leaſe as ſhewn by the College Statutes; and this was chiefly on the Expoſition of the Word *Collegium*. For thereby all the Poſſeſſions of the College are not to be underſtood, but only the Scite and Circuit of the College, or the Place of its Situation *. From which Caſe it ſeemingly follows, that if by the Statutes of a Church the Deputy-Dean may confirm Grants, and join in the making of Leaſes, as if the Dean himſelf was preſent, and did the ſame, ſuch Grants and Confirmations ſhall be good.

† 11 H. 4. 64.

‡ Dav. Rep. 47.

* Dyer Rep. 233 b.

As a Deputy-Dean generally ſpeaking cannot confirm, ſo neither can he that is but a meer Commendatory Dean, tho' he may with the Chapter chuſe a Biſhop; becauſe he is only a *Depoſitary*: Yet ſuch Commendatory Dean may be ſued by that Name, and may take the Profits, and exerciſe the Juriſdiction of a Dean; and yet he is not a Dean compleat †. But if a Dean be elected, and before his Conſecration obtains a Diſpenſation to hold his Deanery *in Commendam*, ſuch Dean may well confirm, *&c.* And if he be tranſlated to another Biſhoprick, and after his Election, and before Confirmation obtains a Diſpenſation to hold the ſame Deanery *in Commendam* with his ſecond Biſhoprick, his old Title remains; and Confirmations and other Acts done by him as Dean are as good in Law, as if he had never been made Biſhop ‡. *Jones Rep.* 158 & 187.

† 27 H. 8. 15. 22 Jac. B. R. Noy Rep. 93.

‡ Palm. Rep. 460.

Tho' one that is Dean, be Dean *de Jure* as well as *de Facto*; yet neither he, nor any other of the Corporation has a Negative Voice in the Chapter, but Confirmations and other Grants are good if made by the major Part of the whole Corporation, as aforeſaid: For the Dean and major Part of the Chapter makes the Corporation, tho' the reſt diſſent *. See the 23*d* of *H.* 8. *ch.* 7. But tho' it is here ſaid, that Confirmations and other Grants are good, if they are made by the major Part of the Dean and Chapter; yet as well the other Members conſenting as the Dean muſt be Perſonally preſent to give their Conſents: For 'tis generally ſaid

* 14 H. 8. 29. 21 E. 4. 27. 15 E. 4. 2. a. 9 H. 6. 32.

ſaid, That when a Corporation paſſes any Intereſt, the *Common-Law* will not ſuffer the Members of the Corporation to give their Aſſent by Proctors or Subſtitutes, but that they ought to be *Capitulariter Congregati* in one certain Place; otherwiſe if they be ſcatter'd in ſeveral Places, that which they ſhall do, ſhall not be ſaid to be the Act of the Corporation, but the Deed of them in their ſingle and private Capacity, and ſhall not bind. Yet it was agreed, that the Dean and Chapter are not confin'd to the Chapter-Houſe, but may aſſemble and make their Acts in any other Place, provided it be a Place certain *. And as the major Part of the Corporation muſt give their Conſents to Confirmations and other Acts in one and the ſame Place, ſo they muſt do it at one and the ſame Time, and not ſcatteringly, or on ſeveral Days: For the Conſent of the Chapter or Corporation being expreſſed by their putting their Seal to the Deed of Confirmation or other Act, it ought to be ſet in the Preſence of the major Part; and if the major Part be not then preſent when the Seal is thus put, what is then done is void for want of the Conſent of the major Part of the Chapter; and in ſuch a Caſe the particular Conſents of their Members given after ſhall not make it good. Alſo the Majority of their Members being aſſembled, they ought to give their Voices and Conſents ſingly and diſtinctly, and not in a confus'd and uncertain manner; and when ſuch Conſent is given, it ought to be expreſs'd by ſetting their Seal to the Deed of Confirmation or other Grant †.

* 21 E. 4. 26. 27 Aſſ. 23. Dav. Rep. 48.

† Dav. ut ſup.

When a Dean of a Cathedral makes a Grant or Leaſe of any of his Poſſeſſions, of which he is ſolely ſeiz'd, to bind his Succeſſors, which wants Confirmation, this (as aforeſaid) muſt regularly be confirm'd by the Biſhop and Chapter of the ſame Church, and not by the King, tho' he be Patron of ſuch Deanery. But there is ſome Doubt, Whether the Biſhop's Confirmation be neceſſary to ſuch Grants? And I find it laid down as a Rule in Law, that both the Biſhop and Chapter's Confirmation is neceſſary in all Leaſes and Grants by the Dean, as above-mention'd; and what *Fitzherberts* ſays ‡, That the Biſhop and Chapter are in Law look'd upon but as one Body, ſeems to favour this Opinion: For 'tis reaſonable, that the whole Body ought to conſent to the granting their Poſſeſſions, and not the Biſhop, who is the Head of the Body, ſhould be unconcern'd therein. And likewiſe becauſe the Poſſeſſions of the Dean are ſaid to be derived from, and carv'd out of the Biſhoprick; and the Biſhop *de Jure* is ſaid to be the Patron of the Deanery *; which are all ſtrong Arguments for the Biſhop's Confirmation. Yet I have not met with any Book-Caſe, that expreſly warrants this Opinion laid down by the *Parſons Counſellor* †, but rather the contrary, *viz.* That the Confirmation of the Chapter without the Biſhop is ſufficient to make good the Dean's Grants or Leaſes that need Confirmation ‡: Therefore *Quære*, and ſee *Regiſt. Original.* 230. But if ſuch Deanery be *merely* Donative, then the King's Conſent and Confirmation is to be obtain'd: But whether the King's Confirmation without the Chapter in ſuch Caſe be ſufficient, *Quære.*

‡ Fitz. N. B. Tit. *ſine Aſſenſ. Capituli.*

* 17 E. 3. 40. b.

† Fol. 124.

‡ Dyer Rep. 40. 273. 349 Plowd. 538.

The Dean of *Wells* might anciently have paſſed his Poſſeſſions belonging to his Deanery with the Aſſent of the Chapter, without the Biſhop's Confirmation; and after this the Deanery of *Wells* was ſurrender'd by the Dean thereof, with all the Poſſeſſions thereunto belonging, and ſo diſſolv'd: And by Act of Parliament this Diſſolution was confirm'd, and a new Dean erected; and the Nomination (by Letters Patents) of a new Dean and his Succeſſors given to the King and his Succeſſors. And it was alſo thereby enacted, That the new Dean and his

his Succeſſors might grant, demiſe and part with their Poſſeſſions in the ſame Manner and Form as the ancient Deans might, and uſed to do: And in this Caſe it is not needful to have the Biſhop's Confirmation of a Grant made by the new Dean, but of the Chapter only; for that his Confirmation of the Grants of the old Dean was not neceſſary; neither is the King's Confirmation of the new Dean's Grants neceſſary, becauſe this Deanery (it ſeems) was not a meer Donative before the Diſſolution thereof, and by the Statute the new Deanery is made to be of the ſame Nature as the old Deanery was *.

* Dyer Rep. 273. 1. Rolls Abr. 478.

The *Civil* and *Canon-Laws* chiefly take Notice of three Sorts of Deans only. The firſt were thoſe that were in the Army ſet over ten Soldiers †; and were by another Name, according to *Vigetius* and *Modeſtinus*, in *Latin* ſtiled *Caput Contubernii*. Afterwards the Word *Decanus* was extended to an Eccleſiaſtical Dignity ‡, which included the Arch-Prieſts; who (perhaps) according to their firſt Inſtitution, were ordain'd and appointed to preſide over ten Clergymen, and retain'd the ſame Name, tho' the Number of Clerks in a Cathedral Church was afterwards augmented and increas'd *; and this was called the Dean of a Cathedral or Collegiate Church, as aforeſaid. The third Sort of Dean was he, whom we ſtile a *Rural Dean* †, of whom I ſhall treat under the next Title. There are alſo ſome Deans in *England* without any Juriſdiction; only for Honour ſo ſtiled; as the Dean of the *Royal Chapel*, the Dean of the Chapel of St. *George* at *Windſor*: And ſome Deans there are without any Chapter, yet enjoying certain Juriſdictions, as the Dean of *Croydon*, the Dean of *Battel*, the Dean of *Bocking*, *&c.* In the Cathedral Churches of St. *David* and *Landaff* there never has been any Dean, but the Biſhop in either is Head of the *Chapter*; and in the Biſhop's Abſence, in the Chapter at St. *Davids* and *Landaff*, the Archdeacon.

† C. 12. 27 per tot.

‡ X. 2. 28. 55.

*50 Diſt. c. 68.

† X. 3. 39. 6.

Of Rural Deans and their Offices.

RURAL Deans, according to *Innocentius*, are ſaid to be ſuch Perſons as have ſome certain Offices and Employments in the Church under Biſhops and Archdeacons, and commonly belonging to them in reſpect of Nomination and Appointment; and, therefore, the Admiſſion and Amotion of them do uſually belong to the Biſhop and Archdeacon both, and their Office is Temporary and not Perpetual. But *Joh. Anan.* is of another Opinion, ſaying, That Rural Deans are call'd Arch-Presbyters, or Arch-Prieſts; and being Perpetual, cannot be remov'd without ſufficient Cauſe ſhewn *: And he calls ſome of them by the Name of *Teſtes Synodales*. It was the Buſineſs and Office of Rural Deans to execute and tranſmit the Citations in Eccleſiaſtical Cauſes, as we may fully read and obſerve in *Lindwood*'s Provincial Conſtitutions ‡; and they were to take an Oath every Year, That they would not give a Certificate to any one, unleſs it were on a Citation of the Adverſe Party rightly and duly made at the proper Time and Place.

* 35 Q. 6. 7. x. 2. 21. 7.

‡ Lib. 2. Tit. 1. Cap. 2.

'Tis likewiſe provided by a Provincial Conſtitution, That for the future no Rural Deans ſhall preſume to hear or take Cognizance of any Matrimonial Cauſe, either in order to join or diſſolve a Marriage, on Account of their Office or under a Pretence of any Cuſtom whatever; becauſe the Plea in both Caſes is *de Fœdere Matrimonii*, and concerns the Validity of it †: And, conſequently, they cannot hear Incident Cauſes or ſuch Matters are as Acceſſary thereunto ‡. And as they cannot hear or examine ſuch a Cauſe: So, conſequently, they cannot decide the ſame; becauſe if that is prohibited which is leſs, that is likewiſe *a fortiori* prohibited which is greater *. By the *Canon-Law* Rural Deans cannot preſcribe to have Juriſdiction in Matrimonial Cauſes, either in Regard of their Office, or under any Pretence of Cuſtom, for as they are not Perpetual; and as whatever they do is not done in their own Name, they cannot preſcribe to have Juriſdiction on the Foundation of Cuſtom: Nor have they any Juriſdiction from ſuch as do make or conſtitute them Rural Deans; ſince they do not deſign to give this Power to them. And another Reaſon is, becauſe theſe Rural Deans are generally ignorant and unskilful in the Law.

† X. 4. 24. 1.
‡ X. 4. 20. 3.
* X. 1. 6. 7.
X. 1. 29. 27.

Of Degradation, Depoſition, and Deprivation, &c.

'TIS a great Scandal and Diſgrace to the Church to have wicked and incorrigible Miniſters belonging thereunto; and, therefore, all ſuch Perſons ought deſervedly to be remov'd from thence *, as the unjuſt Steward in the Goſpel was from his Stewardſhip†: And this kind of Puniſhment the *Canoniſts* ſtile by the Name of *Depoſition*, *Degradation* or *Exauctoration*; which is nothing elſe but the removing of a Perſon from ſome Degree, Dignity or Order in the Church; and the depriving him of his Eccleſiaſtical Preferments. But the *Canoniſts* in Strictneſs of Speech make a Diſtinction between Degradation and Depoſition: For the Word Degradation is commonly uſed to denote a Deprivation and Removing of a Man from his Degree; but the Word *Depoſition* properly ſignifies a ſolemn depriving of a Man of his Clerical Orders by the way of a Sentence; and this Puniſhment of Degradation or Depoſition, is ſometimes inflicted by an Eccleſiaſtical and ſometimes by a Lay Judge, according to the *Civil-Law*, tho' only by an Eccleſiaſtical Judge according to the *Canon-Law*.

* X. 5. 1. 24.
† Luk. ch. 16.

Now Degradation or Depoſition in the general Senſe of theſe Terms is Twofold, *viz. Actual* and *Verbal*. The firſt is, when a Man is depriv'd of his Orders, and this is properly called *Exauctoration* or *Degradation*; and, therefore, this can only be executed againſt a Clerk in Holy Orders ‡: But a *verbal* Depoſition, in other Terms called a *real* Degradation, is a Deprivation or Removing of a Man from his Office and Benefice, together and at the ſame time *, or elſe ſeparately †, which (according to the *Canon-Law*) no one can do but the Biſhop alone, and that not without ſome Crime or other alledg'd and prov'd

‡ X. 5. 34. 15.
* X. 3. 41. 14.
† X. 5. 40. 27.

or

or (at leaſt) confeſs'd. For if a Man cannot diſcharge his Office, or ſupply his Benefice as he ought to do (on the Score of ſome Supervening Infirmity) in his own Perſon, he ought to have a Coadjutor aſſign'd him, and ſhall not be depriv'd or depos'd for this *. *Cyril* in his Letter to *John* of *Antioch*, quoted in *Gratian*'s Epitome, gives us ſeveral Inſtances of Biſhop's depos'd, and afterwards reconcil'd or reſtor'd to their former Churches. It has been a Queſtion among the *Canoniſts*, How many Biſhops ought to be preſent and aſſiſting at a Degradation? And 'tis ſaid, That if the Perſon to be degraded be a Biſhop, twelve Biſhops ought to be preſent and intervening thereat: But if he be only a Presbyter, then ſix are ſufficient; and if he be only a Deacon or Sub-deacon, three are enough; and if he be merely a Clerk in the leſſer Orders, then his own proper Biſhop may degrade him. And 'tis to be obſerv'd, That if ſuch Biſhop's diſagree among themſelves in pronouncing Sentence, the major Part of them ſhall be ſufficient to do it, according to the common Opinion of the Doctors. What I ſay of the Number of Biſhops ought to be underſtood, That they only proceed, when, after a *verbal* Depoſition of this Kind, they come to an *actual* Depoſition: But when a *verbal* Depoſition is not made, to the end that an *actual* Depoſition or Degradation ſhould enſue, then his own proper Biſhop alone may *verbally* depoſe or degrade a Clerk. Nay, at this Day by the Council of *Trent*, when the Proceſs tends to an *actual* Degradation, a Biſhop alone, with the Advice of his Parochial Clergy, may degrade him.

* 7 Q. 1. 1. 13. 17. & 18.

By the Papal Law a Leprous Perſon is depos'd from the Adminiſtration of his Benefice, but not from his Benefice it ſelf, on the Account of *grave Scandalum* †: But Abbots render'd unprofitable, and who can not execute their Office according to their Duty, ought to be remov'd entirely from thence, according to the Imperial Conſtitutions of *Valentinian*, *Theodoſius* and *Arcadius*, *touching Judges and ſuch as have the Adminiſtration of the Commonwealth* *. And the *Papal-Law* carries this Matter of Depoſition ſo far, That the Pope may, according to that Law remove even the Emperor himſelf from his Imperial Dignity, if he becomes unprofitable to Church and State, and another ſhall be ſubſtituted in his Room: And he may do the like, if the Emperor be a Tyrant, or an incorrigible Perſon, or a Pagan, a Perſecutor of the Church, or a Perſon guilty of Hereſy, Perjury, and the like Crimes †. Pope *Alexander* the Third lays it down as a Rule in Law, That Clerks making a Judicial Confeſſion, or convicted by legal Proof of certain Crimes, that deſerve Suſpenſion or Deprivation, may be ſuſpended from their Office, remov'd from their Orders, and depriv'd of their Benefices by their own proper Biſhop: And the Abbot obſerves, that ſuch a Suſpenſion or Removal is a perpetual Deprivation. This is the greateſt Puniſhment that can be inflicted in the Eccleſiaſtical Court; and, therefore, it is never inflicted but in Caſes directed by Law ‡, or for ſome very grievous Offence *, which we call *enormous*.

† X. 3. 6. 4.

* C. 1. 26. 3.

† X. 1. 6. 34. VI. 2. 13. 2. 15 Q. 6. 3.

‡ 50 Diſt. c. 6. & 28.

* X. 5. 37. 6. X. 1. 11. 4.

Degradation according to the *Canon-Law* may be effected two ways, *viz.* either *ſummarily*, as by Words; or *ſolemnly*, as by deveſting the Party degraded of thoſe Ornaments and Rites, which were the Enſigns of his Order or Degree. But in Matters Criminal Princes have anciently had ſuch a tender Reſpect for the Clergy, and for the Credit of the whole Profeſſion thereof, that if any Man among them committed any Thing worthy of Death or open Shame, he was not executed or expos'd to publick Diſgrace till he had been degraded by the Biſhop

Biſhop and his Clergy; and thus he was executed and brought to Shame not as a Clerk, but as a Lay Malefactor: Which Regard towards Eccleſiaſticks in reſpect to the Miniſtry, *Ridley* obſerves to be much more ancient than any *Popiſh* Immunity *; and is ſuch a Privilege as the Church in reſpect of ſuch as once waited on the Altar, hath in all Ages been honour'd with.

* Ridley's View, &c. p. 2.c. 2. Sect. 3.

As to *Deprivation*, or what the Canoniſts term a *verbal* Depoſition, it is a Diſcharge of the Incumbent of his Dignity or Miniſtry, on ſufficient Cauſe againſt him alleg'd and prov'd (as aforeſaid); for by the *Canon-Law* this Puniſhment is alſo extended to Dignitaries as well as benefic'd Clerks, that deſerve the ſame †: And 'tis ſometimes in Law call'd a Privation or loſs of the Military Girdle. All the Cauſes of Deprivation may be reduc'd to theſe three Heads, *viz.* To a Want of Capacity, Contempt, and Crimes. But more particularly 'tis evident, that the more uſual Cauſes of this *Deprivation* are ſuch as theſe, *viz.* a mere Laity or want of Holy Orders ‡, according to the Church of *England*, Illiterature, or Inability for the Diſcharge of that Sacred Function, Irreligion, groſs Scandal; ſome heinous Crime, as Murther, Manſlaughter, Perjury, Forgery, *&c.* Villany, Baſtardy, Schiſm, Hereſy, Miſcreancy, Atheiſm, Simony *, illegal Plurality †, Incorrigibleneſs and obſtinate Diſobedience to the approv'd Canons of the Church, as alſo to the Ordinary ‡, Nonconformity, Refuſal to uſe the Book of Common-Prayer, or adminiſter the Sacraments in the Order there preſcrib'd; the Uſe of other Rites and Ceremonies, Order, Form, or celebrating the ſame, or of other open and publick Prayers; the preaching or publiſhing any Thing in Derogation thereof, or depraving the ſame, having formerly been convicted of the ſame Offence *; the not reading the Articles of Religion within two Months next after Induction, according to the Statute †; the not reading publickly and ſolemnly the Morning and Evening Prayers appointed for the ſame Day according to the Book of Common Prayer within two Months next after Induction on the Lord's-Day; the not openly and publickly declaring before the Congregation there aſſembled his unfeign'd Aſſent and Conſent (after ſuch Reading) to the uſe of all Things therein contain'd, or in Caſe of a lawful Impediment, then the not doing thereof within one Month next after the Removal of ſuch Impediment *; a Conviction before the Ordinary of a wilful maintaining or affirming any Doctrine contrary to the Thirty nine Articles of Religion; or a perſiſting therein without Revocation of his Error, or a Re-affirmance thereof after ſuch Revocation; likewiſe Incontinency, Drunkenneſs after Monition ‡, and forty Days Excommunication: To all which we alſo add, Dilapidation; for Dilapidation was anciently a juſt Cauſe of *Deprivation*, whether it was by deſtroying the Timber-Trees, or committing Waſte on the Church-Lands, or by pulling down or ſuffering to go to Decay the Houſes or Edifices belonging to the ſame †, as appears by *Lyford*'s Caſe in *Coke's Rep. pt.* 11. *p.* 40 & 49. as alſo in the Biſhop of *Salisbury*'s Caſe ‡. Conviction of Perjury in the Spiritual Court according to the Eccleſiaſtical Laws, which tho' it be (as aforeſaid) a juſt Cauſe of *Deprivation*, muſt yet be ſignified by the Ordinary to the Patron: So likewiſe muſt that *Deprivation*, which is caus'd by an Incapacity of the Party inſtituted and inducted for want of Holy Orders ‡. It is alſo a juſt Cauſe of *Deprivation*, if an Incumbent neglects or refuſes to take the Abjuration-Oath for three Months after Inſtitution and Induction into a Benefice or Dignity in the Church, Non-payment of Tenths demanded at the Church, or Parſon's Houſe by the Collector *, and not paid then, or

† X. 1. 6. 12. x. 1. 11. 4.

‡ Dyer Rep. 293. 1. And. 16. 5. Cok. 102.

*31 Eliz. c. 6. 2 H. 4. 37.

† Paſch. 13. Car. 1. B. R.

‡ Crok. Jac. 37.

* 1 Eliz. c. 2.

† 13 Eliz. c. 12.

*14 Car. 2. c. 4.

‡ X. 3. 1. 14. Brownl. Rep. 37.

† 29 E. 3. 16. 20 H. 6. 46. 2 H. 4. 3.

‡ Mich. 12. Jac. B. R.

‡ Dyer Rep. p. 292. :

*26 H. 8. c. 3.

or within forty Days after, and the Biſhop certifying this Default into the Exchequer.

But no one ought to be depriv'd of his Benifice, or depos'd of his Orders in the Church, till ſuch Time as Cognizance has been had and taken of the Cauſe before ſome competent Judge *; nor ought any one to be depos'd, unleſs it be for notorious Offences, and enormous Sins †; nor ought any one to be depriv'd or depos'd, if the Witneſſes produc'd againſt him for his Conviction do only depoſe touching their Credulity ‡. But if a Perſon ſhall, after ſuch Depoſition, Suſpenſion or Degradation, celebrate Divine Service in the Church, and ſhall not deſiſt on an Admonition to the contrary, he ſhall be excommunicated, and cut off from the Body of the Church *. In the Times of *Popery* here in *England* Marriage in the Incumbent was held to be a juſt Cauſe of Deprivation, which I had forgot to mention in the aforegoing Paragraph.

* X. 2. 1. 1.

† X. 5. 1. 18.

‡ X. 5. 1. 21.

* X. 5. 27. 2.

In all Cauſes of Deprivation, where a Perſon is in actual Poſſeſſion of an Eccleſiaſtical Benefice, theſe Things muſt concur, *viz.* *Firſt*, The Perſon muſt be cited or admoniſh'd to appear. *Secondly*, A Charge muſt be given againſt him by way of Libel or Articles, to which he is to give an Anſwer. *Thirdly*, A competent time muſt be aſſign'd for Proofs and Interrogatories. *Fourthly*, The Perſon accus'd ſhall have the Liberty of Council to defend his Cauſe, to except againſt Witneſſes, and to bring legal Proofs againſt them: And, *Fifthly*, There muſt be a ſolemn Sentence read by the Biſhop, after hearing the Merits of the Cauſe, or Pleadings on both ſides. And theſe are the Fundamentals of all Judicial Proceedings in the Eccleſiaſtical Courts, in order to a Deprivation: And if theſe Things be not obſerv'd, the Party has a juſt Cauſe of Appeal, and may have a Remedy in the Superiour Court.

Of Degrees of Kindred.

A Degree in reſpect of Kindred is nothing elſe but that Diſtance of Relation which one of the Kindred bears unto another; or according to *Joh. Andreas* it is ſaid to be a Habitude or Meaſure of the Diſtance of Perſons, whereby we know in what Diſtance of *Agnation* or *Cognation* (for thus the *Civilians* and *Canoniſts* diſtinguiſh Kindred) two or more Perſons differ from each other. And they are called Degrees *ad ſimilitudinem Scalarum*, that is to ſay, after the manner of Steps or Rounds of a Ladder, whereby we climb up to high Places, and go down again by this Means, as from one Step to the next. By the *Civil* and *Canon-Law* there are ſo many Degrees in the Line of *Aſcendants* and *Deſcendants* as there are Perſons, except one. Therefore the Son is ally'd to the Father in the firſt Degree, the Nephew, or Grandſon, to the Grandfather in the ſecond Degree, and the Great Grandſon to the Great Grandfather in the third Degree, and ſo onwards *ad infinitum*. But in an equal Collateral Line, that is to ſay, when each Perſon is diſtant from the common Stock in the ſame Degree; then in whatever

Degree the one is diſtant from the common Stock, in the ſame Degree of Kindred they are both equally diſtant from each other. But in the unequal Collateral Line, that is to ſay, when one is diſtant from the common Stock in a more remote Degree than the other; then in what Degree ſoever he is remoter diſtant from the common Stock, in the ſame Degree they are diſtant from each other: Nor is there any Diſpute in reſpect of theſe Rules among the ancient Profeſſors of the *Canon-Law*, tho' *Hoſtienſis* ſeems to depart from this third Rule in a certain Caſe; and *Duaren* endeavours to defend his Opinion. But notwithſtanding what is ſaid, Degrees are computed one way by the *Civil-Law* and another way by the *Canon-Law*; the *Civil-Law* only eſtabliſhing one Rule for theſe Lines, *viz.* *Quod quot ſunt Perſonæ, demptâ unâ; tot ſunt Gradus.* But in *Popiſh* Countries, where the *Canon-Law* prevails more than it does here in *England*, the Computation of Degrees in all Matrimonial Cauſes is wont to be made according to the Rules of that Law, becauſe it brings Griſt to the Mill by way of Diſpenſations. But between Aſcendants and Deſcendants neither the *Civil* nor *Canon-Law* make any Difference in the Computation of Degrees. Thus far of Degrees in Point of Matrimony and Succeſſion to an Inteſtate's Eſtate.

But there is another Diſtinction of Degrees, which we call *Eccleſiaſtical* and *Scholaſtical* Degrees: The firſt is ſaid to be in the Church, and the ſecond in ſome Univerſity or School of Learning. And in this reſpect a Degree is defined to be a State or Dignity therein; becauſe the Perſons do Step by Step proceed and aſcend unto ſuch State or Dignity *: And among *Eccleſiaſtical* Degrees in the *Romiſh* Church there are the greater and leſſer Degrees of Orders, as hereafter mentioned under the Title of Orders.

*D. 50. 4. 11. 59. Diſt. per tot. C. 2. 7. 13.

Of Denunciation, and the ſeveral Kinds thereof.

HAVING already under the Title of *Accuſation* obſerv'd, That there are three Ways of Proceeding in Criminal Cauſes, *viz.* By Accuſation, Denunciation and Inquiſition, according to the *Civil* and *Canon-Law*, I ſhall here under this Title treat of the ſecond Method of Proceeding *Judicially* in Criminal Cauſes, *viz.* By *Denunciation*. Now *Denunciation* is Threefold, *viz.* *Judicial*, *Evangelical* and *Canonical*. And again *Judicial* Denunciation is diſtinguiſh'd into two Parts, *viz.* *Publick* and *Private*. *Publick* is that, when ſome Crime is deduc'd and brought into Court *ad Publicam Vindictam* on the Report and Preſentment of ſome Officer or other Private Perſon; and the Judge on ſuch previous Report or Denunciation afterwards makes an Enquiry into ſuch Crime; and, according to *Andreas de Iſerne* *, this Kind of Denunciation is like unto Accuſation, only with this Difference, *viz.* That the *Denunciator* does not inſcribe himſelf, nor make himſelf a Party in Judgment as the *Accuſer* does †; nor is a Monition required in this Denunciation, according to *Speculator* ‡. *Private* Judicial Denunciation is that, which is made *ad Privatum Intereſſe*, and

* In Conſtit. v. *literas*.

† Salyc. in l. 7. C. 9. 2. prin.

‡ Tit. de Denunc.

and for the Advantage of a Private Man; as when any Child or Servant is under Oppreſſion from his Father or Maſter; and it is the ſame Thing in every other Perſon oppreſs'd by one that is more Powerful than himſelf, and in miſerable Perſons aggriev'd: For they may denounce or preſent this Matter *Judicially* in order to have Relief from the Judge.

The ſecond Kind of Denunciation whereby we come at Judicature in a Criminal Cauſe, is that which the Lawyers call *Evangelical*; and this is very remarkable, becauſe many Inconviencies are thereby repair'd, which are deſtitute of the Aid of the *Civil-Law*; and according to the *Abbot*, it is ſo ſtiled, becauſe it had its Riſe and Beginning from the Goſpels of St. *Matthew* * and St. *Luke* †. "If thy Brother ſhall "treſpaſs againſt thee, go and tell him his Fault between thee and "him alone; and if he ſhall hear thee, thou ſhalt gain thy Brother. "But if he will not hear thee, then take with thee one or two more, "that in the Mouth of two or three Witneſſes every Word may be "eſtabliſh'd. And if he ſhall neglect to hear them, tell it unto the "Church." And this is *Evangelical* Denunciation, whereby we come at the Church, or the Evangelical Judge, by ſetting forth in a Libel or Articles, after what manner he has offended, and acted contrary to good Conſcience, whereupon after two Admonitions let him denounce him to the Church, that the Church may correct and reform him from his Sin; and, conſequently, compel the Reſtitution: And he ought to declare in his Articles, that the Offender has had two previous Admonitions according to the Goſpel, becauſe otherwiſe according to *Speculator*, this Denunciation is not valid. To this kind of Denunciation every Perſon is admitted, tho' he be infamous; unleſs he perſeveres and continues in his Crime. But yet no Perſon is oblig'd to this kind of Denunciation, but as he is bound to other Acts of Piety: For the principal Effect thereof is the Salvation of a Man's Soul; and as ſuch it does require a ſolemn Order and Form of Law.

* Ch. 18. v. 15. 16. 17.
† Ch. 17. v. 3. 4.

The third Kind of *Denunciation* is what we call *Canonical*, becauſe it was introduc'd by the Canons of the Church; and this is alſo Twofold, *viz. Special* and *General*. The firſt is that which is made by him, whoſe Intereſt it is to have a good Parſon of his Pariſh, a good Subject, Pariſhioner, and the like, and this is only made *propter proprium Intereſſe*, *viz.* to the end that ſome Perſon or other be remov'd *a Beneficio* *; becauſe a Right accrues to me in ſuch a Benefice; and herein three Monitions, or a peremptory Citation, is required. A *general* Canonical Denunciation is that which is made touching ſuch a Matter as properly belongs to the Eccleſiaſtical Court, *viz.* For that a Subject denounces his Superiour or ſome criminal Prelate for Male-Adminiſtration, a wicked Life, and the like; or ſome that have been lawfully join'd together in Matrimony †. And herein a *trina Monitio*, or a peremptory Citation is neceſſary; and the Judge herein does not proceed, unleſs it be made in an Eccleſiaſtical Matter or Cauſe. As when two Perſons are willing to contract Matrimony, and a third Perſon denounces an Impediment of Conſanguinity to the Church, or any other the like Impediment ‡. But no one is obliged to denounce another to his own Diſadvantage, unleſs the Good of the Community be like to ſuffer by concealing his Crimes; as in the Caſe of High-Treaſon, and the like. For a Son is not bonnd to denounce his Father; nor a Wife her Husband, unleſs the Neceſſity of the State requires, or the Perſon has taken an Oath to denounce all Crimes committed within ſuch a Diſtrict, as Churchwardens ſwear to do.

* X. 1. 27. 1. X. 5. 3. 31.
† X. 4. 2. 13. X. 4. 3. 3.
‡ X. 2. 1. 13.

Of

Of Diffamation or Defamation, and the Cognizance thereof.

Iffamation, or *Defamation*, properly ſo called, is the uttering of reproachful Speeches, or contumelious Language of any one, with an Intent of raiſing an ill Fame of the Party thus reproached; *Defamare eſt in malâ famâ ponere*, according to *Bartolus* *: And this extends to *Writing*, as by defamatory Libels; and alſo to *Deeds*, as by reproachful Poſtures, Signs and Geſtures. See *Lindwood* †. And for the moſt Part it proceeds of *Malice*, implying either Matters of *Crime* or *Defect*; ſo it generally aims at ſome Prejudice or Damage to the Party defam'd. Whatever Cognizance the Temporal Laws of this Realm do take of Defamations by Virtue of Prohibitions and Actions on the Caſe; yet it will not be deny'd, but that the Cognizance, when they are duly proſecuted, properly belongs to the Eccleſiaſtical Court; eſpecially, where the Matter of the Defamation is *merely Eccleſiaſtical*. For 'tis recorded by an ancient Statute of the Realm ‡, that Defamation ſhall be try'd in the Spiritual Court. And again it is ſaid *, *That Prelates ſhall correct this Crime by Corporal Pennance, the King's Prohibition notwithſtanding:* But if the *Offender will redeem the Pennance with Money, the Prelate may receive the Money, tho' the King's Prohibition be ſhewn.*

By the Preamble alſo of the Statute for Citations †, 'tis plainly inferr'd, That Defamations belongs to the Cognizance of *Eccleſiaſtical Juriſdiction*; provided they be duly proſecuted according to Law. It likewiſe appears by the Books of the Common-Law throughout the Arguments made in the great Caſe of *Prohibitions*, in the Time of King *Henry* the Seventh ‡, That the Suit of Defamation does hereunto belong. For there both by the *Serjeants* that oppos'd the *Conſultation*, as well as others, and by the *Judges* that granted the *Conſultation*, it was yielded that the Puniſhment of *Slander* or *Defamation* did appertain to the Spiritual Law, if the Original Cauſe was Defamation. And whereas there is a Provincial Conſtitution in *Lindwood*, that decrees a Slanderer or Defamer of another to be *ipſo facto* excommunicated, this is allow'd by a *Conſtitution* in the Regiſter *, to belong to the Eccleſiaſtical Court: And 'tis there added to this effect, *viz. Si in Cauſâ Diffamationis ad pœnam Canonicam imponendam agatur, tunc ulterius licitè facere poteritis, quod ad forum Eccleſiæ noveritis pertinere, prohibitione noſtrâ non obſtante.*

A Perſon ſued another in a Cauſe of Diffamation in the Eccleſiaſtical Court †, and failing in his Proofs, the Defendant was abſolv'd, and the Plaintiff condemn'd in Expences of Suit to him. But the Plaintiff to hinder the Execution of the Sentence, and to eſcape without the Payment of thoſe Expences, procur'd a Prohibition: Yet, upon debating the Matter, a *Conſultation* was herein alſo awarded. So we ſee, that both the *Principal* and

* In l. 5. D. 30. 1.

† Lib. 5. Tit. 17. C. 1. v. *Quocunq; in* Gloſſ.

‡ Circumſp. agat. 13 E. 1.

* Artic. Cler. 9. Edw. 2. cap. 4.

† 23 H. 8. c. 9.

‡ F. 12. H. 7. fol. 22.

* Reg. p. 49. a.

† Reg. p. 51. a.

and the *Acceſſary* Cauſe to be of Eccleſiaſtical Cognizance. But touching Diffamation, for which a Suit is commenc'd in the Eccleſiaſtical Court, it was reſolv'd, That the Matter muſt be merely Spiritual, and determinable only there: For if it concerns any Matter, which is determinable at the Common-Law, the Eccleſiaſtical Judge has not Cognizance thereof ‡. *Brook* in his Abridgment of the Law * ſeems to ſay, That no Diffamation at all is of Eccleſiaſtical Cognizance, and a Book-Caſe in *Henry* the Fourth's Reign not thoroughly conſider'd gave Occaſion to this great Miſtake: But the Truth is, that by that Caſe it is only meant, That ſuch Diffamation as ariſes on a Temporal Matter is not of Eccleſiaſtical Cognizance; which is the firſt Exception of the General Rule ſet down in the Statute of *Circumſpecti agatis*; where 'tis ſaid, That Diffamation ſhall be try'd in the Spiritual Court. And that the ſaid Caſe is to be reſtrain'd to ſuch Diffamation, will plainly appear to him that conſiders the Scope of *Hangford*'s Argument †. The Vicar of *Saltaſh* had given an Oath before the Pope's *Collector* in Confirmation of an Obligation made by him. The Dean of *Windſor* ſued the Vicar before the *Collector*, *pro Læſione fidei*; and hereupon the Vicar purchas'd a Prohibition. *Hangford* in Maintenance of this Prohibition argued, *That the Perjury could not be ſued in the Eccleſiaſtical Court, becauſe it aroſe on a Temporal Matter:* Adding, for Proof of his Argument, *That he himſelf had a Prohibition on the like Reaſon ruled for him, and againſt the Archbiſhop of* Canterbury ‡, *par Attachment ſur Prohibition* &c. *de ceo que il ſuiſt en Court Chriſtian, pur Diffamation.* But the Matter was not then ruled againſt the Archbiſhop *ſimply* for ſuing Diffamation there, but for ſuing of ſuch a kind of Diffamation. For elſe this would not have fitted the Purpoſe of *Hangford*'s Argument: Becauſe it being his Buſineſs to prove that a *Læſio fidei* ariſing on a Temporal Cauſe might not be ſued in an Eccleſiaſtical Court, he could make no Colour of that Aſſertion or Argument of his, by alledging of a Judgment, that no Diffamation at all might be proſecuted there, ſince there is not the like Reaſon. And, therefore, as the *Læſio fidei* aroſe upon a Temporal Cauſe, ſo did the Diffamation there mentioned; for which a Prohibition lay without a Conſultation.

‡ Cok. 4. Rep. p. 20.

* Tit. *Conſultation*. n. 2. & alibi.

† M. 2. H. 4. fol. 15.

‡ H. 14. E. 3.

That Diffamatory Words touching a Temporal Cauſe may not be ſued in the Eccleſiaſtical Court, we have alſo Prohibition in the Regiſter *, without any Conſultation granted. For whereas one gave Evidence in an Inquiſition made by the King about his Exchange at *York*: And the Party being affected therewith, ſued the Witneſs (for diffaming him) in the Eccleſiaſtical Court; and hereupon the Witneſs brought a Prohibition, becauſe the Matter was a Temporal Cauſe. And 'tis likewiſe enacted by a Statute of the Realm †, that a Prohibition ſhall lye, if a Man be ſued in the Eccleſiaſtical Court for Diffamation; becauſe he has indicted another. There is alſo another Reaſon, why ſome Diffamation may not be ſued in an Eccleſiaſtical Court, *viz.* when an Action lies at the Common-Law for it: As where a Man brings an Action of Treſpaſs for Goods taken away ‡; and the Defendant hereupon ſues him in the Eccleſiaſtical Court for Diffamation. Here the Plaintiff may pray a Prohibition; becauſe the Plea in Court Chriſtian was commenced, whilſt the Suit is pending at Common-Law; and a Prohibition lies. So if I am robbed, and do ſpeak of him that robbed me before others, whereupon he ſues me in the Spiritual Court of Diffamation, I may have a Prohibition, becauſe I may have an Appeal of Robbery at the Common-Law. And thus in the Book of *Entries* * we have ſeveral Preſidents of Prohibitions granted in favour of ſuch as are

* Fol. 42. b.

† 1 E. 3. Stat. cap 11.

‡ P. 18. E. 4. fol. 6.

* Tit. Prohibition.

profecuted in the Eccleſiaſtical Court for Diffamation, when they have ſued Men in the Temporal Courts for forging of Evidences, *Mayhem*, *&c.*

One libelled againſt another in the Eccleſiaſtical Court, for ſaying, *That he was a Drunkard, or a drunken Fellow, &c.* And by the Opinion of the whole Court, a Prohibition was granted for ſuch Words †. *Cuckow*'s Caſe. So if a Man be called *Thief*, *Traytor*, or the like, whereon no Suit lies for the Principal in the Eccleſiaſtical Court, but at the Common-Law, and the Slanderer be ſued for the ſame in the Eccleſiaſtical Court, a Prohibition lies. But if a Man calls a Woman *Bawd*, for which a Suit lies in the Spiritual Court, and alſo at the Common-Law; there if the Suit be for Slander or Diffamation in the Eccleſiaſtical Court, no Prohibition lies, becauſe the Party has the Election to ſue in which Court ſhe pleaſes. Again, if a Woman be defamed in her Reputation, whereby ſhe is hindred in her Marriage *, ſhe may either ſue at the Common-Law for Damage †, or in the Spiritual Court for Recantation, provided the Diffamation be of a Spiritual Nature ‡. Thus if a Man calls a Woman *Whore*, or defames her in like Manner, for which a Suit lies againſt the Party in the Eccleſiaſtical Court, no Prohibition lies in the Caſe, becauſe the Suit there is for a Diffamation of a Spiritual Kind. But it is, *laſtly*, to be obſerv'd, That if a Man ſpeaks any Words, for which no Suit lies at the Common-Law, and the Words are not ſuch as concern any Thing whereof the Eccleſiaſtical Court takes Cognizance: I ſay, that it ſeems in ſuch a Caſe, if the Suit be in the Spiritual Court for Slander, as for Reproachful Words, and the like, a Prohibition lies; as for calling a Man *Knave*, *Rogue*, and the like; or Woman *Queen* *, *Jade*, and the like, thro' the Uncertainty thereof †. But it has been reſolv'd at the Common-Law, that a *Conſultation* ſhould be awarded on a Prohibition brought in a Caſe, where a Woman was called a *Welch Jade*; becauſe in the Spiritual Court a *Jade* is known and taken for a *Whore*; and that the Common-Law will give Credit unto the Spiritual Court, eſpecially after two Sentences in that Court ‡.

† Jones Rep.

* Crok. Rep. pt. 3d.

† Poph. Rep.

‡ Crok. Rep pt. 3d.

* Jones Rep.

† Latch. Rep. Winch. Rep.

‡ Crok. Rep. pt. 3d.

By the *Civil-Law* the Perſon defam'd had his Election in all Cauſes, whether he would proſecute the Defamer *ad vindictam publicam*, or *ad privatam Intereſſe*: The former whereof was made Choice of, when the defam'd aim'd more at the Defamer's Shame than his own Intereſt; and choſe rather to reduce him to a Recantation, than augment his own Caſh by the Diminution of his own Credit *. The other way of Proceeding, *viz. ad privatum Intereſſe* was choſen by ſuch defam'd Perſons as valu'd their Credit at a certain Rate, and choſe rather a Pecuniary Compenſation, than an unprofitable Recantation, aiming more at their own private Satisfaction than the Defamers Publick Diſgrace †. But both of theſe the Perſon defam'd could not have; for having determin'd his Election, he was to content himſelf therewith: But having obtain'd a Sentence againſt the Defamer for his Recantation in a Suit *ad vindictam publicam*, he might poſſibly have in lieu thereof a Pecuniary Recompence by way of *Commutation*. The Proſecution *ad vindictam publicam* was left to the Determination of the Eccleſiaſtical Juriſdiction; and the other to the Cognizance of the Temporal: Much in conformity to what the Laws of this Realm ſeem to ſay, *viz.* Where the Proſecution is merely for puniſhing Sin and ill Manners, and no Money demanded, there the Spiritual Court ſhall take the Cognizance of Diffamation: But when Money is demanded in Satisfaction of the Wrong, there the Temporal Court ſhall have Juriſ-

† D. 42. 1. 13.

Juriſdiction, eſpecially if the Defamer undertakes to juſtify the Matter, or the Words do expreſs or imply a Crime belonging to the Cognizance of the Common-Law. Theſe Actions of Diffamation are of a higher Nature than *primo Intuitu*, they ſeem to be (a Man's good Name being Equivalent unto his Life) the *Civil-Law* therefore ſtiles them *Actiones Præjudiciales*, that is to ſay, ſuch as draw leſſer Cauſes to them, but themſelves are drawn of none.

The Method of Proceeding in a Cauſe of Diffamation, when the Perſon defamed ſues for Defamatory Words contain'd in a famous Libel is as follows, *viz.* In this Caſe not only the general and uſual Article is to be inſerted in the Libel, which is common in a Cauſe of Diffamation, *viz.* That the Defendant on ſuch a Day, and in ſuch a Place utter'd ſuch Words, *viz.* the Words contain'd in ſuch *famous* Libel, *&c.* but alſo another ſpecial and particular Article, *viz.* That the Defendant did on ſuch a Day, and in ſuch a Place, write and publiſh, or procur'd to be written or publiſhed a certain *infamous* Libel to theſe Preſents annex'd, if the Plaintiff has the ſaid Libel in his Poſſeſſion; if not an Article containing the Words following, or other Words in effect like unto them, and in this Place the Defamatory Words ought to be inſerted, which are contain'd in ſuch *famous* Libel: Or if the Perſon has a true Copy of the ſaid *famous* Libel, then this Copy is to be annex'd to the Libel given, exhibited in this Cauſe of Defamation (theſe Words being added, *viz. Tenoris Schedulæ preſentibus annexæ, quam pro hic lect' ad inſert' haberi petit*, &c.) And if the Plaintiff ſhall prove his Intention, ſuch as defame Perſons after this manner ſhall be puniſh'd in a more grievous way than ſuch as only defame Perſons by Words.

Of Dignities in the Church.

A *DIGNITY* is taken in a Twofold Senſe, *viz.* largely and ſtrictly. In a large Signification of the Word it is a kind of Preheminence in Point of Degree; and in the *Canon-Law* it includes a *Perſonatus*: But when ſtrictly taken it is uſed for a Biſhoprick, or any other Superiour Promotion in the Church; and the enſuing Perſons are ſaid to have a Dignity therein, *viz.* Archbiſhops, Biſhops *, Archdeacons, Abbots †, Priors Conventual ‡, and Biſhop's Officials ‖; and in this Senſe a Dignity is underſtood according to its Primæval Inſtitution, and according to a Cuſtom obſerv'd in that Behalf. A Dignity is firſt known from the Adminiſtration of Eccleſiaſtical Affairs, as being cloath'd and veſted with Juriſdiction *; and this is true, when the Adminiſtration is aſſign'd to the Dignitary *in perpetuum*; but 'tis otherwiſe, if it is only aſſign'd and granted to him for a Time. *Secondly*, It is known from the Name and Preference which the Dignitary has *in Choro & Capitulo* †, as Archdeacon, *&c.* For of *Common Right* an Archdeacon has no Juriſdiction, nor has he any Adminiſtration in the Affairs of the Church. And, *Thirdly*, From the Cuſtom of the Place where ſuch Dignity ſubſiſts.

* 54 Diſt. 20. *ordo Epiſcopa.*
† X. 1. 7. 2.
‡ Inn. in c. 28. x. 3. 5.
‖ Clem. 1. 2. 2.
Ibid.
*89 Diſt. c. 2.
† X. 1. 4. 6.

12 Dist. c. 7. ſubſiſts ‡ : Since Eccleſiaſtical Dignities are for the moſt Part according to the Cuſtom of the Place, which ought to be regarded. *Innocentius* obſerves, that a *Dignity* and a *Perſonatus* do not differ in Subſtance, unleſs there be a local Cuſtom to the contrary : But the Archdeacon is of a contrary Opinion, ſaying, That a Dignity is the Adminiſtration of Eccleſiaſtical Affairs, as ſuch Adminiſtration is veſted with Juriſdiction ; but that a *Perſonatus* is a certain Kind of Prerogative in the Church without any Juriſdiction at all belonging to it ; as becauſe the Perſon has an Honourable Seat or Stall belonging to him in the Choir above others, or ſomething like unto this. In the * X. 1. 2. 8. *Decretals* * the Words *Perſonatus*, *Dignitas* and *Officium* are all of them ſometimes taken for Synonymous Terms † ; whereby the ſame Of- † VI. 1. 6. 1. fice is called a Dignity and a *Perſonatus:* But an Office, according to the Archdeacon, is the Adminiſtration of Eccleſiaſtical Affairs without any Juriſdiction or Stall in the Choir, as we find by an Example in a Sacriſt or Treaſurer, which are not Dignitaries in the Church of *Common Right*, but only by Cuſtom. But theſe Diſtinctions (I think) are not prov'd by any certain Law ; and, therefore, we ought to believe, that theſe different Terms have had their Riſe rather from a Variety or Diverſity of Places than any Thing elſe : For in many Places a Dignity is called a *Perſonatus* ; and in ſome Places every Benefice with a Cure of ‡ X. 1. 6. 54. Souls is in *Latin* ſtiled *Perſonatus* ‡. Now for further Explication of the Premiſes 'tis to be obſerv'd, That where a Name is impos'd on a Benefice by Law, which ſounds as a Name of Dignity, ſuch Benefice ſhall be deem'd a Dignity ; and in Perſons Inferiour to a Biſhop the Law does not impoſe the Name of a Dignity in Point of Sound, unleſs it be on Archdeacons and Arch-Presbyters by reaſon of the Juriſdiction and Preheminence, which they have over other Perſons ; and eſpecially over their Subjects and Eccleſiaſtical Perſons, as it expreſly appears in * X. 1. 23. the Titles quoted in the Margin *. Yea, tho' Archdeacons ſhould have X. 1. 24. no Juriſdiction according to Cuſtom ; yet in reſpect of the Name, it has the Sound of a Dignity.

Whenever the proper Name alone of a dignify'd Perſon is *ſimply* expreſs'd in any Grant or Legacy given, ſuch Grant or Legacy is deem'd to be made to his own proper Perſon in an individual Capacity : But 'tis otherwiſe, according to ſome Men's Opinion, if his proper Name and the Name of his Dignity be therein expreſſed together ; or if the Name † Bald. Conſ. of the Dignity be therein expreſs'd alone †. As when 'tis ſaid *I give or* 321. N. 7. *grant to* A. B. *all my Eſtate in* London. Nothing paſſes hereby to him as a Biſhop, tho' he be Biſhop of *London:* But if I ſay, *I give or grant unto* A. B. *Biſhop of* London, *all my Eſtate in* London, ſome think that the Biſhop of *London*, as Biſhop of *London*, and his Succeſſors, have hereby a Grant made to them. But I think, that in this Caſe theſe Words, *Biſhop of* London, are only Words of Demonſtration ; and do not give him any Thing as Biſhop, without the Addition of *his Succeſſors*. But when 'tis ſaid, *I give or grant to the Biſhop of* London, *all my Eſtate in* London, according to the *Civil* and *Canon-Law* theſe Words *his Succeſſors* need not be expreſs'd. All the greater Dignities in the Church, as Biſhopricks, Archbiſhopricks, Abbacies, and the like, ought upon a Vacancy to be full of a Paſtor within three Months, otherwiſe the Power of chuſing devolves from ‡ X. 1. 6. 41. the proper Electors unto the next Superiour ‡ : But according to the *Lateran* Council, 'tis well enough, if other Benefices and inferiour Dignities be conferr'd within ſix Months, whether it be by * X. 3. 8. 2. Election or Collation *.

Of

Of Dilapidation, and the Puniſhment thereof.

DILAPIDATION is the Incumbent's ſuffering the Chancel or any other Edifices of his Eccleſiaſtical Living to go to Ruin or Decay, by neglecting to repair the ſame: And it likewiſe extends to his committing or ſuffering to be committed any wilful Waſte in or upon the Glebe-Woods, or any other Inheritance of the Church. Againſt which the Provincial Conſtitutions in *Lindwood* * do make ſome Proviſion, tho' in Truth the Canon there rather provides as to a Satisfaction for, than a Prevention of ſuch Dilapidations. But the *Canon-Law* is expreſs and full in all reſpects relating to this implicit Sacrilege; nor does the Cuſtom of *England*, or the Common-Law, leave the Church without ſufficient Remedy in this Caſe, tho' it poſtpones the Satisfaction of Damages for Dilapidations to the Payment of Debts, as the *Canon-Law* prefers it to the Payment of Legacies. By a *Legatine* Conſtitution alſo in *Lindwood* † it is enacted, That all ſuch Eccleſiaſtical Perſons as are Benefic'd do take eſpecial Care that from Time to Time they ſufficiently repair the Dwelling Houſes and other Edifices belonging to their Benefices, as often as Need ſhall ſo require: Unto which Duty they were frequently and earneſtly to be exhorted and admoniſh'd, as well by their Dioceſans as Archdeacons. And if they ſhall for the Space of two Months next after ſuch Admonition neglect the ſame, the Biſhop of the Dioceſs may from thenceforth cauſe it to be done effectually at the Parſon's Charge, out of the Fruits and Profits of his Living, taking only ſo much, and no more, as may ſuffice for ſuch Repairs. And the Chancels of Churches are to be repair'd in the like manner by ſuch as are oblig'd thereunto. And as to Archbiſhops, Biſhops, and other Inferiour Prelates, they are by the ſaid Conſtitution enjoin'd to keep their Houſes and Edifices in good and ſufficient Repair *ſub Divini Juditii atteſtationi*, that is to ſay, under a Sentence of eternal Damnation at the laſt Day of Account ‡, when the Sheep ſhall be ſeparated from the Goats.

An Inhibition was iſſued out of the Court of *Chancery* to the Biſhop of *Durham*, by Order of the Parliament in *Edward* the Firſt's Reign, for waſting the Woods belonging to that Biſhoprick: And we read, that the Archbiſhop of *Dublin* was fined Three hundred Marks for diſforeſting a Foreſt belonging to his Archbiſhoprick. And we likewiſe find by ſeveral Books of the Common-Law, that a Biſhop, and the like, waſting the Lands, Woods or Houſes of his Church may be depos'd or depriv'd by his Superiour *. And if any Parſon, Vicar, *&c.* ſhall make any Conveyance of his Goods, in order to defraud his Succeſſor of the Remedy in caſe of Dilapidations, it is provided in that Caſe by a Statute of the Realm †, that the Spiritual Court may in like manner proceed againſt the Grantee, as it might otherwiſe have done againſt the Executors of the Incumbent deceas'd, or his Adminiſtrators: And ſuch Grants made to defraud any Perſons of their juſt

* Lib. 3. Tit. 27. C. 1. Gloſſ.

† Othobon. Tit. 17.

‡ Gloſſ. in v. *ſub Divini.* Othobon. Tit. 21.

* 20 H. 6. 46. a.

† 13 Eliz. c. 10.

‡ 13 Eliz. c. 5. Actions are alſo render'd Void by a later Statute ‡. It is alſo enacted by a Statute of the *14th Eliz. Cap.* 11. That the Moneys recover'd upon Damages for Dilapidations ſhall be expended in and upon the Houſes, *&c.* dilapidated: So that it ſeems, that Actions on the Caſe grounded on the Statute as well as Common Law of *England* have been brought in this Caſe at Common Law; and Damages recover'd thereby.

By the Gloſs on the aforeſaid Conſtitution it is inferr'd, That a Parſon may be guilty of Dilapidations, or of a Neglect in that Kind, two ſeveral ways, *viz.* either by not keeping the Edifices in good Repair; or elſe by not repairing them when they are gone to Ruin and Decay. But that Conſtitution chiefly relates to the Manſion-Houſes of all Eccleſiaſtical Benefices, and that not only of all Parſonages and Rectories, but alſo of all Biſhopricks and Prebends, and likewiſe to the Houſes of all other Perſons having Eccleſiaſtical Livings; but not ſpecially (by the Words of this Conſtitution) to their Farm-Houſes, tho' they are alſo by the *Canon-Law* provided for in Caſe of Dilapidations. And ſuch as neglect the Reparations aforeſaid may be preſented and convicted thereof before the Dioceſan, who has Power to ſequeſter the Fruits of ſuch Benefice for the Reparations aforeſaid *. For the Fruits thereof are in Conſtruction of Law as it were tacitly mortgaged by a kind of Privilege for ſuchIndemnity†; and for that Reaſon the Biſhop may in ſome Caſes ſequeſter the ſame for that end.

* Gloſſ. in v. *Ceſſaverit.* dict. Tit. 17. † Gloſſ. in 17. Othob. v. *Fructibus.*

My Lord *Coke* in the third Part of his Inſtitutes || having treated of the erecting of Houſes and Buildings, *&c.* tells us, what he finds in the Books of the Common Law and Records thereof ‡, touching Dilapidations, ſaying, That Dilapidations of Eccleſiaſtical Palaces (for ſo Biſhops are pleaſed to call their Houſes) and other Buildings is a good Cauſe of Deprivation. By the Injunctions of King *Edward* the Sixth * to all his Clergy, it is required, "That the Proprietors, Parſons, Vicars and "Clerks, having Churches, Chapels or Manſions, ſhall Yearly beſtow "on the ſaid Manſions or Chancels of their Churches, being in Decay, "the fifth Part of their Benefices, till they be fully repair'd; and the "ſame being thus repair'd, they ſhall always keep and maintain them "in good Eſtate." See the Thirteenth Article of Queen *Elizabeth's* Injunctions † to the ſame End and Purpoſe.

|| Cap. 97.

‡ 29 E. 3. 16. 2 H. 4. fol. 3. 9 E. 4. 4.

* A.D. 1547.

† A.D. 1559.

My Lord *Coke* obſerves, That a Biſhop is only to fell Timber for Fewel, Building, and other neceſſary Occaſions: The Woods of the Biſhoprick are called the Churches Dower, and theſe are always carefully to be preſerv'd; and if he fells and deſtroys them, the Common Law will grant a Prohibition. The Biſhop of *Durham*, who had divers Coal-Mines, would have cut down his Timber Trees for the Maintenance and upholding of his Works: And upon a Motion in Parliament concerning this Matter, in the King's Behalf, as being the Founder of all Biſhopricks in *England*, an Order was made, That the Judges ſhould grant a Prohibition for the King; and a Prohibition was thereupon awarded. In *Saker's* Caſe ‡ a Prohibition was likewiſe granted for committing great Waſte in pulling down the Glaſs Windows, and plucking up of Planks, after he was convicted of Simony. And thus a Prohibition lies in every Caſe of Waſte or Dilapidation committed on the Eſtate of the Church by the Incumbent; and the Churchwardens and any of the Pariſhioners may as well as the Patron pray the ſame.

‡ Bulſtr. Rep. pt. 3d.

When a Parſon on his Induction finds the Buildings in Decay, and that his Predeceſſor did not leave a ſufficient *Perſonal* Eſtate to repair them, he may have the Defects ſurvey'd by Workmen, and atteſted under their Hands

Hands in the Preſence of two or more credible Witneſſes; which may be a Means to ſecure him from that Charge, which might otherwiſe enſue for the Fault or Neglect of his Predeceſſor.

Of Diſpenſation.

A *DISPENSATION* is defined to be a Relaxation of the Common Law made and granted by one that has the Power of granting the ſame *; and as it is in ſome Meaſure a certain Decree or Sentence, ſo it has the Force and Effect of a Decree or Sentence †: And as 'tis a Relaxation of the Common Law; it is always accounted Odious in the Eye of the Law, and ought to be reſtrain'd as much as poſſible ‡. 'Tis in our Books ſometimes ſtiled a *Legitimation*; becauſe it renders that lawful, which was before ſuch Diſpenſation unlawful †; And ſometimes it is in *Latin* called *Gratia*; becauſe it depends on the Grace and Favour of him that grants it. For tho' the Superiour may ſometimes do ill in not granting a Diſpenſation in a due and proper Caſe; yet the Law does does not compel or require him to grant the ſame contrary to his own Will and Inclination, nor can it be thus demanded by any Right of Action *. But (I think) the better Opinion is, That where a Diſpenſation is refus'd, the Superior of the Perſon refuſing the ſame may be apply'd to in a due and lawful Caſe, in order to compel him to grant a Diſpenſation, where the Law allows of ſuch; and in ſuch a due and lawful Caſe it is rather ſtiled *Juſtice* than *Grace* †. So that in ſuch a Caſe we ought by a Diſtinction to ſay, that it is ſtiled a *Grace* in reſpect of the Perſon diſpenſing, and *Juſtice* in reſpect of the Perſon diſpens'd withal ‡.

* Goffr. in c. 1. Q. 5. 3.

† Oldr. Conſ. 326 & 327.

†Conſ. ut ſup.

‡ Oldr.Conſ. 327.

* Oldr.Conſ. 203. Fed. de Sen.Conſ.40.

† Oldr. Conſ. 203.

‡ Gem.Conſ. 38.

Now a Diſpenſation is a ſolemn Act, which ought to be ſped and executed in a ſolemn manner; ſo that it may be reckon'd among Matters of great and arduous Importance in the Church: And, therefore, a Biſhop ought not to ſpeed and execute the ſame without the Conſent of his Chapter *. And in every Diſpenſation granted by a Perſon that acknowleges a Superiour, there ought to be expreſs'd the Cauſe of granting the ſame, otherwiſe the ſame ſhall not be granted or introduced as valid. As for Inſtance, when a Dignity is granted to a Perſon under Age, and the like, the Diſpenſation is null and void, if the Cauſe of ſuch Diſpenſation be not expreſs'd; for it is not enough that it be therein tacitly imply'd and underſtood. And the Cauſe therein expreſs'd ought to be truly and really ſubſiſting, and not a feigned Cauſe. And a ſummary Account thereof ought to be premis'd and ſet down in the Beginning of the Diſpenſation, to the end that ſuch a Diſpenſation ſhould be valid from the Cauſe and Reaſon thereof: As that the Man diſpens'd with is a Perſon of eminent Dignity, Learning, and the like †. But when an abſolute Superiour, or (as the Law phraſes it) one that is *ſupra Jus*, grants a Diſpenſation, an inducing Cauſe is preſum'd; and, therefore, need not be expreſs'd. Now a juſt and ſufficient Cauſe for granting a Diſpenſation ought to be ſuch a one as adminiſters

* Oldr. Conſ. 326 & 327.

† Fed. deSen. Conſ. 205 & 206.

to

to the Advantage and Behoof of the Publick Weal, and ought (at leaſt) to be probable, and not contrary to the Law of God or of Nature.

A Diſpenſation in the *Canon-Law* is ſaid to be *arida & arcta*, when 'tis granted to diſpenſe with illegitimate Perſons on their Promotion to Church-Benefices: But then ſuch a Diſpenſation does not include Benefices in a Cathedral Church. Thus a Diſpenſation *ob Beneficia obtinenda* does not include a Canonry or Prebend; nor does a ſimple Diſpenſation *ad Beneficium Curatum habendum* comprehend a Dignity, becauſe theſe are diſtinct and different Things. A Diſpenſation is not extended beyond the Caſe therein expreſs'd: And, therefore, if a Perſon be diſpens'd with in the Point of Abſence on the Account of Study, he ſhall not, according to the *Canon-Law*, receive the Fruits and Profits of his Benefice, unleſs it be thus expreſly ſaid and provided in ſuch Grant: And 'tis to be noted, that when a Biſhop has granted ſuch a Diſpenſation, if it be for a Term of Years, and not *ad Bene Placitum*, he cannot revoke the ſame. By the Papal Law a Biſhop may diſpenſe with Clergymen after the Performance of Pennance for Adulteries committed, and other Crimes of an inferiour Nature *.

* X. 2.1.4.2.

Tho' a Diſpenſation be in its own Nature an odious Thing, as being granted againſt the Common Law (as aforeſaid) and, therefore, ought to be reſtrain'd and interpreted ſtrictly; yet this is chiefly to be underſtood of ſuch a Diſpenſation as is granted in an odious Caſe; as where Ambition, and the like, is the Foundation and End for which it is deſir'd; or in a Caſe where another Perſon may receive any Prejudice or Inconvenience thereby. For the Power of Diſpenſing is a Matter of a Favour; and, therefore, in a Caſe that admits of Favour, it ought to be interpreted in a large Senſe, according to the Propriety of the Words and the Intention of the Law: So that a Perſon that is Diſpens'd with to hold two Benefices with Cure of Souls, or a Dignity with a former Benefice or Dignity obtain'd, or with any other Preferment already purchas'd, may hold even a principal Dignity in a Cathedral Church. But tho' a Diſpenſation be a Matter of ſtrict Law generally ſpeaking; and, therefore, ought not to be extended *ad Caſum ſeparabilem:* Yet whenever it is granted *Motu proprio*, and not at the Inſtance of the Partry Diſpens'd with, it admits of a large and favourable Conſtruction.

Whenever a Prince on his being conſulted by any one reſcribes or writes back in this manner, *viz. Toleramus*, he ſeems to diſpenſe with that Act, which had been otherwiſe unlawful for a Man to do †: But 'tis otherwiſe, where the Prince only *de facto* tolerates the ſame to be done by not reſiſting and coercing of it; for then a Diſpenſation is not introduc'd ‡. But the Toleration or Sufferance of a Superiour does not diſpenſe with ſuch Things as are contrary to Moral Right and Honeſty; tho' the Pope by his great Plenitude of Power in the Church, does ſometimes diſpenſe with even theſe immutable Laws for the Sake of Gain to the Apoſtolick Chamber; as he likewiſe does with the Laws of God. He that can limit and interpret a Law, may in a particular Caſe by way of Diſpenſation repeal or take away the Force of ſuch a Law for a Seaſon; but he cannot do it entirely and *in totum*, tho' it be on a lawful Account: But whenever this is done, 'tis neceſſary that the Diſpenſation ſhould mention that Law, againſt which it is granted. A Biſhop cannot grant a Diſpenſation contrary to the Common-Law of the Church: For by a Diſpenſation the Laws are violated; and it is not lawful to violate the Laws of his Superiour.

† X. 4. 14.6.

‡ X. 3. 5.18.

A ſimple Licence cannot properly be called a Diſpenſation; ſince a *ſimple* Licence is not contrary to Law as a Diſpenſation is, but is a Matter founded on ſome Law, and agreeable thereunto: For I call that a *ſimple* Licence or Faculty, which does not in reality ſuſpend or toll the Obligation of a Law, but gives an Operation thereunto, in order to render it effectual according to a certain Mode or Method preſcribed by Law. For 'tis to be obſerv'd, That a Perſon may in ſeveral Laws grant a Faculty, who cannot diſpenſe with them; and the Reaſon required for granting a Faculty and a Diſpenſation is very different. And there are ſeveral Laws and Statutes, which do not *ſimply* forbid a Thing to be done; but that it be not done without ſuch a Faculty granted in ſuch a manner: Wherefore the granting of a Faculty or Licence is not a diſpenſing with the Law, but an Execution and Obſervance thereof. And, therefore, tho' a Licence or Faculty be not a Matter of ſo ſtrict Law as a Diſpenſation is; yet it ought to be accommodated to the Intention of the Law. Yea, a Licence or Faculty is not ſo much an Act of ſome Juriſdiction, as a Diſpenſation is, but rather an Act of ſome Superiority; and, therefore, it has a wide Difference from a Diſpenſation. The uſe of this Word *Diſpenſation*, was firſt introduc'd by the *Canon-Law* *: For we do not meet with it in all the Books of the *Civil-Law*; the *Civil-Law*, according to *Bartoldus* †, calling it by the Name of a *Grace*, or an *Indulgence*. But now becauſe the Word *Indulgence*, according to the Uſe of the *Roman* Church, has another Acceptation, I ſhall refer the Reader to that Title for the meaning thereof.

* Dec. in c. 4. x 2. 1. 2.

† Ind. cap.

Of Diſtributions Eccleſiaſtical and Civil.

DISTRIBUTIONS, which borrow'd their Name from the *Latin* Verb *Diſtribuo*, are in the Senſe of the *Canon-Law* that Portion of Profits which in the *Romiſh* Church ought every Hour to be divided and given *pro Ratâ ſervitii præſtiti* unto ſuch as are preſent at Divine Service. But commonly they are called *Daily Diſtributions*, either becauſe ſuch Perſons acquire them as are daily preſent at Divine Offices, or elſe becauſe they are diſtributed to each individual Perſon *juxta quotam Officii*, which he daily attends, that is to ſay, in other Terms, according to the Merits of each Perſon that aſſiſts every Day at Divine Service, which is publickly perform'd in ſome appointed Place *. Sometimes theſe Diſtributions are in *Latin* called *Veſtuaria* or *Victualia*; becauſe they conduce to the Apparel and daily Subſiſtance of ſuch as attend Divine Service †; tho' this Name ſtrictly ſpeaking ſeems rather adapted to the Fruits of a Benefice than to Canonical Diſtributions, which are often by another Name called *Daily Portions*. And ſometimes they are in *Latin* ſtiled *Sportulæ* or *Diaria*, taking their likeneſs from the Gifts and Preſents which are as it were made every Day to Judges on the Account of their Office ‡. And ſometimes they come under the Name of an *Emolument of Benefices or Prebends*;

* X. 3. 5. 19.

† X. 3. 4. 7.

‡ Dur. de Rir. lib. 3. C. 25. N. 4.

as being a certain Kind of Profit which ariſes from Benefices and Prebends; and ſometimes they are couched under the Style of *Reditus Eccleſiaſtici*, not only becauſe they ariſe from Eccleſiaſtical Benefices, but becauſe the Word *Reditus* may ſometimes be adapted to them, tho' the Stile *Fructus Beneficii* properly taken is not ſuitable to Diſtributions *. But it has been a Doubt with ſome, whether Diſtributions are diſtinguiſh'd from Fruits, or are couch'd under the Word *Fructus*. To which I anſwer, That regularly ſpeaking Diſtributions are in their own Nature diſtinct from Fruits; and it plainly appears from the Council of *Trent*; becauſe the Fruits of a Benefice are ſtiled the *Yearly Rents*, which are uſually collected from certain Eſtates belonging to the Church; but Diſtributions are a certain Portion, which ariſes from the Profits of a Benefice; and ſhall be conferr'd (as aforeſaid) on ſuch as aſſiſt at Divine Service, *juxta quotam Officii, &c.*

* X. 3. 5. 19.

And hence it is we may firſt infer, That a Perſon who is depriv'd of his Diſtributions on the Score of a Crime committed, is not for that Reaſon deem'd to be depriv'd of the Fruits of his Prebend or Benefice, becauſe the Fruits of a Prebend or Benefice do not come under the Name of Diſtributions properly ſpeaking, unleſs ſomething elſe be expreſs'd; for that we are herein concern'd in a Penal Matter, wherein the more benign Interpretation ought to be made: But this ought only thus to be underſtood, when ſuch Prebend or Benefice yields both Fruits and Diſtributions. *Secondly*, A Penſion impos'd on any Benefice is not deem'd to be laid on Diſtributions, but only on the Fruits of ſuch Benefice, unleſs the Benefice conſiſts in Diſtributions alone, or unleſs ſomething elſe be expreſs'd: Becauſe a Penſion, when nothing elſe is expreſs'd, is wont to be laid on the Fruits of ſuch Prebend or Benefice. But ſince this Kind of Diſtributions is not well known here in *England*, it being only common in *Popiſh* Countries, I will add nothing more of them; but proceed to ſpeak of a *Civil* Diſtribution, which is made by the Ordinary of the Inteſtate's Goods and Chattels, according to the Laws of this Realm †, and the *Civil* and *Canon-Law* on this Head.

† 22 & 23 Car. 2. c. 10.

For according to a Statute of the Realm, the Ordinary may call Adminiſtrators to an Account, and order a Diſtribution to be made of what remains in their Hands after Debts, Funerals, and juſt Expences of all ſorts allow'd, according to the Laws in ſuch Caſes, and the Rules hereafter ſet down; ſaving to Perſons aggriev'd, their Right of Appeal. And the Surpluſage ſhall be diſtributed as follows, *viz.* one Third to the Inteſtate's Wife, and the Reſidue among his Children, and ſuch as legally repreſent them, if any of them be dead, other than ſuch Children (not Heirs at Law) who ſhall have any Eſtate by Settlement of the Inteſtate in his Life-time, equal to the other Shares: Children, other than Heirs at Law, advanc'd by Settlements or Portions not equal to the other Shares, ſhall have ſo much of the Surpluſage as ſhall make the Eſtates of all to be equal. But the Heir at Law ſhall have an equal Part in the Diſtribution with the other Children, without any Conſideration of what he has by Deſcent, or otherwiſe, from the Inteſtate. If there be no Children, or legal Repreſentatives of them, then one Moiety ſhall be allotted to the Wife, the Reſidue to be equally diſtributed among the next of Kindred to the Inteſtate in equal Degree, and thoſe who repreſent them. But no Repreſentatives ſhall be admitted among Collaterals after Brothers and Siſters Children. And if there be no Wife, all ſhall be diſtributed among the Children; and if no Child, then to the next of Kin to the Inteſtate in equal Degree, and their Repreſentatives, *ut ſupra* ‡. No ſuch Diſtribution ſhall be made till

‡ 22 & 23. ut ſupra.

till one Year after the Inteſtate's Death; and every one to whom any Shares ſhall be allotted, ſhall give Bond with Sureties in the Spiritual Courts, That if Debts ſhall afterwards be made to appear he will refund his ratable Part thereof towards the Payment of ſuch Debts, and of the Adminiſtrators Charges: And in all Caſes where the Ordinary has uſed to grant Adminiſtration, *cum Teſtamento annexo*, he ſhall continue ſo to do. But by a ſubſequent Act of Parliament *, this Act of the 22 & 23 *Car.* 2. *cap.* 10. ſhall not extend to the Eſtates of *Feme Coverts* that dye Inteſtate; but that their Husbands may have Adminiſtration of the Perſonal Eſtates, as before the making of the ſaid Act: Both which Acts of Parliament were made perpetual by the firſt of King *James* the Second †, tho' at firſt they were only enacted for the Continuance of ſeven Years, and from thence to the End of the next Seſſion of Parliament.

* 29 Car. 2. c. 3.

† Cap. 17.

One *Elizabeth Smith* dying Inteſtate left behind her two Brothers, one of the whole and the other of the half Blood ‡; and in the Eccleſiaſtical Court they would admit the half Blood to come in for Diſtribution with the whole Blood on the aforeſaid Statute *; upon which a Prohibition was granted; and hereunto there was a Demurrer. And the Queſtion aroſe on theſe Words in the Act, *viz. That Diſtribution is to be made to the next of Kin to the Inteſtate, who are in equal Degree, and ſuch as legally repreſent them.* It was urged for the Plaintiff, that Statutes ought to be expounded by the Common-Law, which conſiders not the half Blood, inſomuch, that an Eſtate ſhall rather eſcheat than deſcend to the half Blood. On the contrary 'twas argued, That tho' the half Blood was rejected in Deſcents, yet 'tis regarded in other Caſes; as that Letters of Adminiſtration may be granted to the half Blood, and the half Blood may be Guardian in Socage †. Again, there cannot be two Degrees made of the whole and half Blood; nor does the Common-Law diſtinguiſh when it wholly excludes it. The Court ſaid, That the Intent of this Act was to give the Eccleſiaſtical Court Juriſdiction in this Matter, and to provide for the Diſtribution of Inteſtate Eſtates; which they had a long time attempted and conteſted, but were ſtill prohibited: But this Act permits them to proceed. The Court, being inform'd by *Civilians*, was entirely of Opinion, That the half Blood ſhould come in for the Diſtribution of Inteſtate Eſtates on this Act: For as to the granting of Adminiſtrations, the Being of a Guardian in Socage, and the like, a Brother of the half Blood may be taken to be nearer of Kin than a more remote Kinſman of the whole Blood ‡.

‡ Ventr. Rep. pt. 1. p. 323.

* 22 & 23 Car. 2. c. 10.

† Roll. Abr. 303. Stil. Rep 7. & 75.

Upon an Appeal to the Houſe of Lords, the Lords by the Advice of ſeveral Judges, decreed, That upon the Statute giving Diſtribution of Inteſtates Perſonal Eſtates, the half Blood ſhould have equal Share with thoſe of the whole Blood, being of Kindred of the ſame Degree or Repreſentation *.

‡ Mor. Rep. p. 635. Roll. Rep. p. 114.

On the 10*th* of *May*, 1681. *Wiſeman*, *Exton*, *Lloyd*, *&c.* all Doctors of the *Civil-Law* certify'd to the Lord Chief Juſtice *North*, That as to the Diſtribution of Inteſtates Eſtates among the Collaterals, the *Civil-Law*, and the Practice of the Eccleſiaſtical Courts, has conſtantly obſerv'd theſe two Rules, *viz. Firſt*, That Repreſentation has only Place as to Brothers and Siſters Children. *Secondly*, If there be no ſuch Repreſentation, then the Collaterals next of Kin to the Inteſtate (whether one or more) ſhall have Diſtribution only †.

* Vent. Rep. 2. p. 317.

† Raym. Rep. p. 506.

Of

Of Divination, and the Invention thereof.

DIVINATION is a Prediction or Foretelling of future Things, which are of a ſecret and hidden Nature, and cannot be known by any Human Means: And as this is ſaid to be made by the Help of the Devil, the *Canon-Law* diſallows thereof. For tho' the Devils have no certain Knowlege of ſuch future Contingencies as have not a determinate Cauſe, but depend on our Will alone; yet they may have a far greater Knowlege of future Things, and other Secrets of Nature than Men have. For *Firſt*, They know our Affections and Inclinations. *Secondly*, They have a Knowlege of Natural Cauſes, and of the Powers and Virtue of them, as of the Sun, Moon, Elements, and the like. *Thirdly*, They know the Scriptures much better than Men. *Fourthly*, They have a much greater Experience of Things than Men have. And, *Fifthly*, They know what they themſelves and other Devils, that are the Authors of Miſchief, intend to do by God's Permiſſion.

Divination is uſually made two Ways. *Firſt*, By an expreſs Invocation of the Devil, putting up Prayers to him that he would inſtruct them in what ſhall hereafter happen and come to paſs; and for this they before Hand promiſe to yield him due Obedience. And, *Secondly*, It is made by a tacit Invocation of him alone; and this happens, when any one does, by vain and wicked *Mediums* common unto the Devil, procure unto himſelf the Knowlege of ſuch latent Things, as are above the Force of Human Underſtanding. Divination is ſometimes perform'd by Natural Aſtrology, whereby we gueſs at Natural Effects by a Sight and Contemplation of the Stars, over which Effects the Heavens have an Influence: And the *Canoniſts* hold, That Men are well enough excus'd when they only practice this Kind of Aſtrology for ſearching into the Inclinations of Men thereby, tho' this Kind of Aſtrology is very uncertain. But they condemn *Judicial* Aſtrology, whereby on the Sight of the Heavens we gueſs at fortuitous Events, which depend on the Free-will of Man, as entirely Superſtitious: As the contracting of Marriage with a Perſon of ſuch a Condition, or that Wars ſhall enſue at ſuch a Time, and the like.

Divination was invented by the *Perſians*; and is ſeldom or never taken in a good Senſe. According to ſome Perſons, and (particularly) it was *Varro*'s Opinion, That there are four Kinds of Divination, *viz.* *Firſt*, By Water, called *Hydromancy*. *Secondly*, By Fire, commonly ſtiled *Pyromancy*. *Thirdly*, By Air, termed *Acromancy*. And, *Fourthly*, By Earth, uſually named *Geomancy*.

Diviners are in *Latin* called *Divini*, becauſe they (as they boaſt) are full of Divinity; and by a certain Kind of fraudulent Cunning pretend to foretel what ſhall happen to Men. Among theſe Diviners there are ſome Perſons that perform this Art by the Help of Words; and theſe are properly called Enchanters: As thoſe are

are in *Latin* ſtiled *Arioli*, who put up nefarious Prayers *circa Aras*, about the Altars; and in offering deadly Sacrifices, do, by ſuch Celebrations, receive the Devil's Anſwers. But the South-ſayers, in *Latin* called *Haruſpices*, *quaſi Horarum Inſpectores*, were ſuch as did obſerve Days and Hours in performing the Buſineſs of their Office, and had the Overſight of what Men ought to do at particular Times and Seaſons. Theſe did alſo inſpect the Entrails of Cattle, and from thence foretold what ſhould happen hereafter.

Of Divorce, and the ſeveral Cauſes thereof.

A *DIVORCE* is a lawful Separation of Husband and Wife made before a competent Judge, on due Cognizance had of the Cauſe, and ſufficient Proof made thereof *. And 'tis in *Latin* called *Divortium*, according to the Lawyer, *Caius*, from the Diverſity of the Minds of the Parties in Wedlock; or (as others ſay) becauſe the Parties, who ſeparate their Marriage, do go in *diverſas Partes* †. Now a Divorce, according to the *Canon-Law*, is Twofold: The firſt being only a Separation *a Thoro*; and the other *a Vinculo* or *a Fœdere Matrimoniali*. A Divorce *quoad Thorum* happens when mutual Cohabitation or Converſation is forbidden to the Parties either with a Time, or without any Time prefix'd for their coming together again ‡: But by a Divorce *quoad vinculum* or *Fœdus Matrimoniale*, the Marriage is entirely diſſolv'd; and as to the Subſtance of it for ever reſcinded *.

* Abb. in c. 10. x. 2. 13.

† D. 24. 2. 2.

‡ 32 Q. 1. 2.

* 33 Q. 2. 5.

By the *Civil-Law* the Will of the Perſon that ſues out and makes a Divorce is the *efficient* Cauſe thereof: But by the *Canon-Law* the Judge's Decree is its *efficient* Cauſe. For by the *Canon-Law* a Divorce is not permitted without *ſufficient* Cognizance had of the Cauſe; and the Judge's Decree is neceſſary to declare that Diſſent of the Parties whereon ſuch Divorce is founded; and ſuch Decree ought to be publiſh'd and made known to the World: Whereas by the *Civil-Law* Divorces were often made thro' Heat of Anger, when the *Romans* had a Mind to put away their Wives by ſending them a Bill of Divorce by one of their Freedmen, who was to acquaint the Wife with the Purpoſe and Intention of her Husband †. The Object of a Divorce is Matrimony itſelf, which the Party deſires may be reſcinded either on ſome Impediment of Conſanguinity or Affinity, or on ſome Defect and Crime committed: Tho' I think a Marriage founded on any unlawful Impediment of Conſanguinity or Affinity is null and void *ab initio*, and need not be reſcinded, but only declar'd ſo.

† D. 24. 2. 3.

By the ancient *Civil-Law* the Reaſons or Cauſes for reſcinding Matrimony were various and ſeveral: So that a Wife might be divorc'd and put away from her Husband even for evil Manners, *viz.* If ſhe got Drunk every Day, piſs'd a Bed every Night, or committed any other filthy Actions. But, this Caſe of a Divorce for ill Manners being repealed, *Juſtinian* introduc'd ſeveral Cauſes of a Divorce leſs arbitrary: But, theſe being alſo ſlight and frivolous, they are not now deem'd with us a ſuffi-

cient Cauſe for reſcinding of Matrimony lawfully contracted. By the Papal *Canon-Law* there are only five Cauſes of a Divorce approv'd of, *viz. Adultery*, *Impotency*, *Cruelty*, *Infidelity*, and *Ingreſſus Religionis*.

The firſt of which is for Fornication or Adultery, properly ſo called; on which Account the Parties in Wedlock are ſo ſeparated, that the Husband ſhall not be oblig'd to receive his Adulterous Wife again, tho' ſhe be corrected and amended thereby: Nay, according to ſome, tho' he himſelf had given her Occaſion of committing Adultery *. For ſhe ought not to behave herſelf in a filthy and diſhoneſt Manner on any Pretence of Poverty or other Inconvenience whatever †. But if the Husband himſelf ſhall after ſuch Divorce commit Fornication, the Marriage ſhall be reſtor'd on the Score of his Lewdneſs, and the Husband for a Puniſhment thereof ſhall be oblig'd to receive his Wife again. Nor can the Husband during his Wife's Life-time make uſe of any Hand-Maid to beget Children on, upon the Account of the Barrenneſs of his Wife; becauſe 'tis better to dye Childleſs, than to get an Iſſue or Offspring by an unlawful Bed ‡. And the Example of *Abraham* is no Objection hereunto, who thro' the Barrenneſs of his Wife *Sarah* joyn'd himſelf to *Hagar* the *Egyptian* Woman for the ſake of raiſing an Iſſue to himſelf *; nor of *Jacob*, who, when he could not have Children from *Rachel*, rais'd Children to himſelf from his Hand-Maid †. For before the Law of *Moſes* Adultery was not expreſly and ſpecially forbidden, ſince there was no Sentence of Condemnation againſt it till that Time. For *Abraham* and *Jacob* did not prefer lying with Hand-Maids unto the Marriage-Bed for the ſake of gratifying a vagous Luſt and Appetite, but for the end of propagating Poſterity and acquiring an Offspring ‡.

* X. 4. 19. 5.
† 32 Q. 5. 3.
‡ 32 Q. 4. 8.
* Gen ch. 16.
† Gen. ch. 30.
‡ 32 Q. 4. 3.

There are five Caſes, wherein a Divorce cannot be made on the Account of Adultery. *Firſt*, If both the Perſons in Wedlock are convicted of Adultery; for ſince there are ſome Miſdemeanours, that are taken away by mutual Compenſation, of which Adultery is one, a Compenſation may be made of this Crime *. For it is unjuſt for one Perſon to judge of another, and not give another leave to judge of himſelf. *Secondly*, If the Husband himſelf proſtitutes his own Wife: For in ſuch a Caſe an Exception of Bawdry lies againſt ſuch a Divorce †. *Thirdly*, If the Wife be free from any Fault, as not having an Intention of committing Fornication or Adultery: As when the Wife marries another Man, through a Belief that her former Husband is dead: For, upon the Return of her former Husband, ſhe is bound to forſake her ſecond Husband, and to return to her firſt ‡, unleſs, after his Return, ſhe does with his Privity and Conſent remain with the ſecond *; or unleſs another Perſon had carnal Knowlege of her thro' Error and Miſtake, ſhe believing him to be her own Husband †. *Fourthly*, If ſhe be forc'd or raviſh'd hereunto ‡. And, *Fifthly*, If the Husband has reconcil'd himſelf to her after the Adultery committed by her, or knowingly retains her after ſhe has committed Adultery *. But it is to be obſerv'd, that by the *Canon-Law* the Bond of Marriage is not diſſolv'd on the Score of Adultery or Fornication, but it only operates a Separation of their Converſation at Bed and Board †: Nor can this Law grant a Power unto either of the Perſons in Wedlock of paſſing to a ſecond Marriage ‡.

* X. 4. 19. 4. & 5.
† X. 4. 13. 6.
‡ 34 Q. 1. 1. & 2.
* X. 4. 21. 2.
† 34 Q. 2. 6.
‡ 32 Q. 5. 4.
* 32 Q. 1. 1. 2 & 3.
† 32 Q. 7. 1. & 3.
‡ 32 Q. 7. 7. & 10.

I ſhall conclude this firſt Cauſe with the famous Caſe of the Marchioneſs of *Northampton* here in *England*, who was convicted of Adultery in the Reign of *Henry* the Eighth, and the Marquis was thereupon divorced from her in the Beginning of King *Edward* the Sixth's Reign

X. 4. 20. 9.

Reign, and thereupon a Commiſſion was granted, directed to Archbiſhop *Cranmer*, and nine other Divines, to certify whether ſhe continued his Wife, notwithſtanding the Divorce *a Menſa & Thoro*; and whether by the Word of God he might marry again. But before this Matter was determin'd, he married again, at which the Privy Council were offended; becauſe, according to the *Canon-Law*, the firſt Marriage continued good even after ſuch a Divorce. The Marquis inſiſted, That by the Law of God the very Bond of Marriage was diſſolv'd for Adultery; and that Marriage was never thought to be indiſſolvable till the *Romiſh* Church made it a Sacrament: But yet that Church, by the Help of the *Canoniſts*, had invented ſuch Diſtinctions, which made it eaſy to be avoided. That it would be very inconvenient, if a Marriage ſhould not be diſſolv'd on the Account of Adultery; becauſe then the innocent Perſon muſt live with the Guilty, or be tempted to commit the like Sin, if the Bond of Marriage ſtill ſubſiſted. Soon afterwards the Delegates gave Sentence in favour of the ſecond Marriage, and, amongſt other Things, they founded it on *Chriſt*'s Definition of Marriage, *viz. That two ſhould be one Fleſh*: So that when that was divided, as it muſt be by Adultery, the Marriage itſelf was diſſolv'd. 'Tis true, the Sentence given by theſe Delegates was about four Years afterwards confirm'd by a private Act of Parliament, to which two Peers and two Biſhops diſſented; and the ſecond Marriage was declared to be good by the Law of God, any Canon or Eccleſiaſtical Law to the contrary notwithſtanding. But in the very next Year *, that Act was repealed, and the Reaſon mention'd in the Preamble was, becauſe it was obtain'd upon Private Views, and that it was an Encouragement for licentious Perſons to procure Divorces on falſe Allegations. † A.D. 1553.

The ſecond Cauſe of a Divorce is what the Lawyers call *Impotentia coeundi* †, or an Impotency in Point of carnal Copulation; which in the Man is ſaid to be an Exceſs of Frigidity; and in the Woman *Arctatio*, or too great a Straitneſs in her Genital Parts. Therefore if any one ſhall thro' Ignorance marry a Virgin that is ſo narrow that the Man cannot enter her Body; or if ſhe ſhall have contracted ſuch a natural Imperfection, that it cannot be cur'd by the Aid of Phyſick. Or if a Woman ſhall marry a Man that is of ſo frigid a Nature that he cannot have carnal Knowledge of his Wife, they may be ſeparated, and the Perſon that is qualify'd for Matrimony, may freely paſs to a ſecond Marriage *. If there be a *Conſtat* of natural Impotency in either of the Perſons in Wedlock, the Marriage may be immediately ſeparated: Otherwiſe the ſaid Perſons ought to live and cohabit together for the Space of three Years from the Time of the Solemnization of Marriage, for the Tryal of Nuptial Copulation; for ſo long a Time the Law appoints, if the natural Frigidity cannot be prov'd before. And after this Time is expir'd, if they are unwilling to live together any longer; and the marry'd Woman can prove, that the Man cannot have carnal Knowlege of her, ſhe may, on a Judicial Sentence, take another Husband; and if he ſhall marry another Wife, his Marriage ſhall be diſſolv'd as null and void. But if both the Parties ſhall conſent to live together, the Man may retain her as his Siſter, tho' not as his Wife. But if they both confeſs upon Oath, they never carnally knew each other, thro' the Husband's Inability (for ſo they ought to do, if they cannot have the Teſtimony of ſeven of their Neighbours or Kindred of good Credit hereunto) the Woman may then betake herſelf to a ſecond Marriage on the Judges Decree. But if the Husband ſhall marry another Wife and have Children, they, who have thus ſworn, ſhall be deem'd Guilty of

† C. 5. 17. 10.

* X. 4. 15. per tot. 33 Q. 1. per tot.

of Perjury; and, upon doing Pennance, be compell'd to return to the
† X. 4. 15. 5. & 7. first Marriage †. And thus if it ſhall appear, that the Woman is ſo ſtrait and narrow in her Genital Parts, that ſhe cannot be render'd *Habilis* and fit for Copulation without Bodily Danger, (barring a Divine Miracle) it is the ſame Thing; for the Marriage ſhall be ſeparated: But yet it ſhall be renew'd again, if it afterwards appears, that the Church was deceiv'd herein. This Matter ought to be try'd by the careful Inſpection of grave and honeſt Matrons of her Pariſh; and to be well atteſted by them upon Oath, *viz.* That ſhe can never be a Mother or proper Wife, becauſe ſhe is *nimis arcta*, and unfit for Generation. But this Inſpection ought not to be, till the Parties in Wedlock have liv'd together for three Years (at leaſt) and have uſed their beſt En-
‡ X. 4. 15. 6. & 7. deavours to know each other ‡.

As to this Matter, there happen'd a very remarkable Caſe in the Reign
* 40 & 41 Eliz. of Queen *Elizabeth* *, which was thus. The Wife of one *Bury* was divorc'd from him upon the Score of *Frigidity*, it appearing that for three Years after the Marriage ſhe remain'd *Virgo intacta* on the Account of the Husband's Impotency. Her Husband afterwards marry'd again, and his Wife had Children: And hereupon it was a Queſtion, Whether they were legitimate or not? And it was adjudg'd they were, becauſe born during that Coverture, and before any Divorce had in reſpect of the ſecond Marriage, which they agreed to be voidable, but
† Dyer Rep. 179. that it continued a Marriage till it was diſſolv'd †.

My Lord *Coke* tells us, that a Writ of Error was brought upon this Judgment; and it was affirm'd in the *Queens-Bench* upon great Deliberation: But yet it ſeems to be a very hard Judgment; and the Diſtinction which is there made, *viz.* That a Man may be *habilis* and *inhabilis* at different Times, is not applicable to the Circumſtances of that Caſe. 'Tis true, a Man may be ſo, where the Inability is *ex Maleficio:* But if a Man has a perpetual and natural Impotency, 'tis impoſſible for him to be *habilis* at any Time; and the Marriage in ſuch Caſe is not voidable, but void *ab initio.* To the like Purpoſe was the Lady *Eſſex*'s Caſe, who, on her Petition to King *James* the Firſt, obtain'd a Commiſſion under the Great Seal, directed to the Archbiſhop of *Canterbury* and five other Biſhops, *&c.* to proceed in a Cauſe of Nullity of Marriage, between the Earl of *Eſſex* and herſelf, by reaſon of his *Frigidity*. And the Libel againſt him was, That for three Years after the Marriage they did cohabit as Man and Wife, but that before and ſince the Marriage, he had a perpetual Impotency (at leaſt) in reſpect of her. The Earl reply'd he was frigid *quoad illam*, but not as to any other Woman; for he found that ſhe was not *apta* to have Children. Thereupon the Commiſſioners appointed three Ladies and two Midwives to inſpect her, who return'd, that ſhe was *apta & habilis*: And becauſe the Law preſumes, that where there is three Years Cohabitation after Marriage, and nothing done towards the Act of Copulation, there muſt be *Impotentia coeundi in viro*; which Diſability, whether it proceeds from any natural Defect, or by any other Accident whatever, it matters not; yet if it precedes the Marriage, it ſhall convict the Man of Impotency, and conſequently renders the Marriage void.

The third Cauſe of a Divorce is a Machination of the Wife's Death, or any other Act of Cruelty: For if the Husband does by Poiſon, or any other ſevere Uſage, lay Snares againſt his Wife's Life, ſhe may ſue out a Separation *quoad Thorum & Menſam* *: For ſome of the *Ca-*
* X. 4. 19. 1. & 2. *noniſts* will have a Divorce to be taken in a Threefold Senſe, *viz. Firſt*, For a Separation of Marriage *quoad Thorum* only, that is to ſay, in reſpect

Reſpect of carnal Copulation. *Secondly*, For ſuch a Separation *quoad Thorum & Menſam*, which in *Engliſh* is called *Bed* and *Board*. And, *Thirdly*, For a Diſſolution of Matrimony *quoad Vinculum Matrimonii*. A Divorce on the Account of Cruelty ſeems to be grounded on the Law of Nature: For as Marriage was inſtituted by God in a State of Innocence, it muſt of Conſequence be for the mutual Comfort and Help of each other; and, therefore, a cruel and ſevere Uſage fruſtrates one of the Ends of that State. The Spiritual Court has a proper Juriſdiction in Caſes of this Nature; and we have ſeveral Inſtances of Suits brought there by the Wife for a Separation upon the Score of Cruelty: And tho' in one Caſe Sentence was given for the Husband againſt the Wife; yet he was forced to pay all the Expences of Suit for her *. Afterwards the Wife brought an Appeal, and becauſe the Husband would not appear and anſwer, and pay for tranſmitting the Proceſs, he was excommunicated: And, a Prohibition being pray'd hereupon, the Court of Common Pleas doubted whether they ſhould grant the ſame; becauſe the Proceedings were according to the Courſe and Practice of the Eccleſiaſtical Courts. The Wife of one *Porter* was divorced from him on the ſame Account †, but it was only *a Menſa & Thoro*: For this Kind of Divorce gives the Wife Liberty to live ſeparately from her Husband, which otherwiſe ſhe could not do; and 'tis no more than a Proviſion for her Safety, and to avoid his cruel Treatment of her; ſince ſhe cannot marry again during his Life, without incurring the Danger of Felony ‡. In the Twelfth Year of King *Charles* the Firſt *, a Divorce was *propter Sævitiam* of the Husband, and the Woman married again in the Life-time of her firſt Husband; and it was doubted, whether this was Felony: But no Reaſon was given for this Doubt, only that many Inconveniencies might enſue upon ſuch a Pretence; and, therefore, they adviſed the Woman to get a Pardon, tho' the Divorce in this Caſe is grounded on Natural Right; and like a Divorce (for Adultery) is never to be allow'd on the Confeſſion of the Parties, but only upon plain Proof.

* Crok. Rep. pt. 3. p. 16.

† Crok. Rep. pt. 3. p. 461.

‡ 1 Jac. 1. c. 11.

* Crok. Rep. 461.

The two laſt Cauſes of a Divorce, according to the *Canon-Law*, being not admitted here in *England*, I ſhall omit to handle them under this Title Specially; and, therefore, I ſhall proceed to ſpeak of a Divorce *a Vinculo Matrimonii*. In all thoſe Caſes where ſuch a Divorce was, the Marriage was not *de Jure*, according to the *Canoniſts*; becauſe it was void *ab initio*: For where the Incapacity ariſes from any Matter precedent to the Marriage, there the Marriage is only *de facto*; and a Sentence of Divorce in ſuch Caſe is only Declaratory, that the Marriage is diſſolv'd; for it was abſolutely void before, and either of the Parties might marry again, tho' the other was living. But 'tis otherwiſe, where the Divorce is occaſion'd *ex Cauſâ ſubſequenti*, as in Caſes of Adultery, Cruelty, and the like. For there the Marriage being once good, it can never be diſſolv'd *a Vinculo*; becauſe ſuch ſubſequent Cauſe cannot effect the Bond of Matrimony, tho' 'tis ſufficient to ſeparate the Parties *a Menſâ & Thoro*; which is in the Nature of a Temporal and not a Perpetual Divorce: And if either of the Parties ſhall marry again in the Life-time of the other, ſuch Marriage is void; and ſo it was adjudg'd in the Caſe of *Rye* and *Fulcomb* †. And as a further Confirmation of the Law in this Matter, it was afterwards adjudg'd, That a Divorce *Cauſâ Adulterii* is no Bar of Dower; which ſhews that the Marriage is not diſſolv'd ‡.

† Noy. Rep. p. 100.

‡ Noy. Rep. p. 108.

The Husband may be compelled by an Excommunication to receive his Wife, if he has raſhly and incautiouſly put her away from him; and

he ſhall not only be oblig'd to return to her, but in ſuch a Caſe ſhall be forced to treat her with a Marital Affection. But a Husband may leave his Adulterous Wife, without expecting any Sentence of Divorce, when the Adultery is evident and notorious. The Husband may pray a Separation of Matrimony on the Account of a Matrimonial Impediment, tho' ſuch Impediment proceeds and ariſes from himſelf; as from his own Impotency and Frigidity *: But if he knowingly marries a Woman that cannot render him his Due, he is (notwithſtanding) bound to maintain her, and ſhall not be divorced from her; for he ought to impute it to himſelf.

*Abb. in c. 1. x. 4. 15.

Of Donatives, and the Original thereof.

ECCLESIASTICAL Benefices are commonly diſtinguiſh'd into ſuch as are *Donative*, and ſuch as are *Preſentative*: I ſhall here treat of ſuch as are Donative; ſince a Parochial Church may be a Donative, and exempt from all Ordinary Juriſdiction, as St. *Martins le Grand* in *London* is, as well as many other Churches in *England*. Now a Donative is an Eccleſiaſtical Benefice not ſubject to the Right of Preſentation, Inſtitution or Induction, and, conſequently, not liable to a Lapſe; nor is it ſubject to the Biſhop's Viſitation as Preſentative Churches are. The Original of Donatives in *England* is ſuppos'd to be from what Mr. *Gwin* mentions in the Preface to his Readings, *viz*, That as the King might anciently found a free Chapel, and exempt it from the Dioceſan Juriſdiction: So he might alſo by his Letters Patents licence a common Perſon to found ſuch a Chapel, and to ordain that it ſhould be Donative and not Preſentative; and that the Chaplain ſhall only be deprivable by the Founder and his Heirs, and not by the Biſhop *. There have alſo been peculiar Privileges granted to Lords of Manners, who had ſeveral Tenants living remote from the Church, to erect Chapels for them, and ſome for the Conveniency of ſuch Lords and their Families, (as already remembred under the Title of *Chapels*) with Liberty to put in whom they pleaſed, provided he was a Perſon in Holy Orders: And the Biſhops in thoſe Days granted theſe Privileges to encourage ſo good an Undertaking: which having been continued Time out of Mind, do now turn to a Preſcription. So that there are ſome Donatives by Royal Licence, and ſome by Preſcription.

*Cow. Interp. v. *Donative*.

But it has been a Queſtion, Whether ſuch Donatives are properly *Benefices Eccleſiaſtical?* For *Pet. Gregorius* ſpeaking of Chapels founded by Laymen, and not approv'd by the Dioceſan, nor as it were ſpiritualiz'd by him, plainly ſays †, That they are not accounted Benefices, nor can they be conferr'd by the Biſhop; but the Founders and their Heirs may give ſuch Chapels, if they pleaſe, without the Biſhop's Conſent ‡. And *Lindwood* is very prolix on the very ſame Head, *viz.* Whether St. *Martins le Grand* in *London* be an Eccleſiaſtical Benefice or not *, arguing *Pro* and *Con* on this Subject: But he at length concludes in the Affirmative; for a Benefice may be obtain'd either by way of

† De Benefic. cap. 11. n. 10.

‡ Guid. Pap. Deciſ. 187.

* Lib. 3. Tit. 2. C. 1. v. *Benificiati*.

of Title, or elſe by Canonical Inſtitution. And thus a Church being a Donative, it begins only by the Foundation and Erection of the Donor; and he has the ſole Viſitation and Correction of it, and the Ordinary has nothing to do therewith: For if the King founds a Chapel or Church, he may exempt it from the Juriſdiction of the Ordinary, and in this Caſe the Lord Chancellor or Lord Keeper ſhall viſit the ſame †. And if the King does by his Letters Patents licence a common Perſon to found a Church or Chapel exempt from the Juriſdiction of the Ordinary, the ſame ſhall be viſited by the Founder and his Heirs, and not by the Ordinary ‡. And as the Clerk comes in by the ſole Act of the Donor; ſo he may reſtore and reſign it to him: For *unumquodq; eodem modo quo Colligatum eſt diſſolvitur.* For tho' the Clerk, when he is inveſted, has the Freehold; yet he may diveſt himſelf of it by Reſignation, without any other Ceremony, and the Ordinary has nothing to do therein. In a Donative a Reſignation made to one of the Founders, where there are more than one, is ſufficient; for it enures to them all, as a Surrender ſhall more eſpecially, when they all conſent thereunto and grant it *de novo.*

† 20 E. 3. 9. 21 E. 3. 60.

‡ 6 H. 7. 4. F.N.B. 42.

But tho' Admiſſion, Inſtitution and Induction be not requiſite in the Caſe of a Donative, as aforeſaid; yet if the Patron does in reſpect of a Donative preſent a Clerk to the Ordinary, and ſuffer Admiſſion and Inſtitution thereupon, he has thereby made it always Preſentative: For, as my Lord *Coke* * and others † do poſitively aver, the very Admiſſion, Inſtitution and Induction takes away the Nature of a Donative. And then the Ordinary ſhall viſit the ſame, Procurations ſhall be paid, and a Lapſe ſhall incur to the Ordinary, as in all Benefices Preſentative: But as long as it remains a Donative, it is exempt from the Juriſdiction of the Ordinary. If a Clerk, that has a Donative, be diſturbed in his Incumbency, the Patron or Founder ſhall have a *Quare impedit præſentare*, and declare upon the Special Matter. All Biſhopricks were anciently Donative by the King ‡: And 'tis ſaid there are certain *Chauntries*, which may be given by Letters Patents*.

* Inſtitut. 1 p. 344.
† Cook. 2. Rep. p. 63.
‡ Cok. Rep. 3. fol. 75. b.
* F.N.B. 33.

Of Drunkenneſs and Gluttony.

DRUNKENNESS, in *Latin* called *Ebrietas*, from the Prepoſition (*E.*) which is the ſame as *extra* or *ſine*, and *Bria* ſignifying Meaſure, that is to ſay, *without Meaſure.* There are many Evils and Inconveniencies that flow from Drunkenneſs: For it obſcures the Underſtanding, hinders Senſation, diſturbs the Brain, debilitates the Natural Vigour of the Body, engenders Forgetfulneſs, and injures all the five Senſes, by which the whole Operation of the Body is govern'd; it expels the Appetite, weakens the Joints of the Body, cauſes a Trembling in all the Members, kindles a Heat about the Liver, and renders the Blood thereof groſs and grumous, and denigrates the Colour of the Body: And from hence a Fear and Horror, and a Talking in our Sleep, and fantaſtical Viſions ariſe, a Foulneſs of the Mouth, a Debilitation of the Genitals, and the like;

like; and theſe Things diſtemper a Man ſo much, that they often cauſe a Groſsneſs of Body, and ſometimes a Decay of Nature, and a Leproſy itſelf. And ſo great a Deteſtation had St. *Auſtin* of this Vice of Drunkenneſs, that ſpeakieg thereof, he ſays, *Ebrietas cum abſorbet, a vino abſorbetur, abominatur a Deo, deſpicitur ab Angelis & deridetur ab hominibus.* And, again, he ſays, That it takes away the Memory, confounds the Underſtanding, diſſipates the Senſes, excites Luſt *, hinders the Speech, corrupts the Blood, debilitates all the Members, exterminates Health, and ſhortens Man's Life. But I will not here treat of this Vice as a Phyſician, or a Moraliſt, but as a Lawyer; ſhewing how all *exceſſive Drinking* has at all times been forbidden to the Clergy by the Laws of the Church.

* X. 3. 1. 14.

And here I ſhall firſt obſerve, that all Drinking (*ad Potus æquales*) was abſolutely forbidden to Clergymen, on Pain of Suſpenſion after *Admonition* †; not only by a *Synodical*, but by a *Provincial* Conſtitution under *Edmund* Archbiſhop of *Canterbury*. *Prohibeantur Præsbyteri, ne ad potationes eant, nec bibant uſq; ad Pinnas*, ſays an ancient Conſtitution of a Council held at *London* *, when the Clergy grew Scandalous to the People for this looſe and wicked way of living. The *Canon-Law* puniſhes this Crime of Drunkenneſs with a Suſpenſion *ab Officio vel Beneficio* ‡: But our Conſtitution is more ſevere, and ſays, *a Beneficio & Officio.* The Council of *Oxford* not only ſtrictly forbids all Clergymen from whatever tends to Gluttony and Drunkenneſs, but it requires the Biſhops to proceed ſtrictly againſt thoſe who are Guilty hereof, according to the Form of the General Council; that is to ſay, the fourth Council of *Lateran*, *viz.* by *Admonition* firſt, and then by *Suſpenſion.* *Lindwood* complains, *That this was not ſo much look'd after as it ſhould be, becauſe it brought no Profit to the Prelates* *. I hope this Reaſon will not hold among ſuch as pretend to a Reformation of Religion, which will be very defective, if it extends not to our Lives as well as our Doctrines: For there can be no greater Reproach than to ſee thoſe looſe and diſſolute in their Converſations, who think it their Honour to be Miniſters of a Reformed Church. It was a ſtinging Reflection on our Church by the Archbiſhop of *Spalato* (who was no very ſtrict Man himſelf) *That he ſaw nothing reform'd among us but our Doctrines.* I hope there was more of *Satyr* than of *Truth* in it: For, doubtleſs, there were many then (as there are now) of exemplary Lives, and unblameable Converſations among the Clergy. But if there be any others, it will be the more Shame to the Biſhops not to proceed againſt them, ſince even before the Reformation the Canons were ſo ſtrict and ſevere in this Matter.

† Concil. Angl. Vol. 2. 140. 200.

*A. D. 1102.

‡ X. 3. 1. 14.

* Lib. 3. Tit. 1. C. 1. v. *Vigilanter.*

In the Council at *Weſtminſter* in *Henry* the Second's Time, under *Richard* Archbiſhop of *Canterbury*, *all Clergymen are forbidden going into Taverns to eat and drink, unleſs upon Travelling*; and the Sanction of this Canon is, *aut ceſſet aut deponatur* *. See alſo the *Canon-Law* ‡. The ſame was forbidden in the Council at *York* in *Richard* the Firſt's Reign, in the Council at *London* under *Hubert*, in King *John*'s Time; and ſince the Reformation the ſame Conſtitution is renew'd among King *James*'s Canons †. And there have been ſeveral Inſtances of the Severity of our Eccleſiaſtical Puniſhments againſt Drunkenneſs in Clergymen. In the Eighth Year of King *James* the Firſt's Reign one *Parker* was depriv'd of his Benefice for Drunkenneſs ‡; and tho' he pray'd a Prohibition, yet it was deny'd him: And in the next Year another was depriv'd for the ſame Crime; and the Judges at Common-Law allow'd the Sentence to be good. And no doubt there are other Inſtances of this Kind,

* Concil. Angl. Vol. 2. 104.

‡ 44 Diſt. 4.

† Can. 78.

‡ Brownl. Rep. p. 37.

Kind; but we had not known of theſe if they had not been preſerv'd to us in the Law Reports. By the old Law † it was Death for the Prieſts *to drink Wine or ſtrong Drink, when they went into the Tabernable of the Congregation*; and the Reaſon given is, *That they may put a Difference between Holy and Unholy, and between Clean and Unclean, and that they may teach the Children of* Iſrael *all the Statutes which the Lord hath ſpoken to thee by the Hand of* Moſes. Which implies, that thoſe who are given to drinking *Wine* or *Strong Drink* are unfit to inſtruct others in the Law of God. And God looked on them as ſuch a Diſhonour to his Worſhip, that he threatens immediate Death to them that approached his Altar when they had drank *Wine*: And the *Jews* ſay, that this was the Reaſon why *Nadab* and *Abihu* were deſtroy'd. In ſhort, all Nations have abhorr'd a ſottiſh and drunken Prieſthood, as moſt unfit to approach unto God, or to offer Sacrifices for others, when they have made Beaſts of themſelves. I hope, this Charge is not lying upon any of our preſent Clergy; for who would not rather run into a Wilderneſs, or hide himſelf in a Cave, than take ſuch a Charge upon himſelf, if he could not refrain from this abominable Vice?

† Lev. ch. 10. v. 9. 10.

Of a Duplex Querela, *and the manner of proceeding therein.*

AS the Patron has a Remedy at the Common-Law by a *Quare Impedit*, where the Biſhop refuſes to inſtitute a Perſon preſented; ſo likewiſe has the Clerk a proper Remedy in the Eccleſiaſtical Court: For he may complain to the Court of *Arches*, if he be refus'd by the Biſhop; and to the Court of *Delegates*, where the Refuſal is by the Archbiſhop: And, upon this Complaint, the Dean of the *Arches* writes to the Biſhop in Form of Law, which Writing is in *Latin* called *Duplex Querela*. But becauſe by the Canon * the Biſhop has Twenty eight Days allow'd him to inform himſelf touching the Sufficiency of the Clerk after the Preſentation is tendred to him: Therefore, the ſaid Canon enjoins, that a *Duplex Querela* ſhall not be granted till that Time is expir'd, and Oath made thereof, and that the Biſhop refus'd to grant Inſtitution, or enter into Bond, with Sureties, to prove the ſame to be true: And this under Pain of Suſpenſion of the Grantor from the Execution of his Office for half a Year, to be denounced by the Archbiſhop; and that the *Duplex Querela* ſhall be void. In which Canon there is a *Proviſo*, that the Biſhop ſhall not inſtitute another in the mean time with Prejudice to the Perſon preſented *ſub Pœnâ nullitatis*.

*Can. Jac. 95.

As to the Form of this Reſcript, and the Proceedings on it, it is as follows, *viz.* It ought to contain a Monition, that within five or nine Days the Biſhop ſhould admit the Party complaining, and alſo a Citation for him to appear either by himſelf or his Proctor at another Day, in Caſe he ſhould refuſe ſo to do; and then to ſhew Cauſe of his Refuſal. And there is alſo an Inhibition ſerved on him purſuant to the

Canon above-mention'd, not to admit another *Pendente lite.* The Proceedings on it are thus, *viz.* The Clerk, who has got the Preſentation, muſt procure ſome Perſon to admoniſh the Biſhop to admit him within the time mention'd in the *Duplex Querela*, and three Days afterwards the ſaid Clerk ought to apply himſelf to the Biſhop and pray Inſtitution, and tender himſelf ready to ſubſcribe the Thirty nine Articles, and to take the Oaths of *Supremacy* and *Canonical Obedience*: And this he ought to do twice more within the Time preſcribed in the *Duplex Querela*; and if he cannot be admitted to the Biſhop's Preſence, then he ought to make Proteſtation in the Preſence of ſome credible Witneſſes.

The Biſhop, after ſuch Admonition, refuſing to admit the Clerk, may be cited by a Meſſenger to appear; and if that cannot be done Perſonally, then the Meſſenger may acquaint the Biſhop's Servants, that he has a Citation *ad Inſtantiam* R. B. to inſtitute him to ſuch a Benefice. Then after the Day on which he ſhould have appear'd, if he had been Perſonally cited, the Court will decree a Citation *Viis & Modis*, which muſt be Perſonally executed if that can be done; if not, then it muſt be fix'd to the outward Door of his Houſe or Cathedral. Afterwards the Day of executing the Monition and the Inhibition, the ſeveral Days on which the Clerk pray'd Inſtitution, the Day of his citing the Biſhop, and of his Refuſal to admit, *&c.* are to be certify'd by the Perſon citing; and this is to be on the Back of the *Duplex Querela.* Then the Biſhop, after three Proclamations, is declared *Contumacious*, and the Judge pronounces the Right of Inſtitution to be devolved on him, and decrees that the Clerk ſhall be inſtituted, and that he will write to the Archdeacon to induct him. Then the Clerk muſt apply to the Archbiſhop to examine him, and if he approves him, then he writes to the Judge *Fiat Inſtitutio:* But before he is inſtituted, 'tis uſual for the Clerk to give Bond to indemnify the Judge. But,

If the Biſhop appears, and alledges a Cauſe of his Refuſal to admit the Perſon, as that the Church is full, or that the Perſon preſented is a Simoniac, unlearned, and the like, then they are to proceed to Tryal; and if the Biſhop fails in his Proof, the Judge then pronounces Sentence for his own Juriſdiction, and condemns the Biſhop in Expences of Suit. But if the Biſhop will not defend the Suit, the pretended Incumbent may do it, and alledge that the Church is full of himſelf; but then the Judge will firſt pronounce Sentence for his own Juriſdiction, becauſe the Biſhop has alledg'd nothing to oppoſe it. But if the Biſhop will allow ſuch Incumbent to defend the Suit in his own Name, then the Judge cannot decree for his own Juriſdiction till the Cauſe is determin'd. And in this Caſe, where the Biſhop appears and refuſes to inſtitute, 'tis not a ſufficient Cauſe to alledge, that two Perſons are preſented to the ſame Living; and ſo the Church is become *Litigious:* Becauſe, if it was ſo, he ought to proceed upon a *Jus-Patronatûs* to try the Right. But if not, and one of them appears to be incapable, or otherwiſe deficient, he may admit the other without any Inquiſition upon a *Jus-Patronatûs*; becauſe the Right of Inſtitution *pro hâc vice* is devolv'd on him thro' the Negligence of the Biſhop.

There are not many Inſtances of this Way of Proceeding in our Books and Records; but ſome there are. Sir *Tim. Hutton*'s Clerk was inſtituted by the Archbiſhop of *York*, and inducted by his Warrant or Mandate, upon the Refuſal of the Biſhop of *Cheſter* to admit him *. 'Tis true, there was another preſented to the Church, who ſued the Incumbent

* Hob. Rep. p. 15.

bent in the Court of Delegates, ſuggeſting that his Inſtitution was void, becauſe it was done by the Archbiſhop out of his Province in Time of Parliament at *Weſtminſter* ; and by Conſequence the Induction muſt be void : But a Prohibition was granted, becauſe the Church was full by Induction, which is a Temporal Act ; and which ſhall never be made void but by a Suit in the Temporal Courts. Therefore, a *Duplex Querela* will not be a proper Remedy, where another Perſon is inducted. But if two Patrons pretending a Title to preſent, do each of them grant a Preſentation to his Clerk, and the Biſhop refuſes one who brings his *Duplex Querela*, and upon that obtains Inſtitution and Induction, and afterwards the Biſhop grants Inſtitution to the other, the Suit ſhall ſtill go on in the Spiritual Court to puniſh the Biſhop for a Contempt in granting Inſtitution after an Inhibition, and *Pendente lite* ; but in Reſpect of the Incumbency a Prohibition was granted *. But in ſuch a Caſe if the Biſhop had refus'd both their Clerks, and then one of the Patrons had brought a *Quare Impedit* againſt him ; and (pending that Writ) a *Duplex Querela* had been brought by the other : And upon the Biſhop's Neglect to appear, the Archbiſhop had granted Inſtitution to the Patron's Clerk, tho' he had been Incumbent for ſix Months, yet he ſhould be remov'd, if the other Patron recover'd in the *Quare Impedit*, becauſe he came in *Pendente lite* †.

* Moors Rep. p. 879.

† Roll. Abr. 391. Moors Rep. 572.

• *Note*, This way of Proceeding againſt the Biſhop is very proper, where the Refuſal is for Incapacity, or any other Perſonal Defect in the Clerk ; becauſe theſe are Cauſes, which the Spiritual Judge may try. So if the Refuſal be upon a Pretence, that the Church is full ; becauſe the Plenary ariſing upon Inſtitution ſhall be try'd by the Biſhop's Certificate.

Of Eaſter, *and the Celebration thereof.*

THE Churches of all the Provinces of *Aſia*, which in the Time of the *Romans* were govern'd by a Pro-Conſul, did ſuppoſe, as from a very ancient Tradition, that the fourteenth Day after the Appearance of the New Moon, to be reckon'd from the Time of the Vernal Equinox, ought to be obſerv'd in the Church as the Salutary Feaſt of *Eaſter*, *viz.* The ſame Day whereon the *Jews* were commanded to kill the Lamb : And that they ought always on that Day, (on what Day of the Week ſoever it ſhould fall) to put an end to their ſolemn Faſtings. Whereas it was (notwithſtanding this Cuſtom of the *Aſiaticks*) the general Practice of the Church all over the reſt of Chriſtendom to act after another Manner : For other Chriſtians did not end their Faſtings on any other Day than that of our Saviour's Reſurrection : And as they receiv'd this Uſage from Apoſtolical Tradition (as is pretended) it ſtill prevails in the Church. And the *Aſiatick* Churches (upon this Account) differing from all others, eſpecially the *Latin* Church, in their Celebration of *Eaſter*, divers Synods and Aſſemblies of Biſhops were conven'd, which condemn'd the Practice of theſe Chriſtians, who were by the

the *Latins* called *Quarto-Decumani*, and cenſur'd as Hereticks: And *Eaſter* was by the common Conſent of theſe Synods ordain'd to be celebrated on the *Sunday* following the firſt Full-Moon after the Vernal Equinox; and thereupon they ſent Circular Letters to inform the Brethren in all Places touching this Decree of the Church for the Uniform obſerving of *Eaſter* on the Day of our Lord's Reſurrection; and that the ſolemn Faſts of the Church ſhould not be concluded till that great Day; for ſo 'tis called by the ſixth Canon of the Council of *Ancyra*. For we read, That at the latter end of the ſecond Century, there were ſeveral Councils held concerning this Affair in the Weſtern Church, as at *Rome* and in *Gaul*; and in the Eaſtern Church at *Pontus* and in *Paleſtine*.

*Con. 3. Diſt. 21 & 22.

And thus the Lords Paſſover, which we commonly call *Eaſter*, was order'd by the *Canon-Law* * to be celebrated every Year on a *Sunday*, otherwiſe ſtiled the Lord's-Day; becauſe our Lord on that Day of the Week, roſe from the Dead, and appear'd among his Diſciples: And 'tis ſaid by the fifth Apoſtolical Canon, "That if any Biſhop, "Prieſt or Deacon ſhall celebrate the Holy Feaſt of *Eaſter* before "the Vernal Equinox, as the *Jews* do, let him be depos'd." But 'tis to be obſerv'd, That this Canon does not condemn thoſe who kept it on the fourteenth Day of the firſt Month regularly calculated, but it ſeems to be directed againſt them only, who follow'd the Erroneous Calculation * of the *Jews*: And, therefore, it is probable that it might be fram'd by thoſe that obſerv'd it as the Eaſtern Chriſtians of the firſt Ages generally did. *Platina*, in his Lives of the Popes, ſays, That this Feaſt of *Eaſter* was firſt ſettled on a Sunday by Pope *Pius* the Firſt at the Inſtance of one *Hermes*, with whom he had cultivated a ſtrict Amity and Friendſhip: For to confirm the wavering Minds of ſome Men in this Reſpect, the Angel of the Lord appear'd unto *Hermes* (as the Papiſts pretend) in the Habit of a Shepherd, and declar'd to him, by way of Command, that all Perſons were to celebrate the Lord's Paſſover on the Lord's-Day; and this Meſſage, or Order, he communicated to the ſaid Pope. See the Law above-quoted in the Margin out of the third Part of the *Decretum*. But tho' there have been ſeveral Critical Diſputes concerning the very Day on which *Eaſter* was to be kept, yet all unanimouſly agreed in this, That this Feaſt was to be obſerv'd in the Church; and, by the *African Code*, it is made uſe of as a Date. For ſays the 106*th* Canon of that *Code*, "Whatever *Formal* Letters "are granted, let them mention the *Eaſter-Day* of that Year. But "if that happens not to be known, let the *Eaſter-Day* of the prece-"dent Year be inſerted, as ſometimes in publick Dates 'tis ſaid, *After* "*the Conſulſhip of* A. C. &c.

In the early Ages of the Church the Baptiſm of Catholicks was uſually celebrated at the Time of this Feaſt; but if the Parties were threaten'd with any imminent Danger, or any other Neceſſity requir'd, Baptiſm

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* The *Jewiſh* Calculations were very Faulty; for their ordinary Year conſiſting only of 354 Days, their Paſſover, which they kept on the 14th Day of the Month *Niſan*, muſt often fall a conſiderable Time before the Vernal Equinox; which the Primitive Chriſtians juſtly looked upon as the Beginning of the Natural Year. Once indeed in 84 Years they intercalated one Month of 30 Days, but this was not enough, for in 84 Years they loſt 32 Days, as Biſhop *Beveridge* has obſerv'd: So that when their Account was at the beſt, it was two Days (at leaſt) too ſoon, and ſometimes a Month. *Victorinus*, a famous Arithmetician of *Aquitain*, in Pope *Hilary* the Firſt's Time rectify'd the *Cycle* or Golden Number for aſcertaining the Feaſt of *Eaſter*, far beyond what *Euſebius* and *Theophilus* had done: And ſome will have it, that *Victor* Biſhop of *Capua*, in the Papacy of *Pelagius* the Firſt, did alſo rectify the Miſtakes of the *Roman* Abbot *Dionyſius* touching the *Paſchal Cycle*.

Baptiſm might be perform'd at any other Time: For if any of the *Gentiles* were converted by coming over to the Faith, they might be baptiz'd at any Time, and in any Place whatever, either in the River, Sea, or in Springs and Fountains *. And ſuch as became Sponſors or Sureties for them in Baptiſm, promis'd to take Care, that they were not afterwards found to be Infidels. By the *66th* of the *Trullan* Canons, now only receiv'd by the *Eaſtern* Church, all Horſe-Races and Publick Shews were forbidden from *Eaſter-Day* to the *New Lord's-Day*, commonly with us called *Low-Sunday*; during which intermediate Time all Perſons were to attend ſinging of Pſalms, reading the Scriptures, and enjoying the Holy Myſteries.

* Con. 3. Diſt. 22.

It was heretofore a Traditional Cuſtom among the *Jews*, at the Time of their Paſſover, to ſet at Liberty one Perſon or other under Confinement in Bonds, and to releaſe him from his Impriſonment, in Memory of the People deliver'd from *Egyptian* Bondage †; and this Cuſtom they obſerv'd, together with their Αυτονομία, after they were reduc'd to a Province by the *Roman* Arms; doing this (perhaps) that they might curry Favour with the Provincial Preſidents, and by this Means procure Mercy and Compaſſion to the People. The Chriſtian Emperors after their Converſion, leſt they ſhould ſeem leſs Merciful to the Heathens than the *Jews* were, and as well in Remembrance of *Chriſt*'s Reſurrection, as to teſtify a Common Joy, which all Chriſtians receiv'd on the Score of their Deliverance from the Bondage of Sin hereby, ordain'd, That whenever the firſt Day of *Eaſter* came, all Priſoners and Captives ſhould be ſet at Liberty, and their Puniſhments forgiven them, unleſs it were ſuch as were charged with Crimes of a very heinous Nature ‡. And this, we read, they did on the Account of Piety and Religion towards God.

† Mat. cap. 18. Joh. cap. 27.

‡ C. 1. 4. 3.

Of Eccleſiaſtical Crimes in General, and the Diſtinction thereof.

THE Church having a Juriſdiction by the Grant of the Civil Power in divers Crimes, which are of a Spiritual Nature, and puniſhable in the Eccleſiaſtical Court, I ſhall here treat in general of ſuch Crimes as are of Eccleſiaſtical Cognizance; as *Hereſy**, *Inceſt*, *Adultery*, *Whoredom*, *Sacrilege*, *Blaſphemy*, *Uſury* †, *Simony* ‡, *Perjury*, and ſuch others as are compriz'd under the Sin of *Luxury*; and under their proper Titles handle them in particular. Among theſe there are ſome that are merely of Eccleſiaſtical Cognizance; and others, that are of a mix'd Nature, that is to ſay, ſuch as are cognizable both in the Eccleſiaſtical and Secular Courts: And firſt, of ſuch as are merely Eccleſiaſtical; and, therefore, only Cognizable in the Eccleſiaſtical Courts.

* X. 5. 7. per tot.
† X. 19. per tot.
‡ X. 5. 3. per tot.

Among theſe by the *Canon-Law* the firſt is *Hereſy*, which being a Crime merely of an Eccleſiaſtical Nature, the Secular Judge cannot by any Means intermeddle therewith in Point of Cognizance, but has only

the Power of executing the Puniſhment inflicted thereon by the Eccle-
* Abb. in c. 8. x. 2. 2. n. 19. & 31. ſiaſtical Judge *, at his Requeſt and Petition, or (we commonly ſay) at the Requeſt of the Church: And as this is a Crime merely Eccleſiaſtical; ſo does the Puniſhment and Declaration, of what is *Hereſy*, belong to the Eccleſiaſtical Judge. *Secondly*, By the *Canon-Law* *Simony* is a Crime merely Eccleſiaſtical, and, conſequently, puniſhable by the Eccleſiaſtcal Judge alone †: For it had its Original Prohibition from the Church; and (in Popiſh Countries) is regulated according to the ſtrict Rules and Inſtitutions of the *Canon-Law*; but with us in *England* it admits of ſome Temperament and Reſtriction, as I ſhall ſhew hereafter under that Title. But tho' the Crimes of *Hereſy* and *Simony* are both by the *Canon-Law* equal unto the Crime of Treaſon; yet even by that Law the Crime of *Simony* is not of ſo enormous a Kind as that of *Hereſy*. *Thirdly*, We may reckon *Concubi-*
† Abb. ſup. n. 20.
‡ Abb. ſup. n. 25. *nage* ‡, (or what the *Canon-Law* ſtiles *Whoredom*) to be a Crime merely Eccleſiaſtical, ſince 'tis deem'd no Crime by the *Civil-Law*, but had its Original Prohibition from the Laws of the Church; and, therefore, the Church has only Cognizance thereof. Tho', according to *Hoſtienſis*, *Concubinage*, or the keeping of Concubines, was prohibited and condemn'd even by the *Civil-Law* itſelf: But, I think, the *Civil-Law* only prohibited *Concubinage* or *ſimple Fornication* indirectly, and not directly, And, *laſtly*, In one Word, we may reckon all ſuch to be Crimes merely Eccleſiaſtical, which are not Crimes according to the Prohibitions of the Temporal or Civil Law; as *Uſury*, *Blaſphemy*, *Sa-*
* Abb. in c. 8. x. 2. 2. n. 1. † Abb. ut ſup *crilege* *, *Perjury* †, and the like are: For theſe are not merely Canonical; becauſe, according to *Hoſtienſis*, the Cognizance thereof (at leaſt) in Reſpect of ſome Pecuniary or Corporal Puniſhment does alſo belong to the Secular Judge: But 'tis otherwiſe in Reſpect of Eccleſiaſtical Cenſures to be fulminated againſt ſuch Criminal Perſons.

Among ſuch Crimes and Offences as are claim'd to be Puniſhable by Eccleſiaſtical Juriſdiction ſome are of a publick, and others of a private Nature. The firſt are thoſe that may be proſecuted by any Accuſer or individual Subject whomſoever. As for Example, an Offence againſt God is reckon'd a Crime of a publick Nature, and any one of the People may be an Accuſer herein; becauſe what is committed or done as an Offence againſt God, ſeems to be an Offence againſt Men, as God is the Lord and Father of us all: And ſuch are the Crimes of *Blaſphemy*, *Idolatry*, *Hereſy*, *Apoſtacy* from *Chriſtianity*, *Schiſm*, *Perjury* in an Eccleſiaſtical Court, *Polluting* and *Defiling* of Churches, *Diſturbing of Divine Service*, *Violating and Profaning the Sabbath*, *Neglect of the Sacraments*, *not frequenting Publick Prayer*, and the like. For St. *Paul* has reduced all Eccleſiaſtical Offences (I think) to ſome one of theſe three Heads, as either being *contrary to Piety towards God*; *to Juſtice towards our Neighbour*; and *to Sobriety to-*
‡ Tit. cap. 2. v. 12. *wards our Selves* ‡. That, which is againſt God, the *Latiniſts* ſtile *Impietas*; that, which is againſt our Neighbour, they term *Facinus*; and that, which is againſt a Man's Self, they call *Flagitium*; tho' the two laſt are often confounded without obſerving the true Propriety of Words. Under ſuch Offences as are contrary to Juſtice the Church reckons *Simony*, *Uſury*, *Diffamation*, *Subornation of Perjury in an Eccleſiaſtical Court*, *Sacrilege*, *Dilapidations*, *not building of a Church enjoyn'd by a Teſtator*, *not fencing the Church-Yard*; *not repairing the Church or Chancel*, *and not keeping of it in a decent Manner*; *Violence*
* 5 & 6 E. 6. cap. 4. *done to a Miniſter*; *Violating of a Sequeſtration made for Tithes not paid*; *and Fighting or Brawling in the Church or Church-Yard* *, and the

the like. And againſt Sobriety the Law reckons ſuch Crimes as theſe, *viz. Adultery*, *ſimple Fornication*, *Inceſt*, *Polygamy*, and all manner of *Incontinency*, which is not made Death by the Law of the Realm; *Solliciting of a Woman's Chaſtity*, *Drunkenneſs*, *Filthy Speech*, and the like. But ſome of theſe, I think, are rather Crimes of a private Nature. I find in the Writers of the *Civil* and *Canon-Law* ſeveral Offences affirm'd to be of Eccleſiaſtical Cognizance, which may ſeem (even in this Realm) to be ſuch, tho' I do not expreſly read of them to be ſo accounted either in the Statutes or Reports of the Common-Law: As for *violating* or *diſturbing* the Liberties of the Church; for *admitting* Excommunicated Perſons to an Action, or to give Evidence in a Temporal Court; *forging* Letters*, and other Matters Eccleſiaſtical, as Teſtimonials for Ordination, *&c. digging up* of bury'd Corpſes; *burying* of Excommunicated Perſons or notorious Hereticks in the uſual Places of good Chriſtians †; and, *laſtly*, *Abettors* and *voluntary Company keepers* with Excommunicated Perſons.

* X. 5. 20. per tot.

† Abb. in c. 5. x. 5 33. n. 1. v. in cap. Cl. 3. 7. n. 11.

According to Criticiſm, there is this Difference between what we in *Latin* call *Peccatum*, *Delictum* and *Crimen*: For a *Peccatum* is the ſame with what we in other Words call an *evil* and *wicked Act*: But a *Delictum*, according to *Andreas*, is a forſaking or departing from a good Action, that is to ſay, *Derelictum*. But what we call a *Crime*, is a heinous or heavy Sin or *Peccatum*; and deſerves Accuſation and Condemnation. Or in other Terms a *Delictum* is what the *Logicians* call *Genus Generaliſſimum*, whether it ariſes and proceeds from the Mind or not: But that which we call a *Crime*, is what they ſtile *Genus Sub-alternum*; and under the ſame is comprehended Theft, Adultery and other Sins; which proceed *ex Animo*, and from an evil Conſcience, according to the Archdeacon's Comment thereon *. A *Crime* or Sin is ſaid by the *Canon-Law* to be greater or leſſer, as it more or leſs draws us from the Favour of God; and as it recedes in like manner from the Rules of the Holy Scripture: And when it may be ſaid to recede more or leſs from the Rules of Holy Writ, ſhall be meaſur'd by the Standard of that Contempt which it carries along with it. But 'tis to be obſerv'd, That every Crime committed by a Clergyman does not immediately deſerve Depoſition: For there are ſome Crimes that deſerve a Suſpenſion only; and others, that deſerve Depoſition or Degradation (as aforeſaid) which is a perpetual Removal of him from the Miniſtry and Service of the Altar; but Suſpenſion is only a Removal of him from thence for a Seaſon; and of Suſpenſion there are ſeveral Species, as will afterwards appear under that Title.

* In c. 1. VI. 3. 2. v. *Delictis.*

Both by the *Civil* and *Canon-Law* a Delinquent, on the Account of a Crime committed by him, is ſubject to that Judge's Court or Juriſdiction where ſuch Crime or Offence was committed or begun; becauſe by the Act of offending he has in that Point made himſelf a Subject to the Court or Territory of ſuch Judge, and has oblig'd himſelf *Ratione pœnæ*†: And this is true, whether he be ſued there *Civilly* or *Criminally* for the ſaid Offence; for *Symmachus* in his *Decretal Epiſtles*, writes to this Purpoſe, *viz. Facinus, ubi admiſſum eſt, debet expiari.* And the Emperor *Conſtantine* ſays, That he who commits any Crime, ſhall be Subject to the Publick Laws of that Province, within which the Crime was committed; and that he ſhall not plead any Privilege or Preſcription to the Court. And he aſſigns a Twofold Reaſon for this. *Firſt*, Becauſe the Plaintiff ſhould be the better enabled to prove his Charge, as having his Evidence in a greater Readineſs in the Province where the Offence was done: And, *Secondly*, That by not going out of

† Abb. in c. 20. x. 2. 14. n. 15.

of the Province, he ſhould not be ſubject to greater Expences than the Matter would bear. And as each of theſe Reaſons do favour and reſpect the Plaintiff, he may ſurely renounce this Favour, if he pleaſes; and convene the Defendant into any other competent Juriſdiction.

An Eccleſiaſtical Crime or Offence is brought into Judgment either by the Promotion of ſome Party; or elſe by the Inquiſition or Enquiry of the Judge. The firſt is when any one does in a voluntary Manner impeach or accuſe another of ſome Crime committed *: And the ſecond is, when the Judge proceeds againſt and proſecutes Delinquents *ex mero Officio*. And this Enquiry is either Special or General. The firſt is, when the Judge does by Virtue of ſome probable and well-grounded Fame, or elſe on the Information of Credible Witneſſes, enquire touching ſome certain Crime or other committed: And the ſecond is, when the Churchwardens and Sideſmen of any Pariſh, which in our Books are called *Teſtes Synodales*, do upon Oath in a Viſitation denounce all manner of Crimes committed within their Diſtrict to the Judge, who impoſes this Oath on them; for after they have taken this Oath the Judge demands their Preſentments in Writing.

* X. 5. 1.

Of Eccleſiaſtical Elections, and of the Form and Confirmation thereof.

AMONG all the legal Methods, whereby Eccleſiaſtical Benefices were conferr'd on Clergymen, that of Election was anciently held the chiefeſt, and beſt adapted to the end of their Function, as long as Elections were made without Strife, and were pure and undefiled in the Church: For 'tis to be obſerved, That no one ought to take this Honour unto himſelf, unleſs he be called of God, or by God's Commiſſion, as *Aaron* the High-Prieſt was *. Therefore an Eccleſiaſtical Election, according to *Goffredus*†, is nothing elſe but a Canonical Calling of ſome fit Perſon or other unto ſome Sacred Dignity or Preferment in the Church, or elſe into ſome Religous Fraternal Society therein ‡. For Clergymen do by way of Election aſcend unto ſeveral Degrees of Dignity in the Church, and being there placed, do not only exerciſe ſuch Things as relate to Orders, but to Juriſdiction alſo, after they have received Confirmation and Conſecration in their Office. And, in this Definition, I call it a *Canonical* Calling; becauſe every ſuch Election ought to be made according to the Form of the *Canon-Law*, that is to ſay, by ſuch Perſons as have the Right and Power of chuſing according to the Form preſcribed in the Canons of the Church. For a Canonical Election, in Reſpect of its Form, is not only taken in a *large* Senſe, but alſo in a *ſtrict* and *more confin'd* Acceptation. That I call a Canonical Election in a *large* Senſe, which intervenes and is made according to the Law of right Reaſon, where there is no Form at all obſerv'd and practis'd; but only the Conſent of the Perſons electing and the Perſon elected is neceſſary *. And that I term a Canonical Election in a *ſtrict* Senſe, which is made by the Intervention of all Things, which do not

* X. 1. 6. 17.

† In Sum. x. 1. 6. Sect. 1. prin.

‡ Abb. in Rub x. 1. 5. Gloſſ. in c. 1. vi. 1. 5.

* X. 1. 6. 10.

not carry ſo much of a Solemnity along with them, as they do a Subſtance *. And, *laſtly*, I ſtile that a Canonical Election in a *more confin'd* Acceptation, when all Things intervene, which not only carry Subſtantials, but even Matters of Solemnity too along with them †.

* X. 1. 6. 42.

† 63 Diſt. c. 1.

From what has been premis'd, it then appears, That an Eccleſiaſtical Election properly is when the Canons of any Church meet and chuſe a Prelate or Head to preſide over it, and it transfers or gives a kind of Right to the Perſon thus elected: And this Right is compleatly finiſh'd ‡ by Confirmation. But if an Election be not made within three Months by ſuch Perſons as have the Power of electing Biſhops, the Right paſſes by Devolution to the next Superiour in Point of Order; and thus from Superiour to Superiour, till ſuch Election is fully made; and if it be not made within ſix Months, the Electors ſhall be puniſh'd according to the Canon *; as from a Biſhop to the Archbiſhop, and ſo onwards. In all Elections, as well as in other Reſpects Men ought to be honour'd, regarded and eſteem'd according to their Merits and Virtues; and not according to their Age and Riches: And thus according to the *Canon-Law* an Abbot ought to be elected and ordain'd according to his Vertuous Merits; and not according to Order, or the Time that he has been in a Religious Houſe. And this generally holds true in all Men: For a Doctor of leſſer ſtanding ought to be preferr'd and honour'd in his Election, if he be more learned and vertuous, and ought to have the Preference to one more ancient than himſelf, if ſuch a Perſon be a vicious and illiterate Man: But if a good Man be elected to any Dignity, and a better than himſelf be found; yet ſuch a Election ſhall not be vitiated from hence †. *Note*, The ſix Months juſt now mention'd reſpects inferiour Clerks, and not Biſhops and upwards.

‡ 50 Diſt. 11.

* X. 1. 6. 41. x. 3. 8. 6.

† X. 1. 6. 32.

In the Buſineſs of an Election to an Eccleſiaſtical Benefice, 'tis not only neceſſary to cite all ſuch Perſons as have a Concern and Intereſt therein ‡; but the Buſineſs of an Election ought alſo to be diſcuſs'd and examin'd in Point of its Merits, otherwiſe the Confirmation thereof ſhall not be valid. And hence it alſo appears, that in the Buſineſs of a Preſentation to a Living, which is Equivalent to the Affair of an Election, it is not enough to cite the Parties; but the Matter itſelf ought to be diſcuſs'd and examin'd. But tho' the Confirmation of an Election made without a Citation be null and void; yet the Election ſtands good in its full Strength and Vigour, in ſuch a manner that no Enquiry can be made touching the Validity of the Election itſelf ‡, if it has been made according to the Subſtantial Form thereof; and the greater Part of the Chapter has conſented thereunto. In an Election a Verbal Choice is requir'd as a ſubſtantial Form thereof. And hence it is, that a Fact which *tacitly* imports the Choice of the Perſons electing, and is called a *ſimple* Fact, is not ſufficient hereunto: But in an Election, wherein it is not neceſſary to obſerve a Form, Words are not requir'd; provided there be a *Conſtat* of the Elector's Conſent by the Fact itſelf, as it happens in carnal Matrimony. Therefore, whenever the Form of an Election is not obſerv'd, the Act of Election is null and void *ipſo Jure*.

‡ X. 1. 6. 28.

‡ VI. 1. 6. 39.

A legal Election ſubſiſts under a Threefold Form; as it is or was made after one of theſe three enſuing Ways or Methods *, *viz. Firſt*, The more ancient Way or Form of Election was by the Inſpiration of the Holy Ghoſt, which was the Way and Method whereby *Chriſt*'s Diſciples and Apoſtles were choſen, as we may read in the Holy Scripture †, and which the eleven Apoſtles themſelves made uſe of in chuſing *Matthias* the twelfth Apoſtle, in the room of *Judas Iſcariot* ‡. And this Form of Election ſeems to be that, wherein all the Electors did

* 42 Diſt. c. 2. x. 1. 6. 42.

† Mat. cap. 10 Luk. cap. 9.

‡ Acts cap. 1.

with one Voice and common Conſent pitch on ſome one in their Elections, which in the firſt Ages of Chriſtianity were made without any Corruption or Diſturbance whatever; becauſe their Elections were then govern'd and directed by the Holy Spirit indeed *. And in this ſame unanimous manner the firſt Chriſtians choſe the ſeven Deacons in the Time of the Apoſtles †: And they themſelves choſe *Paul* and *Barnabas*, *Silas* and *Judas* as Chiefs of the Church: But thro' the Broils and Contentions of the Clergy, whom the Holy Ghoſt had forſaken, this Form of Election laſted but very little longer Time than that of the Apoſtles. For ſoon after their Deaths Corruptions got into the Church; and Elections were ſeldom made with any Unanimity, but with much Strife and Hatred; which plainly ſhews, they were not govern'd by the Spirit of God. And, therefore, a ſecond Form of Election was found out, and made uſe of in the Church, which was by way of Scrutiny ‡: Wherein 'tis uſual for all the Electors aſſembled together to chuſe three Perſons of the Chapter or College to take the Poll or Scrutiny of ſuch who have Votes in the Election, which ought to be given Separately and in a ſecret manner. And then either the *Scrutators* themſelves or elſe ſome Notary in their Behalf ought to reduce the Electors Names into Writing, as they come to vote, together with the Names of the Perſons they poll for: And when they have counted the Number of Votes given for each Perſon nam'd, and compar'd them well together, they ought to publiſh the Election by the Mouth of one of the *Scrutators*, whom the other *Scrutators* have pitch'd on for this Purpoſe *; declaring the Number of Votes given in Favour of each of the Perſons named at ſuch Election, commonly called *Candidates*; and then he ſhall pronounce for the Perſon, whom the majority of the Chapter or College has choſen. The third Form of an Election was that of a *Compromiſſum* †, *viz.* When ſome certain Clergymen qualified by Law had a Power granted to them of electing by a *Compromiſe* either *Determinately*, *viz.* on this Condition, That the *Compromiſſarii* ſhould chuſe according to the Votes of ſuch, whoſe Votes they were oblig'd to *ſcrutinize*, or elſe *abſolutely* by a *Compromiſe* made by them. And theſe Perſons were likewiſe bound by the Mouth of one Perſon to declare the Election of him that has a majority of Votes ‡. But as the Method of Electing by Inſpiration has been long ſince departed from the Church, tho' ſome Men vainly boaſt of it ſtill; ſo the Form now is only ſaid to be Twofold, *viz.* by *Scrutiny* and *Compromiſe*.

The Election of a Biſhop ought (if poſſible) to be made in the Cathedral Church, and if the ſame be made in any other Place (unleſs it be on a good and lawful Account) it is not valid *: But if Cuſtom has order'd any other certain Place, we ought to abide by ſuch a Cuſtom: But tho' the Canonical Conſtitution does not ſtrictly require it to be made in the Cathedral, yet it matters not where it be made either in the Choir or Chapter-Houſe, or in any other the like Place fit for Clergymen to meet in; provided it be made within the Verge of the Church. An Election made by the leſſer Part of the Chapter does not hold good, nor can it be ratified and confirm'd by any ſubſequent Conſent whatever †: Nor can it be ſaid to be made by the Community, if all Perſons belonging to the Chapter do ſeparately and ſingly give their Conſent without being aſſembled as a Chapter ‡: For their Conſent ought to be given in Common as a Body Politick, and in a Collegiate manner,

It has been already ſaid, that an Election ought to be ſolemnly publiſh'd, but the Lawyers are not well agreed among themſelves

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* X. 1. 6. 42.

† Acts cap. 6. Acts cap. 15.

‡ X. 1. 6. 42.

* VI. 1. 6. 21.

† X. 2. 43. 13.

‡ VI. 1. 6. 23.

* Abb. in c. 28. x. 1. 6. n. 2.

† X. 1. 6. 29.

‡ Abb. in c. 29. x. 1. 6. n. 8.

in what manner this Publication ought to be made: For ſome will have it, that this Publication ought twice to be made, *viz.* once to the Chapter in the Preſence of the Canons, and a ſecond time to the Laity and Clergy being called together by the ringing of a Bell, if the Perſon elected be an Archbiſhop, Biſhop, and the like.

But, I think, it matters not in what manner this Publication is made, ſince the Publication of an Election is not a Matter of Subſtance therein, and 'tis ſufficient if it be not a clandeſtine Election: And, according to *Hoſtienſis*, ſuch Publication is of ſo little Eſſence thereunto, that an Omiſſion thereof ſhall not vitiate the Election, tho' ſuch Omiſſion be made on Purpoſe to prejudice the Perſon elected. After this they ought to ſing the Hymn, *We praiſe thee, O God:* And after this Hymn ſung, the Biſhop, if he be there preſent, ought to be carried to the Cathedral Church, and there placed on his Throne, or in his Epiſcopal Chair, unleſs the Perſon thus elected refuſes to conſent to ſuch Election *, which he ſeldom does; or after ſuch Election waves and renounces his Right; for he may renounce his Election, before the Examination thereof is referr'd to his Superiour for the Confirmation of it. The Act of Election is one individual Act, tho' ſuch Election has ſeveral Parts in it, *viz.* The Beginning in a *Scrutiny* or *Compromiſe*; the Middle Act conſiſts in the caſting up of the Poll; and the end in the Publication of the Election.

* X. 1. 6. 23.

The Election of Canons may by Cuſtom belong to the Chapter alone without the Biſhop †, as the Caſe of the Chapter of *Volturno* was, which refus'd to admit and receive certain Canons, which the Biſhop of that Church had choſen and inſtituted thereinto; ſaying, That ſuch Election was attempted in Prejudice of them and their Right. On which Account the Biſhop ſued out Apoſtolick Letters to the Biſhop of *Florence* againſt theſe Canons, praying the ſaid Biſhop, that he would prohibit theſe Canons the doing him an Injury in his Election of them; and that for the future they would ſuffer him freely to exerciſe this Right of Choice. The Biſhop of *Florence*, after Conteſtation of Suit, and Proofs receiv'd on the Articles exhibited, doubting which way to proceed, conſulted the Pope by remitting the Proceſs to him: Who gave for Anſwer, That he ſhould abſolve the Canons from the Biſhop of *Volturno*'s Charge; becauſe he ſeems to do no Injury, who makes uſe of his own Right; and this being the Right of the Canons from an Immemorial Enjoyment of it, they did the Biſhop no Injury. And 'tis notorious, that in *Tuſcany* it is a general Cuſtom obſerv'd in all Cathedral Churches for the Canons to chuſe their Canons without requeſting the Biſhop. By the *Canon-Law* an Eccleſiaſtical Election, wherein Laymen intervene with Clergymen, is entirely null and void, becauſe the Form thereof is not obſerv'd: For in Hatred hereof the Law has formally introduc'd itſelf; ſaying, That Laymen ſhall not be preſent, and if they are, the Act ſhall be totally annull'd. But 'tis otherwiſe if no ſuch Form be introduc'd; as in other Corporation-Acts, wherein the Act is not vitiated and made void, tho' unqualified Perſons be admitted thereunto, if the Majority be qualified, and do elect as they ought to do.

† Abb. in c. 31. x. 1. 6. n. 1 & 2.

Tho' a Canonical Election ought to be confirm'd by the Superiour (as aforeſaid) yet ſuch Superiour before ſuch Confirmation ought to enquire touching the Life and Converſation of the Perſon elected, in the Place where he had his Reſidence and Abode, and if on ſuch Election he ſhall be thought worthy in reſpect of Life and good Manners, his Election ought to be confirm'd without Delay *; for Confirmation immedi-

‡ X. 1. 6. 3.

* Abb. in c. 3. x. 1. 6. n. 1.

immediately follows Election *, and gives Power of Administration to the Elected †. And here 'tis to be obſerv'd, that Confirmation is a Matter of Neceſſity, tho' the Election itſelf be a Matter of Will and Pleaſure; for the Canons of a Church are not bound to elect any one certain Perſon ||, ſince that would be *Hopſon*'s Choice (as we ſay in *Engliſh*) but may chuſe whom they pleaſe, provided he be a Perſon fitly qualify'd: And then the Superiour, to whom Confirmation belongs, ought *ex debito Juſtitiæ* to confirm the Election, if nothing hinders the Perſon elected from being confirm'd. And hence it is, that the Power of confirming or inſtituting the Perſon elected or preſented to a Living, which of *Common Right* belongs to the Biſhop, does on a Vacancy of the See paſs to the Chapter ‡: But 'tis otherwiſe in the Buſineſs of a Collation, or an Election properly ſo called *. And the Reaſon of this Diverſity is, becauſe Inſtitution and Confirmation is a neceſſary Act; and the Superiour is not at liberty herein, as exerciſing a neceſſary Point of Juriſdiction. And *Secondly*, from hence it appears, That Election does not give a Plenary of Right, before the Superiour has confirm'd the ſame: And, therefore, the Election ought of Neceſſity to be confirm'd; and by Confirmation the Perſon elected acquires the Exerciſe of the Right accruing to him in his Office of Prelacy, if ſuch Election be not null and void; ſince before Confirmation he has only a Right in *Habitu* and not in *Actu* †. And 'tis the ſame Thing in an Election made by a Secular College or Corporation: For the Election ought, according to Law, to be confirm'd by the Viſitor or Superiour Power ‡. Thus when a Rector of an Univerſity of Scholars is choſen by the Corporation or Univerſity, the Election ought to be confirm'd by the Superiour of ſuch Univerſity: Yet according to *Baldus*, it may by Cuſtom prevail, That ſuch a Rector may have the Adminiſtration thereof without Confirmation; and thus we ſee it commonly practis'd in the Univerſities of *Italy*, and ſome other Countries. But, I think, in Reſpect of Eccleſiaſtical Corporations ſuch a Cuſtom is not valid. Confirmation gives the Power of Adminiſtration; and Acts done by a Perſon unduly elected are not binding and valid in Reſpect of his Publick Office *. Confirmation is always granted by a Superiour, as by Biſhops and other Superiours *gradatim* †; and by a Chapter during the Vacancy of an Epiſcopal See: Becauſe Confirmation is an Act of Epiſcopal Juriſdiction, which the Chapter exerciſes during the Vacancy of the See ‡, as being in the Biſhop's Stead. Yea, tho' the Election of any Dignity belongs to the Chapter, and the Confirmation belongs to the Biſhop; yet the Chapter ſhall both elect and confirm during the Vacancy of the See *: For in ſuch a Caſe the Chapter has a Twofold Right. But here 'tis to be obſerv'd, that tho' a Chapter (*ſede Vacante*) may confirm the Elections of Perſons in inferiour Churches, as that of Abbots, and the like; yet the Chapter cannot confirm the Election of a Biſhop, that is not exempt; but the Archbiſhop ought to confirm it, tho' ſuch Biſhop has not yet been conſecrated †: And according to the Papal-Law an Archbiſhop elect is confirm'd by ſome Primate, Patriarch, and ſometimes by the Pope himſelf *: But in Places exempt, by the ſame Law the Pope ought always to be apply'd to for Confirmation, or elſe his Legate in ſuch Places where he reſides, if the Perſons thus exempt are immediately ſubject to the Pope †: But 'tis otherwiſe, if they are only mediately ſubject to him, as Provincials, and the like ‡; who tho' they are exempt, yet they have a general Superiour of their Order, by whom they ought to be confirm'd.

* X. 1. 6. 3.
† X. 1. 5. 16.
|| Abb. in c. 14. x. 1. 6. n. 3.
‡ X. 1. 33. 14.
* X. 3. 9. 1.
† Gloſſ. in c. 10. Diſt. 63. & inc.
‡ Gloſſ. ut ſupra.
* Innoc. in c. 44. x. 1. 6. & D. 1. 14. 3.
† X. 1. 6. 9.
‡ X. 1. 34. 14.
‡ VI. 3. 8. 1.
* Gloſſ. & Dd. in C. 3. VI. 8. 1.
† X. 1. 34. 14.
X. 1. 6. 32. 64 Diſt. 8.
* 100 Diſt. 1.
X. 1. 6. 9 & 15.
† 63 Diſt. 9.
X. 1. 7. 1.
‡ VI. 1. 6. 36.

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In granting Confirmation all ſuch Perſons ought to be firſt cited who have oppos'd the Election; and theſe ought to be cited *Nominatim*, if the Election was made by Part of the Electors: But if the Election was made unanimouſly and *Concorditer*, then all ſuch Perſons ought to be cited in general, who may or will object any Thing againſt ſuch Election; to appear at a certain Day and Place, when the Confirmation is to be perform'd, in order to ſhew Cauſe of their diſapproving of the Election, and to impeach the Confirmation thereof*. And thus as an Election gives a Beginning to ſome Church-Preferments; ſo does Confirmation add a Perfection thereunto: But 'tis the Entrance on the Office, that gives a Poſſeſſion thereof †.

* VI. 1.6.47.

† Bald. in Rub. x 1. 6. Coll. fin.

Of Eſpouſals de futuro, *commonly called Præ-Contracts.*

THO' this Word *Sponſalia*, in *Engliſh* called *Eſpouſals*, in the proper Import thereof only ſignifies a Proſpect of future Marriage*; yet 'tis not always confin'd to this Senſe alone: For ſometimes 'tis extended to denote *Love-Gifts* made by Parties betrothed; as *Jewels*, *Bracelets*, *Chains* †, and namely the *Ring* itſelf ‡, being often us'd as an aſſured Pledge of a perfect Promiſe ‖. But ſometimes 'tis taken for that *Portion of Goods* which is given for, and in Conſideration of the Marriage to be ſolemnized*; and ſometimes for the *Banquet* or *Feaſt* made at the Celebration of Marriage †. Our Common Lawyers indeed do uſually confound theſe Terms of *Eſpouſals* and *Marriage*, uſing them promiſcuouſly for each other ‡: But yet they do not confound their Natures with the Names themſelves: For till the *Celebration* of Marriage they do not repute the affianced Couple as one Perſon, nor deem their Iſſue as lawful; nor does the Man gain any Property in the Woman's Goods, nor ſhe any any Dower in his Lands by Force of a Matrimonial Contract alone, without Solemnization of Marriage*, according to *Perkins*, *Tit. Feoffments*, *fol.* 40. But tho' the *Civilians* ſeldom uſe the Word *Eſpouſals* for Matrimony itſelf †, but rather for a Preamble thereunto ‡; making no leſs Difference betwixt *Eſpouſals* and *Matrimony* than betwixt the Promiſe and the Performance of the Act ‖: Yet both the *Civilians* and *Canoniſts* in favourable Caſes generally*, in Matters indifferent often, and ſometimes in ſtrict and penal Caſes †, do liken *Eſpouſals* unto pure and perfect Matrimony. The *Canoniſts* indeed are ſomewhat more critical in the obſerving of Terms; and not only diſtinguiſh between *Matrimony* and *Eſpouſals* ‡, but deſcending further, they diſtinguiſh betwixt one kind of Eſpouſals and another, being the firſt Inventors of the ſeveral Names of Eſpouſals *de futuro*, and Eſpouſals *de præſenti* ‖: And yet oftentimes they make little or no Difference betwixt the Natures and Effects of theſe Kinds of Eſpouſals*.

* D. 23. 2. 1. Abb. & Felin. in x. 4. 1.
† C. 5. 8. 1. C. 1. 3. 56.
‡ Conſtant. Tract. de Sponſ. c. 2. n. 12.
‖ Gen. cap. 24. v. 22. cap. 38. v. 18.
* 1 King. cap. 18. v. 25.
† Cic. lib. 2. Epiſt.
‡ Fitzh. Abr. Tit. *Baſtardy* Brook. Tit. Eod.
* Rebuff. in l. 46. D. 50. 16. 1.
† Dd. in L. 1. D. 23. 1.
‡ Sichard. in Rub. C. 5. 1. n. 3.
‖ D. 23. 2. 38. Dd. ib.
* Sichard. ut ſup. n. 10.
† Bart. in L. 4. D. 48. 9.
‡ X. 4. 1. per tot.
‖ X. 4. 31. 1.
* X. 4. 17. 12. Felin. in Rub. x. 4. 1. Gloſſ. in c. 1.
* Abb. in Rub. x. 4. 1.

The *Latin* Word *Sponſalia* is deriv'd from the Verb *Spondeo*, which is to *promiſe* *: And hence it is, that the Perſons betroth'd or affianc'd, and not yet marry'd, are in *Latin* called *Sponſus & Sponſa*, that is to ſay, the *promis'd Couple*. Therefore I ſhall here (according to the Lawyer *Modeſtinus*) define *Eſpouſals* to be a mutual Promiſe of a future Marriage, rightly and duly made between ſuch Perſons, as may lawfully make the ſame †. In which Definition I ſhall make ſome particular Remarks. *Firſt*, That this Promiſe muſt be mutual. *Secondly*, That it muſt be made *rightly* and *duly*. And, *Thirdly*, It muſt be made by them, to whom it is lawful. And, *Firſt*, As this Promiſe is deſcrib'd to be mutual, 'tis not ſufficient for either of the Parties to promiſe alone ſingly ‡: And, therefore, (for Example) if the Man ſays to the Woman, *I promiſe that I will marry thee*; and the Woman does not promiſe the like to the Man, this is a Contract that walks upon one Leg; and, conſequently, not of any Force in Law ‖. And ſo *vice verſâ*, if the Woman promiſes, and not the Man, it ſhall be deem'd a lame Contract. Nor is the ſilent Party in this Caſe preſum'd to conſent; unleſs ſuch Conſent appears either by Words, or (at leaſt) by ſufficient Conjectures *. As when the Father and Mother contracts Eſpouſals, or promiſes Marriage for their Child, the Child's Silence in this Caſe (if preſent and hearing the ſame) ſhall be taken for a Conſent and Approbation thereof †; tho' 'tis otherwiſe, if any other Perſon than the Parents takes on him to ſpeak or anſwer for the Party, in which Caſe the Parties Silence does not prove any Conſent at all, according to *Innocentius*, the Archdeacon, and others. For by the *Canon-Law* Parents may contract Eſpouſals for their Children; and ſuch a Contract ſhall be valid, if they are under Puberty ‡. And in former Ages ſuch was the Authority of Parents, and Obedience of Children (as ſome will have it) that Parents made Promiſes of their Children's Marriage, and not the Children themſelves ‖, who neither would, nor could, without the Parents Conſent preſume to make any Promiſe concerning a future Marriage, much leſs proceed to the actual Celebration of Marriage without the Parents Approbation. But tho' Eſpouſals contracted by Parents are now valid by the *Canon-Law*, yet they may not compel their Children on that Account, even by that Law, to contract Matrimony *, nor by the *Civil-Law* is a penal Stipulation forfeited on this Account, becauſe ſuch a Stipulation is conceiv'd and drawn contrary to good Manners: And this is not only true, when the Penalty is inflicted on the Children; but alſo if it be levy'd and eſtreated againſt the Parents: For there ought to be the greateſt Liberty imaginable allow'd and given to Children in Reſpect of Matrimony †; becauſe if ſuch Liberty of contracting Marriage be taken away, 'tis eaſy to conclude, that nothing but Strife and Diſcord will enſue thereupon between Husband and Wife; and (perhaps) they will lay mutual Snares for each other's Life ‡; and, therefore, the Law has thought fit to obviate and provide againſt ſuch dangerous Conſequences ‖.

Secondly, Whereas this Promiſe ought to be duly made, we ought to conſider that this Word *duly*, in the ſtrict Senſe of it, relates only to the Formalities of the Act or Contract *; but, in a more ample Signification, it comprehends whatever is included within the Compaſs of the Word *rightly*, *viz.* Whatever reſpects the Juſtice and Equity of the Matter †. In this Definition it ſeems to include both the one and the other, and ſo this Promiſe of Marriage muſt not only be *formal*, but *juſt* and *right* alſo ‡. The old *Romans* were ſo preciſe in the Obſervation of this Form, that they did not for a long while admit any other

* D. 23. 2. 2.
† D. 23. 2. 1. 30. Q. 5. 3.
‡ X. 4. 1. 26 & 31. x. 1. 21. 5.
‖ Dd. in c. 31. x. 4. 1.
* Abb. in c. 14. x. 4. 2.
† Abb. in c. 5. x. 2. 23.
‡ X. 4. 16. 2. x. 4. 1. 29.
‖ Alciat. Par. lib. 1. cap. 2.
* VI. 4. 2. 1.
† X. 4. 1. 14.
‡ X. 4. 1. 17.
‖ X. 4. 1. 12.
* Bart. in L. 2. D. 5. 2. & Reb. in L. 73 D. 50. 16.
† Luc. de Pen. in L. 10. C. 10. 10.
‡ D. 23. 2. 42.

other way of contracting Eſpouſals, but by *Stipulation* *, *viz.* By a certain Form of Words conſiſting of Queſtion and Anſwer: For Example, the one Party asking, *Wilt thou marry me?* The other anſwering, *I will* †. But this preſcrib'd Form of Words is now not without a juſt Cauſe aboliſh'd, and a Liberty granted to contract Eſpouſals by any Form of Words whatever, or by any other Means; as *Writing, Signs, Tokens, &c.* whereby a mutual Conſent may appear: And thus, at preſent, there is no one Form of betrothing more lawful than another; but 'tis enough, if the Conſent of Parties appear by any Form ‡.

* D. 23. 1. 2.

† Sichard. in Rub.

‡ D. 23. 1. 4.

Thirdly, By theſe Words of the Definition, *viz Between ſuch Perſons as may lawfully make the ſame*, we may infer, That it is not lawful for every Perſon to contract Eſpouſals, *viz.* Not for Infants under ſeven Years of Age *, nor for any Perſon forbidden to contract Matrimony †, as ſuch are that are of Kin, within the *Levitical* Law Degrees ‡, and ſuch as are already marry'd, with many others hereafter mention'd under the Title of Matrimony. For in contracting Eſpouſals, as well as Matrimony, there is a certain and particular Age neceſſarily requir'd, which is capable of receiving and underſtanding Advice: And, therefore, tho' a Perſon under fourteen Years of Age in a Man, and twelve in a Woman, called the Age of Puberty, may contract Eſpouſals *de futuro* *; yet he cannot contract Matrimony or Eſpouſal *de præſenti*. The *Civil-Law* approves the Opinion of thoſe Men who think that Puberty ought to be taken and adjudg'd according to the Number of a Perſon's Years, and not according to the Strength of his Body: And, therefore, it deems a young Man fit for Marriage at fourteen, and a young Woman at twelve Years of Age compleat; for a Woman arrives at Puberty ſooner than a Man by Reaſon of her natural Heat, and the nutritious Powers of her Body *. But by the *Canon-Law* Puberty is not adjudg'd according to the Number of the Perſons Years, but from the Habitude of the Body, and the Faculty of Generation, whether the Term of Puberty decreed by the *Civil-Law* be paſt or not: For it ſometimes happens, that a Perſon above fourteen Years of Age, has not the Power of getting Children, and ſometimes that a Perſon under this Age has this Power. Hence it was anciently obſerv'd without any Inconvenience, that the Proof of Puberty was deriv'd and taken from an Inſpection of the Body about the *Membra Pudica*: For when thoſe Parts put forth a Down or *Lanugo*, and the Beard grew below, Perſons were adjug'd to arrive at Puberty.

* X. 4. 2. 4. D. 23. 1. 14.

† D. 23. 1. 16.

‡ 32 H. 8. c. 38.

* C. 5. 5. 2.

* X. 4. 2. 3.

Eſpouſals are divided into Eſpouſals *de futuro*, of that which is to come; and into Eſpouſals *de præſenti*, of that which is preſent (as aforeſaid). Eſpouſals *de futuro* are a mutual Promiſe of Marriage to be had hereafter *: As when a Man ſays to a Woman, *I will take thee for my Wife*; and ſhe then anſwers, *I will take thee to be my Husband* †. Eſpouſals *de præſenti* are a mutual Promiſe or Contract of *preſent* Marriage ‡: As when the Man ſays to the Woman, *I take thee to my Wife*; and ſhe anſwers, *I take thee to my Husband* ‖: But ſome think this Diſtinction fights with the 'foregoing Definition of Eſpouſals; becauſe if Eſpouſals are only a Promiſe of *future* Marriage, they do not conſiſt with a Contract of *preſent* Marriage: And, therefore, the Definition is either inſufficient, comprehending only Eſpouſals *de futuro*; or if it be perfect, it deſtroys this Member of Eſpouſals *de præſenti*. Hereunto I anſwer, 'Tis true that Eſpouſals *de præſenti* are improperly called *Eſpouſals*, being in Nature and Subſtance rather Marriage than Eſpouſals. But this Diſtinction was not known to the Makers of the *Civil-Law*, but

* Weſemb. in Tit. 1. D. 23.

† X. 4. 1. 30. 31.

‡ Weſemb. ut ſupra.

‖ X. 4. 1. 31.

but was the Invention of the *Canoniſts* about a Thouſand Years ago. And yet there is no ſuch great Diſagreement between that Definition and this Diſtinction; but that they may be reconcil'd by a good *Canoniſt*: For the Word *Marriage* is not always referr'd to the Subſtance and indiſſolvable Knot of Matrimony alone, but often ſignifies the Rites and Ceremonies obſerv'd at the Celebration of the Marriage *. And if this be true, then it follows, That ſince a Man may contract preſent Matrimony, and yet defer the Solemnization thereof till another time, in reſpect of this future Solemnization; the Contract *de præſenti* may juſtly be defended and verify'd to be a Promiſe of future Marriage †.

* 30 Q. 5. 8. Gen. cap. 24. v. 66.

† Abb. & Dd in C. 31. x. 4. 1.

Secondly, Some Eſpouſals are *pure* and *ſimple*, and others are *conditional* ‡. *Pure* and *ſimple* are they, wherein no Condition is added: As *I will take thee to my Wife*, and *I will take thee to my Husband*, *&c.* *Conditional* Eſpouſals are they, whereunto ſome ſuch Quality is annex'd, as thereby the Validity of the Contract is ſuſpended: As *I will marry thee, if my Father conſents**, *&c.* To which Diſtinction it may be ſaid, That ſome Eſpouſals are referr'd to a Day: As *I will marry thee before the firſt Day of* May †. Again, ſome Eſpouſals are *publick*, and others are *private*, or made in a Clandeſtine manner *. Thoſe I call *publick* that are contracted before ſufficient Witneſſes †; and thoſe are *Clandeſtine* and private, that are contracted betwixt the Parties without the *Preſence of Witneſſes* ‡. And, *laſtly*, Eſpouſals may be contracted either between them that are *preſent*, or betwixt *abſent* Perſons. By *preſent* I mean, when one of the Parties is perſonally ſubject to the others Senſe: And by *abſent*, when the one Party neither hears, nor ſees, nor apprehends the other with any Senſe; but are eſpous'd by the *Interceſſion* or *Mediation* of a third Perſon †.

‡ X. 4. 5. Hoſtien ibi. || Abb. in c. 5. x. 4. 5.

* X. 4. 5. 5.

† Abb. & Dd. in C. 22. x. 4. 1.

* Frig. Tract. de Sponſ.

† Frig. ut ſup.

‡ Abb. & Dd. in c. 3. x. 4. 3.

† Hoſt. Sum. x. 4. 5.

I have ſaid that *Clandeſtine* Eſpouſals are ſuch as are contracted without the Preſence of Witneſſes‡, whereby they may be proved: But this I only underſtand of Eſpouſals *de futuro*, for Eſpouſals *de præſenti* may be ſtiled *Clandeſtine* three ſeveral Ways. *Firſt*, If they be not contracted in the Preſence of Witneſſes, but privily, and as it were by ſtealth *. *Secondly*, If the due and proper Solemnities requiſite unto Marriage be not obſerv'd, but omitted; as heretofore a leading of the Woman into the Church, the Publication of Banns, and the like †. And, *Thirdly*, If they be made contrary to ſome Statute or Cuſtom, or the Tenor thereof. Hence it is, that if there be a Canon or Statute in ſome certain Place, commanding, That no one ſhould contract Marriage or Eſpouſals without the Prince's Conſent, they will be called *Clandeſtine* Eſpouſals, if the Prince be not requeſted thereunto, or if the Perſons have not the Prince's Conſent.

‡ Hoſt. Sum. x. 4. 1.

* X. 4. 3. 2.

† 30 Q. 5. 1. Gloſſ. in c. 3. x. 4. 3.

It may be clearly and well enough inferr'd from the aforeſaid Definition of Eſpouſals, That a Contract of Eſpouſals may be prov'd, if any ſimple Promiſe of future Marriage has interven'd between a Man and a Woman: As when they mutually ſay to each other, *I will take thee to be my Wife*, and *I will take thee to be my Husband* ‡: And this is good in Law, according to the Doctors, whether the Words are utter'd or conceiv'd in the preſent or future Tenſe ||. And the Teſtimony of the Man and Woman thus betrothed unto each other ſhall likewiſe be good Evidence of ſuch a Contract, if they confeſs the ſame, ſince Eſpouſals are contracted by Conſent alone. But yet, for the greater Proof and Solemnity of the Contract, the Parties contracting were wont in the Days of the latter Emperors to give Earneſt on both ſides *; tho' this Earneſt had nothing in common with the Dowry itſelf, or with the

‡ X. 4. 1. 1. 15 & 31.

|| Maſc. de Prob. Vol. 3.

* C. 5. 1. 3.

the Donation *propter Nuptias*. And, according to *Bartolus*, ſuch a Delivery of Earneſt in Eſpouſals may be prov'd by the Confeſſion of the Parties, or the Perſon that receives the ſame, unleſs the contrary appears by ſtrong Conjectures. But *Baldus* ſeems to be of another Opinion, ſaying, That it ought to be proved either by Witneſſes, or elſe by ſome publick Inſtrument, wherein the Notary Publick atteſts the Payment of ſuch Earneſt in the Preſence of the Party, or ſome Notary witneſſing the ſame. And upon the Intervention of Earneſt, if the Perſon that gave the ſame did diſſolve or break off the Contract, he was to loſe his Earneſt, and if the Perſon that receiv'd the ſame did diſſolve the Contract, he was not only to loſe the Earneſt that he had taken, but was likewiſe oblig'd to reſtore Twofold, if he was a Perſon of lawful Condition, but if he was a Minor, then he was bound only to pay back the Earneſt given *. But now in this preſent Age a Ring is uſually given by way of Earneſt, tho' Eſpouſals are not contracted by the giving of this Ring alone, unleſs the ſame be expreſs'd in proper Terms, uttered by the Voice and Tongue of the Parties contracting, or elſe otherwiſe ſignify'd in Writing, that this Ring was given for this End and Purpoſe, and that the Woman receiv'd the ſame on the Account of Eſpouſals.

* C. 5. 1. 5.

† Imol. in C. 10. x. 2. 27. Aretin. Conſ. 17.

The Effects of Eſpouſals are various and ſeveral, the firſt and Principal whereof is this, *viz.* That the Parties, which have contracted Eſpouſals, are bound by the *Laws Eccleſiaſtical* of this Realm to perform their Promiſe, and to celebrate Matrimony together in purſuance thereof *: But this Concluſion is both extended and reſtrain'd, as may appear from the following Ampliations and Limitations. The firſt Ampliation is, that not only they who contract Eſpouſals *de præſenti*, but even they who contract Eſpouſals *de futuro*, are bound to the Performance of the ſame †: And to this the Parties betrothed are obliged, tho' the ſame was made without an Oath ‡. *Secondly*, Tho' one of the Parties affianced ſhould afterwards contract Eſpouſals with another Perſon, and confirm the ſame with an Oath; yet the firſt Contract ſhall be perform'd, tho' not ſworn to ||. And, *Thirdly*, Not only they who have contracted Eſpouſals are bound to perform the ſame, but even they who promiſe that they will contract Eſpouſals *. *Laſtly*, If the Parties have contracted *de præſenti*, and one of the Parties ſhould afterwards marry another Perſon in the Face of the Church, and conſummate the ſame by carnal Copulation, and Procreation of Children; yet the firſt Contract is good, and ſhall prevail againſt the Marriage †. *Sed Quære.* The Limitations of the foregoing Concluſion are theſe, *viz. Firſt*, Where the Parties eſpouſed were not of ripe Age at the Time of the Contract made; for, afterwards coming to Years of Conſent, they may diſſent without Danger ‡. *Secondly*, When the Eſpouſals are Conditional, and the Condition is not perform'd, the Parties are not bound to intermarry ||; unleſs the Condition be impoſſible, diſhoneſt, *&c*, *Thirdly*, When either of the Parties thus affianc'd afterwards contracts Matrimony with another Perſon *; or elſe contracts Eſpouſals *de futuro* with another, and then has Knowledge of the ſame Perſon †; for in both theſe Caſes the former Eſpouſals are diſſolv'd by the latter. *Finally*, When the Eſpouſals are unlawful either by Reaſon of ſome Impediment in the Perſon, as being of Kin within the Degrees prohibited; or thro' want of Conſent occaſion'd by Fear, Madneſs, Drunkenneſs, *&c.* I ſay in theſe and the like Caſes Eſpouſals have no Effect ‡.

* Lindw. lib. 3. Tit. 13. cap. 4. v. *Solutarum*.

† X. 4. 2. 7. Abb ibi. x. 4. 1. 7. Dd. ibi.

‡ X. 4. 2. 7.

|| Abb. in c. 22. x. 4. 1.

* D. 30. 1. 49. 8.

† X. 4. 1. 31.

‡ X. 4. 2. 7.

|| X. 4. 5. 5.

* X. 4. 1. 22 & 31.

† Dd. in c. 30. x. 4. 1.

‡ D. 42. 1. 46.

The ſecond Effect is, That Eſpouſals *de futuro* do become Matrimony by carnal Knowledge between the Parties betrothed ||: But then

|| X. 4. 1. 31.

even this Concluſion admits of ſome Ampliations and Limitations. As, *Firſt*, Tho' one of the Parties betrothed ſhould afterwards marry another Perſon in the Face of the Church, and ſhould even lye with the ſaid new married Perſon; yet (notwithſtanding this Marriage thus ſolemnized and conſummated) the Party ſo marrying ſhall be compell'd to return to his or her aforeſaid Spouſe formerly known *. *Secondly*, Tho' the Parties betrothed ſhould proteſt before the Act done, that they did not thereby intend, that the Eſpouſals ſhould become Matrimony; yet this Proteſtation is defeated by the enſuing Act: For by lying together they are preſum'd to have ſwerved from their diſhoneſt Proteſtation; and ſo the former Eſpouſals are now preſum'd to be honeſt Matrimony †. *Thirdly*, Tho' he or ſhe, who contended for a Contract of Matrimony, ſhould after the Deed done confeſs, That they did not thereby intend to make Matrimony; yet the Preſumption of Law is ſo ſtrong in Favour of Matrimony, that this Confeſſion works nothing againſt it ‡. *Fourthly*, Tho' the Woman was betrothed againſt her Will; yet if ſhe ſuffers herſelf to be known by him, to whom ſhe was eſpous'd, ſhe is preſum'd to have conſented as to her Husband, which makes the Eſpouſals to be Matrimony ||. *Fifthly*, Tho' a Woman be uncertain, as where a Man ſwears to three Siſters, that he will marry one of them: For by lying with one of them, ſuch Eſpouſals do become Matrimony *. *Sixthly*, Eſpouſals *de futuro* by carnal Copulation become Matrimony, tho' either Party had firſt contracted Eſpouſals with ſome other Perſons †. And, *laſtly*, Tho' the Man does by Violence carry away the Woman, with whom he has contracted Eſpouſals, and has carnal Knowledge of her; yet Eſpouſals hereby become Matrimony, according to *Paul de Caſtro* ‡. The Limitations of the former Concluſion are, *Firſt*, It appears that the Eſpouſals were diſſolv'd either by mutual Conſent, or by ſome other lawful Means, before the Parties lay together: For diſſolv'd Eſpouſals never become Matrimony, tho' the Parties afterwards know each other. And 'tis the ſame Thing, if the Eſpouſals were void from the Beginning by reaſon of ſome juſt Impediment; as Conſanguinity or Affinity within the Degrees prohibited, and the like. *Secondly*, Eſpouſals do not become Matrimony, when the Parties lay together before a Contract of Eſpouſals, but not after. *Thirdly*, When the Parties themſelves betrothed do not actually know each other, but only endeavour ſo to do, Eſpouſals *de futuro* are not hereby reſolv'd into Matrimony, unleſs they were Eſpouſals by Interpretation of Law only: As when two Children are contracted by Words of the Preſent Tenſe; for theſe Eſpouſals are transform'd into Matrimony by Endeavours only, after the Parties have attained to lawful Age ||.

* X. 4. 1. 30. x. 4. 1. 15.

† X. 4. 5. 6. Abb. & Gloſſ. ibi.

‡ Abb. & Dd. in c. 30. x. 4. 1.

|| X. 1. 4. 7.

* Abb. in c. 10. x. 4. 1.

† Jo. And. in c. 30. x. 4. 1.

‡ In L. 54. C. 1. 3.

|| X. 4. 2. 10.

By the Eccleſiaſtical Laws of this Realm, if any Perſons having contracted Eſpouſals, and being thereupon conven'd and adjudg'd to celebrate Matrimony in purſuance thereof, ſhall refuſe to undergo the Execution of the Sentence pronounc'd by the Ordinary, he or ſhe ſo refuſing, after lawful Admonition in that Behalf, may for ſuch Diſobedience therein be excommunicated *: And if he ſhall perſevere in his Excommunication for forty Days, the Ordinary ſhall by a *Significavit* under his Seal certify his Contempt into the Court of *Chancery*, and crave the Aid of the Secular Power, as is done in Matters of the like Kind for ſuch Perſeverance; for which ſee Title of *Excommunication* hereafter: Where 'tis ſaid, that a Writ *de Excommunicato capiendo* ſhall be iſſued out and directed to the Sheriff for arreſting his Body, and detaining the ſame in Priſon without Bail or Mainprize, till he ſhall humble himſelf, and obey the Monition of the Ordinary, *&c.*

* Lindw. lib. 5. Tit. 17. c. 3. v. *Regni Conſuetudinem.*

Of

Of Exceptions, and of the Nature and Diviſion of them.

AN *Exception*, in the ſtrict Senſe of the Word, is a Bar or Plea, which the Defendant often makes to the Plaintiffs Action, in order to exclude and deſtroy the Force thereof, by marring the Plaintiffs Intention, and preventing his own Condemnation *. For it ſometimes happens, that tho' the Action itſelf be juſt and well founded on Law, as conſider'd in its own Nature; yet it may be unjuſt in reſpect of him againſt whom it is commenc'd. And hence *Theophilus* defines an Exception to be a kind of Allegation accruing to the Defendant againſt the Plaintiffs Action; which tho' effectual enough in ſtrictneſs of Law; yet in Point of Equity it carries much Iniquity with it: But an Exception taken in the general Senſe of the Term is nothing elſe but a neceſſary Defence †; and he that makes the ſame does in ſome Meaſure ſuſtain the Part of a Plaintiff ‡. And, tho' in Property of Speech, an Exception is only a Bar to the Plaintiffs Action (as aforeſaid) yet under this Stile or Title of Exceptions we may alſo reckon *Replications* ||, which are Exceptions made on the Plaintiffs Part to the Defendants Plea, by Means of which the Plaintiff retorts and as it were caſts back the Defendants Exceptions; and thereby maintains and defends his own Action. And thus in the like manner *Duplications* are thoſe Exceptions, which the Defendant makes uſe of to repel the Plaintiffs *Replication*; and thereby the Defendant juſtifies his own Exceptions. There are alſo *Triplications*, which the Plaintiff objects to the Defendants *Duplication*; and *Quaduplications*, which the Defendant propounds to the Plaintiffs *Triplication*. Theſe three laſt our Common Lawyers call *Rejoinders*, *Sur-Rejoinders*, and *Rebutters*. But good Practice in the *Civil-Law* does not permit us to go beyond a *Replication*.

* D. 44. 1. 2

† D. 44. 1. 9. & 11.

‡ D. 44. 1. 1.

|| X. 2. 25. 2.

Every Exception is either an Exception of *Fact*, otherwiſe called an Exception to the Plaintiffs Intention; or an Exception of *Law*. Now the firſt is that which bars and excludes the Plaintiffs Intention (as we ſay) *nullo Jure Actoris*, or in *Engliſh*, from the Plaintiffs having no Right to the *Action* commenc'd: As when he brings an *Action* for Money, which was never lent or credited, or if lent it has been already paid and ſatisfied: And an Exception of *Law* is a Bar to the Plaintiffs Right, *viz.* it excludes the *Action* itſelf: As when the Plaintiff brings his *Action* thro' an Impulſe of Fear, or thro' the Subtlety of Fraud and Deceit, in order to obtain the Things promis'd him; for an Exception *of Law* bars ſuch *Action* accruing to him.

Exceptions of *Law* are either *Dilatory* and *Temporal*, or elſe *Peremptory* and *Perpetual* *: And theſe laſt are ſo called, becauſe they do entirely perempt and deſtroy the Plaintiffs Suit or *Action*; whereas the former do only for a Time ſtop the principal Matter in Suit, and the Cognizance thereof: For ſometimes the Cognizance of a Cauſe is delay'd,

* D. 44. 1. 3.

delay'd, becauſe ſome Objection is made againſt the Judge or his Juriſdiction: And ſuch an Exception ought to be propounded in the Beginning and before Conteſtation of Suit, leſt the Defendant by Pleading in Judgment ſhould ſeemingly conſent to the Judge and his Juriſdiction. *Secondly*, The Cognizance of a Cauſe may be deferred, becauſe ſome Exceptions may be made to the Perſons of the Litigants, or to ſuch as intervene in their Behalf: As that they are not fit and proper Perſons to appear and practice in a Court of Law. Or elſe, *Thirdly*, Becauſe ſome Objection may be made to the Propriety or the Form of the *Action*, *viz.* That ſuch a particular *Action* ought to be commenc'd and enter'd; or that ſome previous *Action* ought to be enter'd, leſt a greater Cauſe ſhould be injur'd and prejudg'd thereby. And this is the Nature of *Dilatory* Exceptions, *viz.* That they ought to be propounded before Conteſtation of Suit, as aforeſaid; ſince they touch not the Merits of the Cauſe, but only ſuch Things as are the chief Conſtituents of Judicature, or a *Judicial* Proceſs: As Perſons, Time, Place, and the like. For it would be very Prepoſterous to propound them after Suit conteſted; ſince a Perſon, by his Silence herein till then, ſeems to have renounc'd the Benefit of all theſe Exceptions. Wherefore, if he will afterwards make uſe of a *dilatory* Exception, which he has paſſed by, he muſt make Oath that ſuch Exception did not come to his Knowlege before, or elſe he ſhall not only loſe the Benefit and Effect thereof, but his Advocate ſhall likewiſe be fin'd and condemn'd in a certain Penalty, if he might have inform'd him better. Therefore, leſt *Judicial* Proceedings ſhould be delay'd too long, the ſtated Time for making theſe Exceptions ought to be obſerv'd; unleſs (perhaps) ſome new Matter or Cauſe ſhould emerge and ſtart up afterwards as a Foundation for ſuch an Exception, and the Defendant then muſt make Oath *, as aforeſaid; or elſe prove that he had, before Suit conteſted, enter'd his Proteſtation touching the ſame †: And all this muſt be done, unleſs the Proceedings previous or ſubſequent to Conteſtation of Suit are null and void. An Exception of the *greater* Excommunication is a *dilatory* Exception, and may be made both before and after Conteſtation of Suit ‡; provided it be not made *Animo Calumniandi*: Wherefore, the *Species* of Excommunication, and the Perſons pronouncing it, ought to be ſet forth in the Pleading by the Party *Excipient* within eight Days; and the Truth thereof ought to be prov'd. This Exception was introduc'd by the *Canon-Law*, in Hatred and Deteſtation of an excommunicated Perſon, in order to repreſs his Contumacy, and cover him over with Shame, that he might be the more eaſily induc'd *ad Humanitatis Gratiam*, and be reconcil'd thereunto; as I ſhall ſhew hereafter. But an Exception of Excommunication may be eluded by a Reply after this manner, *viz.* *Titius* accuſes *Martin*. *Martin* excepts againſt *Titius*, ſaying, That *Titius* is Excommunicated with the *greater Excommunication*. *Titius* replies againſt *Martin*, ſaying, *Thou can'ſt not except againſt me, becauſe thou haſt participated with me both in Prayer and Converſation.*

Peremptory Exceptions may be propounded at any Time before a definitive Sentence, becauſe they do not concern the conſtituent Parts of Judicature, but relate only to the Determination of a *Judicial* Proceſs already ſettled, by putting an end to the Cauſe itſelf: But after Sentence *Peremptory* Exceptions cannot be objected without an Appeal from thence. Yet there are ſome *Peremptory* Exceptions, which being propounded in the Beginning of the Suit, do prevent and hinder an Entrance thereon: And theſe are term'd Exceptions *Litis finitæ*;

* Cle. 2. 2.

† Dd. in l. 19. C. 2. 13.

* X. 2. 25. 4.

† X. 2. 25. 4.

‡ X. 2. 25. 12.

finitæ ; of which Kind we reckon an Exception *Rei Judicatæ*, *Juris-jurandi*, *&c.* for that, beſides the principal Matter, they reſpect the *Inſtance* alſo. And the ſame Thing is allow'd in all ſuch *Peremptory* Exceptions, whereby the Defendant avers the Plaintiff to have no Right of Action accruing to him ; as in an Exception of *Payment*, and of *Acceptilation* too *. And this Reſtriction according to *Bartolus*, is ſo true, that if theſe Exceptions are propounded and prov'd *incontinently* after the manner of *dilatory* Exceptions, they rather hinder any further Proceedings in the Cauſe than refute the Merits thereof. *Peremptory* Exceptions may not only be propounded before Conteſtation of Suit, if there be a Publick *Conſtat* of the Truth of them, and the Plaintiffs Calumny does not evidently appear thereby, and by this Means hinder a Conteſtation of Suit to the great Eaſe of the Defendant in Court ; but the Defendant may alſo make them after the Plaintiff has founded his Intention, and Witneſſes have been produc'd ; and ſuch an Exception deſtroys the Plaintiffs Intention. Every *Peremptory* is ſtiled an *Incident* Exception, *quaſi incidens ſeu perimens ipſum negotium principale.* But if the Defendant propounds ſuch an Exception after the Plaintiffs Intention founded ; and does not on the Aſſignment of a Term-Probatory *incontinently* prove the ſame, he ſhall be condemn'd in Expences, becauſe he is herein preſum'd to be guilty of Fraud, Malice and Deceit : And, therefore, ſhall be compelled to pay the ſame without expecting a Definitive Sentence. And if he cannot pay theſe Expences, he ſhall be *corporally* puniſhed according to the Judge's Diſcretion ; and the like holds true in *dilatory* Exceptions. When a *peremptory* Exception is made before Conteſtation of Suit, it bars the Plaintiffs Intention only ; but when 'tis made afterwards, it bars the *Action* itſelf : For ſuch an Exception is admitted in a notorious Caſe, even before Conteſtation of Suit (as already obſerv'd) and it has the Effect and Operation then of a *dilatory* Exception †. But *peremptory* Exceptions regularly ought not to be made after Sentence ; becauſe then no one can be repelled : Yet ſome *peremptory* Exceptions may be propounded even after Sentence, tho' paſſed in *Rem Judicatam* ; and being thus made and prov'd, do impeach the Execution thereof. As an Exception *Senatus Conſulti Macedoniani*, which accrued to Children in the Father's Power, if they borrow'd Money ‡ : It being introduc'd in favour of them, in Deteſtation of Uſurers. And by a Special Privilege granted to Soldiers, they might propound ſuch an Exception after Sentence ‖, if thro' Ignorance of Law they had not made it before Sentence. And this Benefit alſo accrues to Minors under Twenty five Years old, by reaſon of their tender Age ; and likewiſe to ſome other Perſons.

* I. 3. 30. 1. & 2.

† VI. 2. 3. 1.

‡ D. 14. 6. 11.

‖ C. 2. 18. 1.

Dilatory Exception ought to be prov'd before Conteſtation of Suit *, leſt the Defendant by conteſting Suit ſhould ſeem to conſent to the Judge, and to approve the Perſons that implead him, tho' the *Code* ſeems to thwart this Opinion, ſaying, that the Defendant ought to alledge and prove a *dilatory* and *peremptory* Exception at one and the ſame time Time ; and 'tis enough for the Defendant to prove a *dilatory* Exception after the Plaintiff has ſet forth his Intention ; for if he cannot make good his *peremptory*, he may prove his *dilatory* Exception : But *Donellus* thinks this an Error in the Text, and inſtead of the Word *Dilatoriam* read *Peremptoriam.* But, according to the uſual Reading of all our Books, the Law (I think) ſpeaks of ſuch a *dilatory* Exception as rather concerns the Cauſe itſelf than the *conſtituent* Parts of Judicature : For ſuch an Exception may be proved after Conteſtation of Suit, as the Defendant does not thereby ſeem to prejudice himſelf.

* C. 8. 36. 13.

ſelf. *Ex. gr.* Suppoſe a Man ſues for a Loan of Ten Pounds, and the Defendant denies to have borrowed any Money of him; adding, by way of *Diſjunctive*, *viz.* That if he lent him the Money, he covenanted with him not to ſue for the ſame within five Years. And as this Exception *ex Pacto* concerns the principal Cauſe, and is of a mix'd Nature; ſo 'tis enough for the Defendant to prove the ſame, after the Plaintiff has prov'd his Intention or Aſſeveration touching the Money lent.

A *Procuratorial* Exception is Twofold, *viz.* *Firſt*, That A. is not a lawful Proctor *: And, *Secondly*, That he cannot be a Proctor†. And if any one has omitted this Exception, he cannot afterwards on better Thoughts reſume the ſame, unleſs ſuch Exception be of the firſt Kind of theſe *Procuratorial* Exceptions, *viz.* *That he is not a lawful Proctor*: And 'tis a known Rule in Law, that all *Procuratorial* Exceptions ought to be made before Conteſtation of Suit, and not afterwards, as being *dilatory* Exceptions, if a Proctor was then made and conſtituted. He that objects it as a *Procuratorial* Exception, that 'tis not lawful for the adverſe Party to appoint a Proctor, as in *Popular* Actions, and all Criminal Cauſes; or that ſuch a Perſon cannot be a Proctor, becauſe he is a Soldier, and the like, ought to prove theſe his Exceptions, the Proof of ſome of them conſiſts in Law. See hereafter the Title of *Proctors*.

* D. 17. 1. 29. 4.
† D. 22. 3. 19. 2.

An Exception is alſo a Defence made againſt improper Witneſſes, by whom the Defendant may be aggriev'd: And ſuch an Exception may be alledg'd on a Threefold Account. *Firſt*, It reſpects the Witneſſes themſelves, *viz.* becauſe they are ſuch as ought not to be examin'd in a Criminal Cauſe; as they are Perſons infamous, guilty of Perjury, and the like. We ought, therefore, to know, That when any Exception is inſufficient, *viz.* *That they are Perſons infamous, guilty of Perjury, &c.* but the Place where, and the Time when ſuch Crime was committed, ought to be ſpecified, and other Circumſtances thereof. Some will have it that the Party *Excipient* ought alſo to prove, that the Witneſſes alledg'd to be infamous are held and reputed as ſuch in the common Opinion of all Men. But the more common Opinion in this Caſe is to the contrary, *viz.* 'Tis enough to prove a Witneſs infamous on ſuch and ſuch a particular Account, thro' ſome Crime committed, without ſaying, *He was and is reputed*, as aforeſaid. Yet let Men be careful how they make ſuch Exceptions without Witneſſes ready at Hand to prove the ſame; becauſe by the *Civil-Law*, if they do not prove the Crimes objected, they are liable to an Action of Injury. But a Perſon *judicially* objecting any Crime againſt Witneſſes, in how general Terms ſoever it be, is not liable, if he proves the ſame, whether it be by Action or Exception. But if he does not prove it, he is obnoxious, tho' done by way of Exception, according to the common Senſe of the Doctors. Yet by the general Cuſtom of *France*, the Perſon objecting any Crime by way of *Judicial* Exception againſt Witneſſes is not liable to an Action of Injury, tho' he does not prove the ſame: But Advocates always proteſt in their Exceptions againſt Witneſſes, *viz.* They do not make the the ſame *Animo Calumniandi*, *&c.* The ſecond Head regards the Proceſs of Depoſitions, *viz.* becauſe the Witneſſes themſelves are not admitted according to Law: As when they depoſe without an Oath adminiſtred to them; or are examin'd according to Law; or (perhaps) are admitted on a general Inquiry: In which Caſes their Depoſitions gain no Credit, tho' they be repeated. The third Head reſpects the veryDepoſitions of Witneſſes themſelves; as being falſe, various, contrariant,

trariant, ſingle, inconcludent, *&c.* But more of this under the Title of *Witneſſes.*

Every Exception has the Nature and Property of a Defence, as already hinted; and a Defence accrues from the Law of Nature, ſo it ought not to be deny'd to any one: And, therefore, every Exception, that may be made after Conteſtation of Suit, may be objected in an Appeal: But a *dilatory* Exception cannot be objected in a Cauſe of Appeal, becauſe regularly it ought to be propounded before Conteſtation of Suit, unleſs it be omitted thro' Ignorance, as before obſerv'd. Nay, ſometimes an Exception has a greater Operation in Law than an Action itſelf; ſince we obtain many Things by an Exception which we could not do by commencing an Action as Plaintiff in a Cauſe. A Judge in not admitting a lawful Exception, ſeems to aggrieve the Party *Excipient*, tho' he not expreſly pronounces thereon; and, therefore, an Appeal lies from hence *: But two contrary Exceptions cannot be alledg'd; becauſe as one Exception is contrary to the other, the firſt deſtroys the laſt. An Exception may be propounded in ſuch doubtful Terms as do not poſitively determine any Thing; as by the Word *Credo*, and the like ‡. For Example, *I believe my ſelf not to be oblig'd.* A *legal* Exception is ſaid to be ſuch as cannot be eluded by the Help and Means of any Replication whatever: And ſuch an Exception breaks the Force of an Action, if it cannot be repelled by a *legal* Replication †. But Exceptions which do require a deeper Search and Inquiry, are not admitted in ſummary Cauſes, tho' they are reſerv'd in principal Cauſes ‖: And an Exception is ſaid to require ſuch Search and Inquiry, when it is involv'd with ſome Subtlety of Law. An Exception is more eaſily prepar'd and given to any one than an Action; but then the Defendant, who in reſpect of his *exceptive* Matter becomes a Plaintiff, muſt prove the Intention of his Plea; ſince all Exceptions are properly ſaid to conſiſt in Fact, as they all ariſe from ſomething or other done or not done.

* Abb. in c. 3. x. 2. 3. n. 4.

‡ D. 5. 3. 42. D. 16. 3. 13.

† Abb in c. 5. x. 1. 9. n. 13.

‖ D. 10. 4. 3. 13.

Of Excommunication, and of the Diviſion and Effects of it.

EXCOMMUNICATION being an ancient Cenſure or Puniſhment made uſe of in the Church to eſtabliſh the Diſcipline thereof; I ſhall, in order to explain the Force and Authority of it, here conſider, *Firſt*, What it is: And, *Secondly*, How it is divided. The Word itſelf is a generical Term, which ſignifies an expelling or caſting of Perſons out of the Communion and Society among Men: And, therefore, there may be as many *Species* of it as there are Kinds of Communion or Society among Men, from whence they are caſt out. And as there is one *Species* of Communion with God (as the Church phraſes it) and another with Men; ſo there is one *Species* of Excommunication, which is ſtiled a *Divine*, and another which is ſtiled a *Human* Puniſhment: Again, there is another *Species* of Communion, which

which is entirely among Men ; and this is either *Civil* or *Eccleſiaſtical*. So that by the *Canon-Law* there is one Kind of Excommunication, which ſeparates us from the Grace and Favour of God ; and another, which ſeparates us from Civil Society ; and a third, which (according to the *Canon-Law*) ſeparates us from God and the Civil Society of Chriſtians. Touching the firſt, 'tis certain, according to the fifth Synod or general Council in the Church, that every impious and wicked Man is entirely ſeparted from God, till God is pleaſed to be reconciled to him again by a Pardon of his Sins *. And herein St. *Jerome* in his Book *de Jud.* perfectly agrees; where, ſpeaking of a wicked Man, he ſays, *That God has departed from him, in that he has committed Sin.* But a Civil Excommunication is made by Human Authority : And as the former is a Sentence pronounced by God alone; ſo this latter is a Sentence pronounc'd by Man, and is either *Civil* or *Eccleſiaſtical*, properly ſo called. I ſhall in this Title treat of that which we ſtile *Eccleſiaſtical.*

* 24 Q. 3. 9.

Now ſuch an Excommunication is an Eccleſiaſtical Cenſure, whereby a Perſon baptiz'd is depriv'd of ſome good Things, which are common to all Chriſtians, *viz.* The Fellowſhip of the Faithful, the Participation of the Sacraments, and the common Suffrages of the Church. It is called a *Cenſure* by way of *Genus*; becauſe every Excommunication is a Cenſure : And 'tis ſaid, *Whereby a Perſon baptiz'd is depriv'd of ſome good Things, which are common to all Chriſtians*, in order to diſtinguiſh Excommunication from other Cenſures. And by the Words *a Perſon baptiz'd* we likewiſe point out the Subject thereof; ſince a Perſon not yet baptiz'd is not the Subject of Excommunication, as being no Member of the Church†. And thus Excommunication in the Import of the Word is the ſame with *Extra-communion* ‡; becauſe a Man is thereby ſeparated from the Communion of the Faithful, and the Participation of the Sacraments, eſpecially of the *Euchariſt*, by an *Antonomaſia* called the Communion. Excommunication is alſo by another Name called an *Anathema*, which properly differs from an Excommunication only in reſpect of a greater Kind of Solemnity, with which the Biſhop uſually pronounc'd it, having twelve Prieſts ſtanding round about with Candles, which they threw on the Ground at the end of the Solemnity and trampled on. The Word *Anathema* is deriv'd from ἀνά and τίθεμι to place; taking its Similitude from the Ancients, who placed thoſe Things in a manner diſtinct and ſeparate from others, that were taken from the Enemy in War. Excommunication is likewiſe ſtiled *Anathema Maranatha*, importing the *greater* Excommunication pronounced by a Sentence ; for the Word *Maranatha* ſignifies *till Chriſt's coming*. Wherefore, when this *Anathema* is pronounc'd, 'tis the ſame Thing as to ſay, *Let him ſtand excommunicated till our Lord's coming*, or in other Terms, till by Repentance he be converted. Excommunication in *Latin* has ſeveral Names: For 'tis ſtiled *Mors*, ſometimes *Medicina*, ſometimes *Mucro Epiſcopalis* ‖, *Virga ferrea*, and *Nervus Eccleſiaſticæ Diſciplinæ*. In the foregoing Definition it is ſaid, *from the Fellowſhip of the Faithful, &c.* chiefly to denote the Effect of the *greater* Excommunication, which conſiſts in depriving a Perſon of ſuch good Things as are common to all Chriſtians, *viz.* The Fellowſhip of the Faithful, the Participation of the Sacrament, and the Prayers of the Church *. And hence appears the Difference between the *greater* and *leſſer* Excommunication : For Excommunication is Twofold according to this Diſtinction.

† 24 Q. 1. 4.

‡ 11 Q. 3. 33.

‖ 16 Q. 2. 1.

* 11 Q. 3. 24. Sect. *evidenter.*

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The *greater* is that which is called an *Anathema* (as aforesaid) excluding a Man *ab ingressu Ecclesiæ*, from the Communion of the Faithful, and from the Sacrament of the *Eucharist*; or (as the *Papists* say) from the Sacraments of the Church; because they maintain seven Sacraments. But the *lesser* Excommunication is that which excludes a Man from one of these Things only; and does not bar him the Participation of the Sacraments, nor repel him a *limine Judiciali*, from commencing a Suit; much less from propounding a lawful Exception; nor does it hinder a Man from the Execution of an Office *. For an excommunicated Person can neither be Plaintiff in a Civil, nor an Accuser in a Criminal Cause, tho' he may do all Things that are Matters *Meri facti*, *viz.* He may buy and sell, hire or let to Hire, and make all other Contracts in his own Name, and even constitute a Proctor *ad Negotia*: But he cannot come into Judgment, unless he be a Defendant; and then he may (notwithstanding his Excommunication) use his lawful Exceptions against the Plaintiff, because a Person has every legal Defence reserv'd to him, tho' he be excommunicated. But if the Defendant shall industriously omit his Exception of Excommunication, which is a *dilatory* Exception, with a Design of wearying out the Plaintiff with Vexation and Expences of Suit, he shall be condemn'd to pay the Plaintiff all his lawful Charges †, though he may object the same in any Part of the Suit: Which is particular in this Exception, since all *dilatory* Exceptions ought regularly to be propounded before Contestation of Suit, as already remembred in the 'foregoing Title. But if a Man communicates with an excommunicated Person, he cannot object Excommunication to him in Judgment, as likewise there observ'd; because he cannot reprobate and disallow of that which he daily approves of by his Conversation ‡. For a Conversation with excommunicated Persons ought to be avoided, if they are excommunicated with the *greater* Excommunication: But 'tis otherwise, if this be with the *lesser* Excommunication; since such Person is not separated from the Communion of Men, but only from the Participation of the Sacraments ‖. But when a Man is excommunicated even with the *greater* Excommunication, and a Person only knows this *in Foro Conscientiæ*, as God knows it, then he ought not to avoid him in Publick or Private, since he ought not to betray his Neighbour either by Word or Sign *: For a Man is not properly said to know a Thing, who knows it as God does, according to *Hostiensis* †: But if he knows as a Man, *extra Signum Confessionis*, according to the *Papists*, then in such Cases as the Law allows, he is not forbidden to communicate with such a Person.

* X. 5. 27. 1.

† X. 2. 25. 12.

‡ X. 5. 39. 46.

‖ X. 2. 25. 2. x. 5. 27. 10.

* X. 1. 31. 13. x. 5. 38. 12. Sect. fin.

† In c. 14. x. 5. 39. x. 5. 39. 7.

But tho' an excommunicated Person cannot bring his Action at Law; yet he may appeal from every Grievance inflicted on him before a Sentence; and, consequently, may *a fortiori* appeal from a definitive Sentence ‡, if he has any Complaint against the Iniquity of the Judge's Sentence: And he may in Defence of himself *Personally* appear in Judgment; and is not bound to constitute and appoint a Proctor to this end ‖. But an excommunicated Person shall not be admitted to prosecute his Appeal, unless he does in the first Place pray Absolution from such Excommunication *; yet 'tis otherwise, when a Person appeals from a Sentence of Excommunication, which he alledges to be an unjust Sentence. But when he confesses himself to be bound by such Sentence, he ought not to be admitted to litigate about the Injustice of such Sentence, till he first prays Absolution. An Excommunication pronounc'd after a *Judicial* or *Extra-Judicial* Appeal is null an void *ipso Jure*; and so is every Act done by a Judge after an *Extra-Judicial* Appeal, as already

‡ X. 2. 25. 11.

‖ X. 2. 1. 7.

* X. 5. 39. 40.

ready hinted under the Title of *Appeals*. As a Sentence of Interdict is not ſuſpended by an Appeal, after it has been once pronounced in Things Spiritual; ſo neither is a Sentence of Excommunication ſuſpended by any ſubſequent Appeal. I call it here a Sentence of Excommunication, becauſe it ſavours of the Nature of an Interlocutory Sentence or Decree; for an Excommunication properly ſpeaking is no Sentence, becauſe it does not put an end to the Suit.

Tho' an excommunicated Perſon may be conven'd into a Court of Judicature, and defend himſelf by Pleading, yet he ought to give in his *Perſonal* Anſwer by ſome other Perſon, leſt he ſhould ſeem to reap an Advantage from his own Malice and Iniquity *: And thus a Debt may lawfully be demanded and ſued for from all excommunicated Perſons †; for they may be conven'd and impleaded in Judgment, tho' they ought not rightly to anſwer by themſelves ‡. If a Defendant ſhall by way of Exception *Judicially* object Excommunication to the Plaintiff, which he does not prove within due Seaſon, the Plaintiff ſhall be heard and admitted to plead his Cauſe; but if he proves it, the Judge ſhall abſolve the Plaintiff, if he be excommunicated for a Cauſe committed to his Cognizance: But if it be for any other Cauſe, and it be not among the Caſes reſerv'd by the *Canon-Law*, he ſhall remit him to his Excommunicator; and if he will not abſolve him, in *Popiſh* Countries the Pope's Delegate may abſolve him. And ſometimes the Judge ought to remit the Excommunication and other Cenſures, by granting the Perſon excommunicated the Power of impleading his Adverſary on the Parties giving of Caution, *viz.* When the Excommunication ſeems to require a deeper Examination, and a longer Cognizance than the Matter then admits of. An Excommunication may be proved by one Witneſs, together with the Oath of the Party objecting the ſame ||; tho' *Speculator*, *Anton. de Butrio* in his Treatiſe of Witneſſes, and *Romanus* in his *Singularia* are of a contrary Opinion: But I think *Imola*'s to be the better Opinion, becauſe the Doctors, that hold the contrary, do there ſpeak of a Crime criminally impleaded. And according to *Felinus**, 'tis the ſame Thing in proving an Abſolution from Excommunication by one Witneſs.

The Church, according to the *Canon-Law* †, derives this Cenſure of Excommunication from St. *Paul* the Apoſtle in his firſt Epiſtle to the *Corinthians*, who deliver'd the inceſtuous *Corinthian* over to *Satan*: And, therefore, the *Canoniſts* ſay, that Excommunication is of Apoſtolical Authority; and is a Cenſure whereby the Souls of ſuch as err in the Faith, and lead others into Error, are delivered over unto *Satan* ‡. For, according to them, thoſe Perſons are given over to *Satan*, who are not of the Faithful with the Church: As among the *Jews* ſuch as had greatly ſinned or offended were caſt out of their Synagogues; as it is written in St. *John*'s Goſpel, That it was a Decree among the *Jews*, if any one confeſſed our Lord *Jeſus* to be the *Chriſt*, he ſhould be caſt out of the Synagogue, which the *Jews* dreaded very much. And ſurely a good Chriſtian ought to ſtand in Fear of nothing more than the Danger of being ſequeſtred from Chriſt's Body the Church: For if he be ſeparated from the Church, he is no longer a Member of Chriſt's Body; and if he be not a Member, he is not refreſhed and quickned by his Spirit: And the Apoſtle ſays ||, *That whoſoever has not the Spirit of Chriſt, is none of his.* And hence it is, that we define Excommunication to be a ſeparating and caſting of any Perſon out of the Communion of the Church *: But then, I think, that Chriſtians ought not to be excommunicated for light and trifling Matters, but

* X. 2. 1. 7.

† X. 5.39.31.

‡ X. 2. 1. 7.

|| Imol. in c. 38. x. 2. 20.

* In c. ut ſup.

† 11 Q. 3. 32.

‡ 24 Q. 3. 13.

|| Rom. cap. 8. v. 9.

* 11 Q. 3. 33.

but only for great and heinous Sins *. But every wicked and impious Man is ſeparated from God, tho' (perhaps) he be not ſeparated from the Communion of the Church: And in this Senſe an *Anathema* has no other Import than that of a Separation from God; ſo that in the true Signification of the Word, he that is ſeparated from God as an impious Perſon, is ſaid to be *anathematiz'd* †. This Cenſure in the early Times of Chriſtianity, when Men were more in Earneſt with Religion than at preſent, was decreed by and with the Conſent of the Church in general, upon a full Hearing of the Matter, and only pronounc'd by the Mouth of the Biſhop or ſome one Perſon there aſſembled: And tho' according to the Diſcipline of the Church at the Time when the Council of *Nice* met, Excommunication was ſuppoſed to paſs by the Biſhop only; yet it was ſtill under the Direction of a General or Provincial Synod, and not at the Pleaſure of any one ſingle Perſon. See the fifth Canon of the Council of *Nice*.

* 11 Q. 3. 41.

† 24 Q. 3. 9.

And tho' afterwards Biſhops, by invading the Rights of the Church, got this Power ſolely into their own Hands; and exercis'd it on the ſlighteſt Acts of Diſobedience and Contumacy; yet now by the *Canon-Law* even Abbots and Priors may excommunicate their Monks for Diſobedience to their Commands; and if they become incorrigible thereby, they may be expell'd and turn'd out of the Society of the Fryarhood †. So that Excommunication is not now reſtrain'd to the Power of Biſhops alone; which was a mighty Step gain'd by the Pope towards exalting his Spiritual Monarchy, if we conſider the near Relation and Dependance that Abbots and Priors have on the Holy See: Of which hereafter under the Title of *Monaſteries*.

† X. 1. 33. 10.

But 'tis a Rule in Law, That before any Perſon can be involv'd in a Sentence of Excommunication, he ought to receive three Admonitions, as well by the Law of God *, as by the *Canon-Law* †; ſince 'tis the greateſt Puniſhment that can happen in the Church of God ‡: But then by a Diſtinction the *Canoniſts* have evaded both theſe Laws, ſaying, That this Law only extends to Archdeacons and their Officials, and other Inferiour Ordinaries in the Church, who are forbidden to pronounce any Sentence of Excommunication, Suſpenſion or interdict againſt any Perſon without a Canonical Monition previous thereunto, unleſs the Exceſs be manifeſt and notorious. And ſo ſays a Provincial Conſtitution in *Lindwood* ||. And a Prelate or Ordinary that excommunicates a Man without a competent Admonition, or a manifeſt and reaſonable Cauſe, ſhall be ſuſpended for one Month *ab ingreſſu Eccleſiæ*; and a Perſon who falſely complains of an unjuſt Excommunication, ſhall be puniſh'd after the ſame manner *. A Sentence of Excommunication ought alſo to be in Writing †; and he that does not cauſe it to be ſo made, ſhall be *ipſo facto* ſuſpended *ab ingreſſu Eccleſiæ* for a Month; and the Pronouncer thereof ſhall, moreover, be condemn'd in Expences, and have ſome other condign Puniſhment inflicted on him. But when the Judge pronounces a Sentence of Excommunication *in vim Statuti*, a verbal Monition is not neceſſary; becauſe the Law or Statute is a Monition unto ſuch a Perſon: Nor is a Sentence in Writing neceſſary hereunto; for that the Law itſelf is the Sentence.

* Mat. c. 18. v. 17.

† X. 5. 39. 45. & 48.

‡ 24 Q. 3. 17.

|| Lib. 5. Tit. 17. cap. 2.

* X. 5. 39. 48.

† 2 Q. 19. 4.

There is one Kind of Excommunication, which is ſtiled an Excommunication *of Law*, and another which is called an Excommunication *of Man*, as I have already related under the Title of *Cenſures Eccleſiaſtical* ‡. The firſt is ſaid to be that which is pronounc'd by the Legiſlator himſelf, with an Intent of making ſome general Law or Statute perpetual, and is *ipſo Jure* inflicted on the Tranſgreſſors thereof

‡ Pag. 156.

of by way of Puniſhment without the Miniſtry or Declaration of Man. But an Excommunication *of Man* is that which is pronounc'd by ſome Judge or Superiour that has a Power of doing the ſame; and is juſtly, according to the *Canon-Law*, inflicted on contumacious and diſobedient Offenders: And by that Law a Perſon excommunicated may be again and again excommunicated, if there be an Occaſion for ſo doing *; and the Sentence of Excommunication ought to be publick and manifeſt, ſince Perſons converſing with a Criminal under ſuch Sentence incur an Excommunication *ipſo facto* †. If a Judge be excommunicated, his Deputy or Vicegerent is not hereby excommunicated, unleſs he participates with him in the ſame Crimes.

* X. 5. 6. 6.

† X. 5.39.29.

By a Provincial Conſtitution in *Lindwood* ‡, all ſuch Perſons do incur the Sentence of Excommunication, who injuriouſly preſume to diſturb the Peace and Tranquility of our Sovereign Lord the King, and his Realm: The Clergy at the Time when this Conſtitution was made pretending, That the Cognizance of the King's Peace did belong to the Church, becauſe Acts of Pacification among the King's contentious and diſagreeing Subjects did then appertain to them as Paſtors of *Chriſt*'s Flock. And they founded their Pretenſions on our Saviour's Inſtitution at the Time of his Death, ſaying ||, *Behold! Peace I leave with you*; or rather, *I would have Peace preſerv'd among you:* And from hence they would infer, That the Preſervation of the Peace throughout the whole Kingdom both in Spirituals and Temporals did belong to them. I will make no Remark hereon, ſince the Reflection is obvious: And I only mention it in this Place by the by, to ſhew the Sophiſtry of Men, that were willing to be the Rulers of the People.

‡ Lib. 5. Tit. 17. Cap. 1.

|| Joh. c. 14. v. 27.

By the Cuſtom of the Realm of *England* excommunicated Perſons perſevering under a Sentence of Excommunication for forty Days, ſhall at the Requeſt of *their proper Biſhops* be arreſted and impriſon'd till ſuch Time as they ſhall humble themſelves to God, and yield Obedience to the Church: For the King is not wont to ſend and iſſue out his Writ *de Excommunicato capiendo* for the arreſting of excommunicated Perſons at the Requeſt of Inferiour Prelates, as Archdeacons, and the like. And 'tis ſaid, that if any one be excommunicated by a Perſon below a Biſhop, as by the Dean or Archdeacon, the Biſhop ought to invoke the Secular Arm or King's Aſſiſtance for ſuch Contempt of this Sentence; ſince Perſons inferiour to Biſhops cannot do the ſame without a Cuſtom: Yet the Biſhop ought to execute their Sentences *; and if he ſhall refuſe to do it, the Archbiſhop may compel him hereunto †. And the uſual Writ *de Excommunicato capiendo* ought to be granted, whenever a Biſhop, that has Power and Authority to ask the ſame, does by writing to the King certify ſuch Contempt: For before ſuch a Writ can be granted, the Contumacy and Contempt of the Party made to Holy Church muſt be ſignify'd into the Court of *Chancery*, by the Biſhop's Letter under his Seal Epiſcopal. But this Certificate by Letters may be made into *Chancery* by a Biſhop even before his Conſecration: And the ſame may alſo be certified by Letters of the Chancellor or Vicar-General, when the Biſhop is beyond the Seas, or out of his Dioceſs *in remotis agend, &c.* And tho' the Biſhop be in his Dioceſs; yet the Certificate of the Vicar-General by his Letters into *Chancery*, reciting, that the Biſhop is *in remotis agend.* is ſufficient, and ſhall not be travers'd. And in the Time of the Vacancy of the Biſhoprick, the Certificate ought to be made by the Guardian of the Spiritualties. And upon this Writ he ſhall have an *Alias* and a *Pluries:* And if they are not anſwer'd, an Attachment againſt the Sheriff, directed to the Coroner, and return-

* X. 1. 31. 3.

† X. 3.38.17.

returnable into the King's Bench. But if this Certificate be made under the Biſhop's private and ordinary Seal, it is not good *. The Reaſon why an Archdeacon's Certificate is not good, tho' he is an immediate Ordinary (as has been ſaid) is, becauſe the King cannot have Benefit to ſeize his Temporalties for his Contempt upon a Writ *de Excommunicato deliberando*, ſince he has not Temporalties as a Biſhop has. For if the Perſon excommunicated has made Satisfaction to the Church for his Contumacy and Contempt, *&c.* then the Biſhop or his Vicar-General, or the Guardian of the Spiritualties (as aforeſaid) ought to certify the King in his Court of *Chancery*, That the Party has ſatisfy'd the Church for the Contempt, *&c.* And thereupon he ſhall have granted him ſuch a Writ to the Sheriff to cauſe the Perſon impriſon'd to be ſet at Liberty. And if the Sheriff ſhall not execute this Writ, he ſhall have an *Alias* and a *Pluries*, and an Attachment againſt the Sheriff, directed to the Coroner, and returnable, as aforeſaid. * 20 H. 6.

But if the Party thus arreſted and impriſon'd ſhall offer ſufficient Caution or Surety to abide by the Rules and Orders of the Church, and the Ordinary or Judges there do refuſe to admit ſuch Caution or Surety, then the Party may have another Writ to the Biſhop to admit of his Caution †: Which Writ ſee in the Regiſter. For where any Perſon is excommunicated, ſuſpended or interdicted on the Score of any Contumacy committed by him, he ought by the *Canon-Law* before a Relaxation of ſuch Sentence, to give Caution *de parendo Juri* ‡; and if he cannot give any other than *Juratory* Caution, he ought then to take an Oath, that he will obey and ſubmit himſelf to the Commands of the Church ‖. If the Biſhop takes Caution of the Party to obey the Orders of the Church, then the Biſhop may certify the ſame into *Chancery*; and thereupon the Party ſhall have a Writ to the Sheriff to deliver him. But if the Biſhop will not ſend to the Sheriff to deliver him upon giving Caution, then the Perſon ſo excommunicated ſhall have ſuch a Writ out of *Chancery* to deliver him, as we find in the *Natura Brevium* *. And upon this Writ he ſhall have an *Alias* and a *Pluries* to the Sheriff; and if he does not ſerve the Writs, he ſhall have an Attachment againſt the Sheriff; but he ſhall not have the ſame againſt the Biſhop, *&c.* But if the Biſhop certifies by his Letters into the *Chancery* that he has ſent to his Official or Archdeacon to abſolve the Party excommunicated, then the ſaid Party ſhall have a Writ to the Sheriff rehearſing thoſe Letters: And yet it ſeems that the Official or Archdeacon, to whom the Biſhop has ſent his Letter to abſolve the Party, is not bound to certify the Sheriff that he has ſuch Letters; but the Biſhop ought to go or ſend to them to know the Truth thereof; and thereupon to deliver the Party: And the Biſhop, or he who excommunicated him, and upon whoſe Certificate the Party was taken, may command the Sheriff to deliver him, as may be ſeen from the Writs in the *Regiſter*. For if the Biſhop thinks in his Conſcience, or be in Doubt whether the Sheriff will deliver him by that Writ, the Biſhop may purchaſe another Writ directed to the Sheriff, reciting the Caſe †. But if the Sheriff delivers ſuch excommunicated Perſons without Order of Law, then on the Biſhop's Complaint into *Chancery*, he ſhall have a new Writ to the new Sheriff (upon a Rehearſal of the Matter) commanding him to arreſt and detain ſuch Perſon in Priſon: And alſo in the ſame Writ he ſhall command the Sheriff to cauſe the old Sheriff to anſwer the King in his Bench for ſuch Contempt: And if the Sheriff who ſets the Party at large be yet Sheriff, then it ſeems the Writ ſhall be awarded to the Coroner

† F. N. B. F. 141.

‡ X. 5.40.23.

‖ X. 5.39.40.

* F. N. B. 141. D.

† F. N. B. 64.

to apprehend the Party excommunicated, and to cauſe the Sheriff to appear, as aforeſaid.

* Lib. 5. Tit. 17. cap. 3.

By a Provincial Conſtitution in *Lindwood* * it is ordain'd, That all excommunicated Perſons thus arreſted and going out of Priſon without the Biſhop's Conſent, and their making Satisfaction to the Church (as aforeſaid) be publickly and ſolemnly excommunicated by Bell, Book and Candle in all Churches, Markets, Fairs, or other Publick Places, where a multitude of People aſſemble together, as a Terror to them; or elſe in ſuch Places where their Ordinaries ſhall think fit to have it denounc'd. And ſuch Sheriffs and Bailiffs as ſhall diſcharge them without making ſuch Satisfaction and Amends to the Church, ſhall incur an Excommunication on a *Judicial* Proceſs at Law, (for they ought to be cited to ſhew a reaſonable Cauſe why they ought not to be excommunicated) and if they ſhall not within the Term prefix'd them appear and alledge the ſame, nor ſufficiently excuſe themſelves from this Offence, they ſhall be excommunicated. But (I think) the Edge of this Conſtitution is blunted by ſubſequent Laws of the Realm, and (particularly) by the 25*th* of *H.* 8. For to ſo high a Pitch of Power were the Clergy advanc'd, when this Conſtitution was enacted, that they preſum'd to admoniſh the King himſelf of his Duty herein, if he did not immediately grant or cauſe the ſaid Writ *de Excommunicato capiendo* to be iſſued out upon their Certificates; tho' the ſame be only a Writ *of Grace*, and not *of Right*, according to the *Regiſter:* And upon failure hereof, they inſtantly ſubjected all his Majeſty's Cities, Caſtles, Manors, Towns, Boroughs, and Villages, which he had within the Dioceſs of ſuch Prelate who wrote to the King hereon, to an Eccleſiaſtical Interdict, till ſuch Writ was granted, and it had its lawful Execution. *Note*, A ſolemn Excommunication here mentioned, is that which is publickly pronounced by the Prieſt in his Sacerdotal Habit, *viz.* His Gown and Surplice (at leaſt) and other Prieſts ſtanding round him. See *Lindwood*'s Gloſs †.

† Lib. 5. Tit. 17. cap. 3. v. *Solenniter.*

If a Man be ſued in the Spiritual Court, or the Biſhop cites him *ex Officio*, and excommunicates him, and certifies the ſame into the Court of *Chancery*; and upon the ſame a Writ is awarded to the Sheriff to apprehend him: And afterwards the Official by Letters certifies into the *Chancery*, that he has appealed from that Sentence of Excommunication to the Court of *Canterbury*, and the like; then upon ſuch Certificate he ſhall have a Writ of *Superſedeas* directed to the Sheriff, reciting that he has appeal'd, and commanding the Sheriff not to arreſt him, *pending the Buſineſs of ſuch Appeal*; or thus, to ſurceaſe, *donec de conſilio noſtro aliud indè duxerimus ordinand'*, or *uſq; talem diem*; or thus, if he has arreſted him upon that Account, *tunc ipſam a priſonâ prædict' quâ*, &c. *deliberari facias*, &c. And if a Man be excommunicated by the Biſhop, and afterwards the Vicar-General certifies the ſame into *Chancery* (the Biſhop being *in remotis*) for which a *Significavit* is granted, and he is taken by it; and then the Perſon arreſted does by his Friends ſhew in the Court of *Chancery*, that he has appealed to the Court of *Arches*, which he follows with effect: I ſay, upon this Surmiſe he ſhall have a Writ to the Sheriff who has the Party excommunicated in his Cuſtody, commanding him to warn the Biſhop or Vicar-General, and him who ſued out the Proceſs againſt the Perſon excommunicated, to appear at a certain Day in *Chancery*, to ſhew wherefore the Party ſhould not (*pendente Appellatione*) be deliver'd; and alſo to cauſe the Excommunicated Perſon under ſafe Cuſtody to come and do as the Court ſhall conſider in in the ſaid Cauſe ‡.

‡ F.N.B. p. 145.

A Sentence of Excommunication is contemn'd ſeveral ways, according to the *Canon-Law*. *Firſt*, When the Perſon excommunicated adds one Fault to another *. *Secondly*, When he enters and comes into the Church, tho' it be not in the Time of Divine Service †, unleſs he does this on the Score of hearing a Sermon preach'd, and the like; which when he has done, he ought immediately to withdraw from thence ‡. *Thirdly*, If he ſtands Abroad at the Church-Doors at the Time of Divine Service for hearing the Celebration thereof, tho' he never enters the Church ‖; and if any Clergyman, that celebrates the ſame within, does not on Knowlege hereof immediately deſiſt from the Miniſtration hereof, he ſhall be puniſh'd *. *Fourthly*, When he thruſts and intrudes himſelf into the Company of other Men, when 'tis in his Power to avoid the ſame †. *Fifthly*, When he ſleeps and ſits ſecure under ſuch a Sentence whereby 'tis preſum'd that this wholeſom Medicine has no Operation at all on him. And tho' regularly the Church ought to wait for the Submiſſion of ſuch a Perſon till the end of the Year ‖, according to the *Canon-Law* before the Ordinary can proceed againſt him as a Perſon ſuſpected of Hereſy for his Continuance in his Obſtinacy *: Yet by the Cuſtom of this Realm, in reſpect of invocating the Secular Arm, a Lapſe of forty Days is ſufficient, as already obſerved: Which is a Liberty peculiar to the Church of *England* above all the Realms in *Chriſtendom*.

* VI. 5.11.6.
† 1 Q. 1. 6.
‡ X. 5.39.43.
‖ X. 5.33.25
* X. 5.39.18.
† X. 5. 27. 5.
‖ 11 Q.3.36.
* VI. 5. 2. 7.

In a Sentence of Excommunication, Suſpenſion and Interdict, the ſame Rule is not always to be aſſign'd: For ſometimes a Diverſity happens in all theſe Cenſures. They are Equivalent in ten Reſpects, and different in nine. For, *Firſt*, They are Equivalent in reſpect of the Form to be obſerv'd in each of them †. *Secondly*, A previous Appeal is a Defence and Protection to the Appellant in each of them, but not a ſubſequent Appeal ‡. *Thirdly*, Perſons that incur either of theſe Sentences ought not to celebrate Divine Service ‖. *Fourthly*, A Monition ought to precede each of them *. *Fifthly*, Perſons under either of theſe Cenſures ought to take an Oath before they receive Abſolution; and an Abſolution *ad Cautelam* may be granted in each Caſe †. *Sixthly*, No Perſons during either of theſe Sentences can be a Witneſs, an Elector, or Perſon elected ‡. *Seventhly*, Superiours ought to obſerve theſe Sentences ‖. *Eighthly*, A Superior ought not to make any Order or Decree about them without firſt citing the Parties *. *Ninthly*, The Pope's Legates, who are ſtiled the peculiar Sons of the *Romiſh* Church or the Apoſtolick See, are not bound by either of theſe Sentences †. And, *Laſtly*, Theſe Sentences are all compriz'd under the Appellation of an Eccleſiaſtical Cenſure ‡. And they differ in nine Reſpects. *Firſt*, In Participation; becauſe I may participate with a Perſon ſuſpended or interdicted, unleſs Participation be ſpecially forbidden ‖; but not with an excommunicated Perſon *. *Secondly*, Becauſe properly ſpeaking a Man is excommunicated or ſuſpended, but not interdicted. *Thirdly*, Becauſe the Effect of an Excommunication *pronounc'd* cannot be ſuſpended, but the Effect of the two other Cenſures may †. *Fourthly*, Becauſe a Relaxation of a general Interdict againſt Cities, Towns and other Places cannot be made *ad Cautelam*, but an Abſolution from an Excommunication or Suſpenſion may ‡. *Fifthly*, Becauſe a Sentence of Excommunication generally pronounc'd binds a Biſhop, tho' there be no ſpecial mention made of him; but a Sentence of Suſpenſion or Interdict does not ‖. *Sixthly*, Becauſe, tho' a Sentence of Excommunication cannot be pronounc'd againſt a Corporation or Body Politick; yet an Interdict may *. *Seventhly*, Becauſe excommunicated Perſons are not admit-

† VI. 5. 11.1.
‡ X.2.28.53.
‖ X. 5. 27. 2 & 7.
* X. 2.28.26.
† X.5. 39.52.
‡ X. 1. 4. 8.
‖ X. 1. 6. 16.
* X. 1. 31. 3.
† VI. 15.3.11.
‡ VI. 5.12.1.
‖ D. 48.19.9. D. 18. 7. 5.
* X. 1. 40. 5.
†Dd. in c.12 x. 5. 39.
‡ VI.5.11.10
‖ VI. 5. 11.
* VI. 5. 11.

admitted to Pennance, unleſs it be *in articulo mortis*; but 'tis otherwiſe
*VI. 5. 11. 24. of Perſons ſuſpended or interdicted *. *Eigthly*, On certain Feſtivals Perſons interdicted are admitted into Churches; but Perſons excommu-
† VI. 5. 11. 24. 3. nicated are not †. And, *Laſtly*, Becauſe Excommunication is never pro-
‡ 24 Q. 3. 1. nounc'd *pro Culpâ alienâ*; tho' an Interdict and Suſpenſion may ‡.

Of Executors, their ſeveral Kinds, and of their Duty, &c.

AN Executor, ſo called *ab exequendo*, is he that is appointed by any Man in his laſt Will and Teſtament to have the Execution thereof, and to diſpeſe of all his Subſtance according to the Direction of the ſaid Will; and in the *Civil* and *Canon-Law* he is ſometimes called *Hæres Teſtamentarius*, and often *Hæres* ſimply. This Executor is either *Particular* or *Univerſal*: *Particular* when this or that Thing is committed to his Charge; *Univerſal*, when he has the Care and Diſpoſal of the whole Eſtate. This Executor had his Beginning in the *Civil-Law* by the *Imperial* Conſtitutions, which permitted ſuch as thought fit by their laſt Wills to beſtow any Thing upon good and pious Uſes, to appoint whom they pleas'd to ſee the ſame perform'd; and if they appointed none, then the Law ordain'd, That the Biſhop
*C. 1. 3. 28. 1. & 2. of the Place ſhould have Authority of Courſe to effect it *. But now an Executor is generally taken to be a Perſon appointed by the Teſtator to execute his laſt Will and Teſtament, and has a Property and Intereſt in the Teſtator's Goods and Chattels, upon Confidence to diſpoſe of them according to the Will as the Law directs.

In treating of Executors I ſhall here, *Firſt*, Conſider what Perſons the Law forbids to be Executors: For knowing this, it will eaſily appear, who may be Executors; becauſe *Cognito uno ex contrariis, cognoſcuntur & reliqua*. *Secondly*, I ſhall conſider the Power of Executors. And, *Thirdly*, I will endeavour to ſhew, wherein Executors differ from *Tutors* and *Curators*: And by the way I ſhall incidently treat of ſuch Points or Matters as relate to the Buſineſs of Executors. And here 'tis to be obſerv'd, That an Executor may be taken in a Threefold Senſe or Manner, *viz.* *Firſt*, In a Senſe of the largeſt Extent. *Secondly*, In what we call a larger Senſe. And, *Thirdly*, In a large Senſe. In the firſt Senſe every Perſon is comprehended, that has the Management and Execution of another Man's Affairs, as a Proctor, *a Negotiorum Geſtor*, and the like, as the Etymology of the Word *Executor* denotes. *Secondly*, It includes thoſe that execute Sentences and laſt Wills. And, *Thirdly*, It only takes in Meſſengers, and ſuch as
* X. 3. 26. 17. execute Sentences and other Acts of Judicature *.

Among theſe Executors of laſt Wills and Teſtaments there are three
† Specul de Inſtrum. edend. Sorts of Executors †: Some of which are properly ſtiled *Teſtamentary*, others are called *Legal* Executors; and a third Sort are term'd *Dative* Executors. Thoſe are properly *Teſtamentary* Executors, whom the Te-
‡ X. 3. 26. 17. ſtator appoints to this End and Purpoſe, as we daily ſee practis'd ‡.

Thoſe

Thoſe are ſtiled *legal* Executors, unto whom either the *Civil* or *Canon-Law* has given the Power of executing the Wills of Perſons deceas'd; as Biſhops, an *Oeconomus*, and the like ‖. And thoſe are term'd *Dative* Executors who are appointed ſuch by the Judge's Decree *, as Adminiſtrators with us here in *England*; tho' this among the *Romans* happen'd very ſeldom. Now having thus explain'd the Nature of Executors, I come in the next Place to conſider, what Perſons cannot be Executors of laſt Wills and Teſtaments, as I before propos'd to do.

‖ C. 1. 3. 49 x. 3. 26 17.
† D. 34. t. 3. Sect. fin.

Now the Law repels a Pupil, Madman, Lunatick, Ideot, and the like, from this Office of an Executor, becauſe they cannot be Proctors *ad Negotia tractanda*; nor can they be ſuch in *Judicial* Cauſes thro' a Defect of Underſtanding: But a Woman, if ſhe be of good Underſtanding, may be an Executrix †, tho' ſhe cannot be a Proctor *ad Lites*. And by the *Canon-Law* all minor Fryars and Religious Perſons confin'd to a Cloyſter are prohibited this Office ‡, becauſe the handling and meddling with Money is contrary to the Rule of the *Franciſcan* Order; but other Religious *Mendicants* may by the leave of their Superiour (and not otherwiſe) become Executors: For a Religious confin'd to a Cloyſter cannot be an Executor even in a Will made to Pious Uſes without the Leave of his Superiour ‖, not only becauſe he can neither Will or Nill a Thing, but becauſe he ought to abſtain from thoſe Things which may diſtract and draw his Mind from Things Divine. But notwithſtanding this Biſhops and other Secular Clerks may be made Executors of laſt Wills and Teſtaments: For tho' this Office was heretofore interdicted them *; yet for the good of the Church at this time it ſeems to be permitted them, as appears not only from daily Practice, but from the Law itſelf †, and according to the Council of *Trent*. I have juſt now ſaid, that a Woman may be made an Executrix of a laſt Will and Teſtament, becauſe ſhe is not prohibited by the Law; and all Perſons whom the Law does not forbid, may become Executors; for as they undertake all other Buſineſs, ſo they may likewiſe undertake this: Nor is a Woman that is made Executrix by her former Husband, depriv'd of this Office by paſſing to a ſecond Marriage, ſince ſhe is not depriv'd of this Office by any Law. But if a Teſtator that has Brothers and Siſters, ſhall ſay, *I leave my Brothers, or my Brethren, my Executors*, I think that under the Name of *Brethren* or *Fratres*, the Males are then only underſtood; becauſe that Women are not very fit for this Office. But, according to *Molina*, this admits of a Limitation. For if a Teſtator, that has only one Brother, ſhall ſay, *I make my Brethren my Executors*, then under the Word *Brethren* even his Siſters ſeem to be included; for otherwiſe the Teſtator's Diſpoſition is not rightly verify'd.

† D. 34. 1. 15. 1.
‡ Dd. in c. 2. VI. 3. 11.
‖ VI. 3. 11. 2.
* 11 Q. 1. 29.
† D. 5. 3. 50.

By the *Civil* and *Canon-Law* no Heretick can be an Executor ‡, tho' the Party be not condemn'd of Hereſy; for if he perſeveres in his Hereſy, he ſhall not be admitted, no not in a Military Teſtament ‖, tho' a Soldier has more liberty in making an Executor than another Perſon. And tho' he that is named Executor, does by Repentance reclaim his Hereſy; yet being a Heretick either at the Time of making the Will, or at the Time of the Teſtator's Death, or at the Time when he undertakes the Executorſhip, he ſtands excluded *. For this is a perpetual Rule in Law, that if any Perſon be incapable either at the Time of the Will made, or at the Teſtator's Death, or at taking the Executorſhip on himſelf, 'tis as if he was always incapable †; but it does not hinder, if he be incapable at other Times ‡. Nor by the

‡ C. 1. 5. 5.
‖ C. 1. 5. 20.
* I. 2. 19. 5.
† D. 28. 5. 49. 1.
‡ D. 28. 5. 6. 2.

Canon-Law can an excommunicated Perſon be admitted as an Executor, as long as he continues under a Sentence of Excommunication; and this is agreeable to the Laws of *England*. But if a Corporation aggregate of many are made Executors, Excommunication cannot be decreed againſt them; becauſe they are a Body Politick. My Lord *Coke* * ſeems to intimate, That an Excommunication is a greater Diſability to an Executor than an Outlawry: For if a Plaintiff, who is an Executor, be outlaw'd, his Outlawry cannot be pleaded to diſable him from proceeding in the Suit, becauſe 'tis in the Right of another; but if he is excommunicated 'tis otherwiſe, becauſe every Man that converſes with ſuch a Perſon is excommunicated himſelf. But with my Lord *Coke*'s Leave, this is a Miſtake; for they are not excommunicated, till he is denounc'd, and they are admoniſh'd not to converſe with him. So likewiſe where there are three Executors †, and one is excommunicated, and in an Action of Debt brought by them, the Excommunication of one of them is pleaded in *Abatement*, this only *ſuſpends* but does not *abate* the Action, ſince he may obtain Abſolution.

* 1 Inſt. 134.

† 3 Lev. 208.

It has been a Queſtion among the Doctors, Whether an Executor may be compelled to undergo this Office? And ſome of them think that he may; becauſe 'tis the Intereſt of the Publick that Mens laſt Wills and Teſtaments ſhould have a good Effect or Event in Law: Therefore, ſay they, every Private Man may be compelled to undergo a Publick Office of this Kind *. But, on the contrary, this admits of a good Diſtinction according to the *Civil-Law* now practis'd. For if it be underſtood of an Executor in Law, or a legal Executor, he ſhall be compelled hereunto †: But if it be intended of a *Teſtamentary* Executor, then he ſhall not be preciſely compelled to execute this Office; but 'tis enough if he be contented to loſe the Legacy, or the Reſiduary Advantage of the Eſtate left him by the Deceas'd: And the Reaſon of this is, becauſe no one can charge or burden another *ultra Beneficium* ‡, beyond his own Advantage. But if he has once taken on himſelf the Adminiſtration of the Goods he ſhall be compell'd to fulfil and go thro' the ſaid Office, even by the Cenſures of the Church, or elſe by ſome other arbitrary Puniſhment ||. And if one Executor, where ſeveral are nam'd, ſhall delay to adminiſter, the others may in the mean time execute this Office, according to the Doctors *: But if there are ſeveral Executors appointed, 'tis neceſſary that all of them ſhould implead, or be impleaded together, according to *Odofredus*; for, ſays he, theſe Executors are like unto Proctors, ſo that one of them alone cannot execute a Will in Part, unleſs this be ſo order'd by the Teſtator; but every one ought to execute the ſame *in ſolidum* †. And *Guido Papa* approves this Opinion, ſaying ‡, That one Executor cannot bring his Action, nor be impleaded without the other, if any Exception be made hereunto. But *Franciſcus*, by aſſimulating theſe Executors unto Guardians or *Curators* of Minors, ſays, That each of them may execute the Will *per ſe & in ſolidum*: And this laſt Kind of Practice is obſerv'd by the Cuſtom of *England* in our Temporal Courts ||. And this ſecond Opinion ſeems to be the truer Doctrine in Point of Executors, that take on themſelves the Adminiſtration of their own accord.

†C. 1.3.28.2.

‡ D. 31.1.70. prin.

|| Joh. An. in c. 19. x. 3.26. v. *Cogi.* X. de reg. jur. 21.

* Guid. in c. 2. VI. 11. 2. v. *nolente.*

† D.30.1.107 D. 3. 3. 32.

‡ In c. 2. VI. 3. 11.

|| D. 14. 1. 1. 29. D.14.1.2.

An Executor and Adminiſtrator ought to ſwear, that each of them will faithfully perform and do all ſuch Things as are committed to their Adminiſtration *, and whenever requir'd render a true Account. And ſo true is this, that no one ſhall be admitted to be an Executor to any Teſtament, till he has given ſufficient Caution either by Pledge, Oath,

* C. 6.42.32.

Oath, or Surety for the due Execution thereof; and for rendring a faithful Account of the Reſidue of the Goods, that is to ſay, of ſuch Things as are not ſpecify'd by the Teſtator, but paſs under a general Clauſe ‖. And if a Religious was made an Executor, his Superior gave this Caution or Surety for him: For a Religious Perſon even of an exempt Juriſdiction may not only be called to render an Account of his Adminiſtration or Executorſhip before the Ordinary, but he is even hereunto bound by Law, notwithſtanding his Exemption *. And tho' a Teſtator ſhould be ſo weak as to forbid an Executor to render an Account of his Office; yet it ſhall be at the Diſcretion of the Judge or Ordinary (notwithſtanding ſuch Teſtator's Order) to compel the ſame, by conſidering the Fame and Character of the Teſtator; and the Quality and Quantity of the Thing in diſpute: For the Teſtator's Intention cannot be preſum'd to be ſuch, as that he ſhould inſert a Clauſe in his Will to bar the Power of the Ordinary by deſtroying the Execution of his own Teſtament, but rather that he would chuſe to rely very much on the Honeſty of his Executor, as well as on that of the Ordinary †. For 'tis a Rule in Law, that in every general Remitter, it is never to be underſtood, that Fraud and Deceit is thereby remitted ‡. Nor is it foreign to our preſent Purpoſe to add, that Executors are preſum'd to be fraudulent Perſons, as we may collect from the Emperor *Juſtinian* in the *Authenticks*, and *Luca de Penna* in his Commentary on the *Code*.

‖ C. 5. 37. 13. 14. &c.

* VI. 3. 5. 1.

† D. 26. 2. 3.

‡ D. 26. 7. 21. & 44.

‡ D. 34. 3. 9.

The Law requires an Executor to make an Inventory of all the Goods and Chattels, before he intermeddles or lets himſelf into the Poſſeſſion of them, at leaſt he ought to do this for his own Safety, to the end that he may not be made liable *ultra vires bonorum*, that is to ſay, beyond the Aſſets found in ſuch Inventory according to the Form of it. And this is not only enjoin'd both by the *Civil* and *Canon-Law*, but alſo by an expreſs Conſtitution in *Lindwood* ‖; where 'tis enacted, That before ſuch Executor ſhall be veſted with the Adminiſtration of the Goods of the Deceas'd, he ſhall exhibit a true and perfect Inventory of all the ſaid Goods taken in the Preſence of fit and proper Perſons (as Creditors and Legataries are) unto the Ordinary; and if he ſhall refuſe or neglect to do this, he ſhall be puniſh'd according to the Diſcretion of the Ordinary: And, moreover, it is here order'd, That before any Executor be admitted to the Execution of any laſt Will and Teſtament, upon his preſenting the ſame to the Ordinary for the Probat thereof, he ſhall wave and renounce the Privilege of his own Court or Juriſdiction in reſpect of this Act: For by the *Civil-Law* a Controverſy touching an Executorſhip ought to be determin'd in that Court or Juriſdiction, where the Perſon who is conven'd has his Dwelling or Habitation; or elſe where Hereditary Effects are lying and being, if the Defendant can be found there: For the *Civil-Law* deems it contrary to Juſtice and Equity to call a Man away from his own Court and Dwelling to the Place where the Teſtators's Eſtate lies; ſince Men are not drawn away from their Eſtates and proper Employments without ſome great Diſadvantage.

‖ Othob. Tit. 14.

It has been ſaid, that a *Teſtamentary* Executor, who takes on himſelf the Office of ſuch a Perſon, ought to perform his Truſt, and ſhall be oblig'd to execute the ſame with Fidelity, by the Compulſion of a competent Judge †. And here it is to be obſerv'd, that by the *Canon-Law* it does not only belong to the Biſhop of the Dioceſs to take Care and ſee that the laſt Wills and Teſtaments of Perſons deceas'd be demanded to Execution ‡, but even to the Dioceſan whoever he be, that is to ſay,

† X. 3. 26. 1

‡ X. 3. 26. 1

ſay, to him who has Epiſcopal Juriſdiction excluſive of the Biſhop, tho' he be no Biſhop himſelf. For it often happens, that Abbots, Archdeacons, and others that are not Biſhops, have either by Privilege or Preſcription an Epiſcopal Juriſdiction: And theſe, according to the Gloſs, are compriz'd under the Apellation of Dioceſans; and have ſometimes *Ordinary* Juriſdiction in this Behalf, tho they are not properly Ordinaries. Yea, a College of Canons, vulgarly called a *Chapter*, may in the Vacancy of the Epiſcopal See compel Executors to execute the laſt Wills of Teſtator's deceas'd: And if theſe Executors are negligent, they may demand the ſame to Execution, ſince this Matter belongs to Epiſcopal Juriſdiction, as aforeſaid. The Biſhop of the Dioceſs is the lawful Executor of a Will made *ad pias Cauſas*, and may compel Executors in Truſt to execute the Wills of Perſons deceas'd in reſpect of Legacies given
* X. 3.17.16. to *Pious Uſes* *; tho' the Teſtator ſhould have interdicted the ſame by a contrary Order: But notwithſtanding this, by the *Civil-Law* the Secular Judge may be apply'd to alſo in this Caſe, and has ſtill this Power in Reſpect of Legacies left to Charitable Uſes; this being a
‖ C. 1. 3. 28. Truſt of a mix'd Juriſdiction ‖. And hence all Men are by this Law allow'd to ſue, in order to have ſuch Legacies paid and brought to Execution, if they ſee any Thing attempted contrary to the Teſtator's Will, either by the Fraud or Sloth of the Heir, Executor, or the Judge himſelf.

By the *Civil-Law* it ſeems, That the Ordinary may remove and put out an Executor, that is appointed even by the Teſtator himſelf, from his Executorſhip, whereby he ſhall not have the Adminiſtration of the Teſtator's Goods; eſpecially if this be upon a juſt Occaſion, as becauſe he cannot render an Account of his Adminiſtration: And *Juſtinian* in
† I. 1.26.5.v. his Inſtitutions ſeems to favour this Opinion †. But yet the laſt Section of this Title in the *Imperial* Inſtitutes is objected hereunto: From whence it appears, that tho' a Man be poor, yet if he faithful and diligent in his Adminiſtration, he ſhall not be remov'd. To which I anſwer, that when a Preſumption of Fraud and Deceit lies againſt him, becauſe he has formerly in Matters of the like Nature behav'd himſelf deceitfully, he may be well remov'd and ſet aſide before the Admini-
‡ Gloſſ. in L. 6. I. 1. 26. ſtration is committed to him ‡; but not afterwards without juſt Cauſe ſhewn. But an Executor or Adminiſtrator may (according to *Bartolus*) be alſo remov'd from his Office, if he runs away and becomes a Fugitive; provided this be for ſome Crime or Offence committed: But (I think) *Bartolus* ſtands ſingle in this Opinion. But if a Perſon be only poor, and can give Security for his juſt Adminiſtration, he ſhall not be remov'd from his Office; and herewith agrees the Law of *England:* And tho' he cannot find Security; yet ſo indulgent is the *Civil-Law*, that if he be otherwiſe diligent and faithful in his Adminiſtration, his Poverty ſhall be no Objection to him. For 'tis not Poverty that ſhall render a Man ſuſpected; but only an evil Behaviour, and a ſtrong Inclination to Knavery and Negligence. And 'tis regularly true, according to the *Civil-Law*, that if an Executor be hindred in the Execution of his Office by any Impotence of Law or Fact, whereby he cannot fulfil the laſt Will and Teſtament of the Perſon deceas'd, the Biſhop of the Dioceſs ſhall have the Power of acting and diſtributing the Teſtator's
‖ C. 1. 3. 28. & 49. Goods transferr'd and committed to him ‖: But this is only to be ſo underſtood, when one ſingle Perſon alone is made Executor; the Matter being otherwiſe, if there be more than one appointed to the Office. For then if one of them ſhall be deficient in his Adminiſtration, the Adminiſtration is lodged with the others.

By

By a Provincial Conſtitution in *Lindwood* *, an Executor is forbidden to apply or appropriate unto himſelf any of the Goods of the Perſon deceas'd, whoſe Will he has the Execution of, either by the way of ſecret Purchaſe, or by any other Title whatever, under the Pain of Suſpenſion *ab Ingreſſu Eccleſiæ*, unleſs it be in the following Caſes, *viz. Firſt*, When the Teſtator has made him a Grant thereof by way of Donation *inter vivos*. Or, *Secondly*, When he has in his laſt Will and Teſtament bequeath'd the ſame to him by way of Legacy. Or, *Thirdly*, Has order'd, that his Executor ſhall have ſo much out of his Perſonal Eſtate, according to the Diſcretion of the Ordinary, by way of Recompence for his Labour and Trouble, when he has no particular Legacy left him: For in ſuch a Caſe an Executor cannot reward himſelf *arbitrio proprio*, becauſe he would by this Means be a Judge in his own Cauſe. Or, *Fourthly*, When the Deceas'd was indebted to him in his Life-time: For an Executor may openly and fairly deduct ſuch a Debt out of the Subſtance, and pay himſelf in the firſt Place upon an equal Right. Or, *Laſtly*, On the Score of ſome moderate Expences he has been at on the Account of his Adminiſtration or Funeral. And ſuch Executor ſhall in no wiſe obtain an Abſolution from ſuch Sentence, till ſuch Time as he ſhall have made Reſtitution of what he has unduly appropriated or apply'd unto his own Uſe, and ſhall have paid Twofold out of his own Eſtate for the Goods thus appropriated to himſelf towards the building and Repairs of the Cathedral Church, unto which the Perſon deceas'd was a Subject. And this Conſtitution was to be ſolemnly publiſh'd twice every Year in all the Churches within the Province of *Canterbury*: But it is now grown obſolete and entirely out of Uſe upon a better Foundation of Law.

* Lib. 3. Tit. 13. cap. 5.

Executors, according to *Hoſtienſis*, may not only have an Action againſt the Heirs, if there be any, in reſpect of Legacies given to Charitable Uſes; but even againſt all other Perſons, if they are not *nude* Executors, to recover Debts, and the like; and in all other ſuch Matters as do relate to the Execution of a laſt Will and Teſtament, becauſe they are to receive an Advantage from hence: But if they be *nude* Executors, then no Action accrues to them for a contrary Reaſon †. And if an Executor *ad pias Cauſas* ſhall be negligent herein, then the Dioceſan, who is the Executor in Law, ſhall cauſe this to be done. A *nude* Executor here mention'd is no more than an Executor in Truſt, whom the Teſtator has made Choice of on the Account of his great Integrity; and as he has not the Right of Adminiſtration, and no Intereſt accrues to him, he is not oblig'd to give Security for his faithful Adminiſtration. But an Executor *Teſtamentary*, and the like, cannot make an Agreement with the Heir, or with the Teſtator's Debtor, in ſuch a manner as to remit the Debt ‡, any more than a Proctor aſſign'd *ad agendum* can; unleſs it be (perchance) with the Conſent of the Creditors and Legatees, who have an Intereſt herein ‖; or unleſs he has a ſpecial Order and Mandate from the Teſtator for this End and Purpoſe *. But ſome Perſons hold the contrary Opinion, eſpecially if he has made a Diſtribution of all the Teſtator's Goods, and the Suit be doubtful for want of good Evidence. Nor can a *Teſtamentary* or *Legal* Executor of any Perſon deceas'd commit his Office by way of Delegation unto another Perſon. Yea, the Teſtator himſelf cannot ſo much as give him a Power of ſubſtituting another Perſon in his Stead, according to *Tiraquellas*, unleſs it be *ad pias Cauſas* †.

† Inn. & Alb. in c. 19. x. 3. 26.

‡ C. 2. 3. 22.

‖ X. 1. 36. 3.

* C. 2. 13. 10.

† de Priv. 31. piæ Cauſ.

Of the Execution of a Judicial Sentence.

THE laſt principal Act in a *Judicial* Proceſs is the Execution of a Sentence: For 'tis not enough that a Sentence be pronounced, unleſs it be demanded to Execution *. And that Sentence is ſaid to be committed or demanded to Execution, which is valid according to Law, and not ſuſpended by any Appeal or Petition of Reſtitution *in integrum*: For if ſo, the Execution of ſuch a Sentence ought to be deferr'd and put off till the Buſineſs of the Appeal, or the Cauſe of Reſtitution ſhall be decided. But if a Sentence be only ſuſpended by a *Supplication*, ſuch Sentence ſhall be demanded to Execution, and the *Victor* in the Cauſe ſhall find Sureties for the Reſtitution of that which he has obtain'd by the Sentence, in caſe the former Sentence happens to be revers'd. A *Supplication* here mention'd is a Remonſtrance by way of Petition againſt a Sentence pronounc'd by ſome Superiour Judge †, from whom no Appeal lies, to revoke ſuch Sentence upon a Re-hearing of the Cauſe. Of which hereafter.

* X. 2. 27. 15.

† C. 7. 42. C. 1. 19. 5.

Now the demanding of a Sentence to Execution, after it has paſſed *in Rem Judicatam*, is a Thing ſo entirely neceſſary, that as Laws are of no Advantage to any State, which cannot be executed: So a Sentence is vainly pronounc'd, and has no Life and Force without a due Execution thereof ‡. Wherefore, I ſhall here, *Firſt*, examine, what Sentences ought of Right to be demanded to Execution, and likewiſe by what Judges. *Secondly*, I ſhall enquire in what Order and Manner this Execution ought to be made. *Thirdly*, I ſhall conſider in what Cauſes, and againſt what Perſons it may be committed. And, *Fourthly*, For what Reaſons it may be ſtopp'd and delay'd. And, *Firſt*, 'Tis to be obſerv'd, That every Sentence may be demanded to Execution, as ſoon as paſſed *in Rem Judicatam*, *viz.* After the *Fatale* for the Interpoſition of an Appeal is elaps'd; and it may be committed to Execution by the Judge pronouncing the ſame ‖. For a Sentence is always ſaid to have *Executionem paratam*, or an Execution at Hand *. Yet this Rule in Law, *viz.* That a Sentence ought to be executed by the ſame Judge that pronounc'd it, or, which is the ſame Thing, that *Judgment ought to be ended where it began*, does not always obtain: Since the Execution of a Sentence ſometimes does of *Common Right*, according to *Vivius* in his firſt Book of *Common Opinions* †, belong to the Province of another Judge. *Secondly*, This Rule has no Place in Matters *Executive*, when the Proceſs is by way of Execution, and not according to the ordinary manner of Proceeding. For in Matters *Executive*, when the Proceſs is by way of Execution, the Perſon may vary the *Judicial* Proceſs, and commence a Suit by ſeveral *Executive* ways, not only before the ſame, but even before any other Judge, and in any other Place. But properly ſpeaking, indeed we ought not to begin a Proceſs with Execution, but a Sentence ought to go before, and the Execution thereof ought to follow the ſame ‡. But a Sentence has no need of Execution;

‡ X. 2. 27. 15. C. 7. 53. 2.

‖ X. 2. 27. 15. D. 2. 1. 19. * D. 4. 4. 40.

† Opin. 400. N. 3.

‡ C. 7. 53. 1.

tion, that is invalid *ipso Jure*, as being pronounc'd by one, that has no Right or Power to pronounce the ſame‖; as by an Executor, Apparitor, *&c.* whoſe Office it is effectually to execute the Force of the Judgment, after the Matter of the Suit is heard and diſcuſs'd, and a Sentence pronounc'd thereon between the Parties †. For ſuch an Executor cannot by taking Cognizance judge touching the Equity or Validity of the Sentence; and if he ſhould order or act any Thing contrary to ſuch a Sentence, it is of no Moment or Conſequence at all. But,

‖ D. 42. 1. 4. 6.
D. 42. 1. 58.
† C. 7. 53. 8.

Secondly, A Sentence cannot be executed by the ſame Perſon that pronounc'd it, (how great ſoever he be) unleſs he has *Ordinary* Juriſdiction; and, conſequently, a *mixtum Imperium* incident thereunto: For 'tis a Matter of ſome Juriſdiction to execute a Sentence *. Wherefore by the *Civil-Law* a Judge, or *Arbiter*, aſſign'd by the *Prætor* cannot execute his own Sentence, as having no Juriſdiction, but only a Power of examining thereinto; and as ſoon as he has taken Cognizance of the Matter he is diſcharg'd from his Office, as having finiſh'd the ſame †. Nor can a *delegated* Judge execute a Sentence; but the Execution thereof belongs to the Perſon that delegates him ‡: And generally ſpeaking the *Ordinary* or Preſident of the Province executes the Sentence of a *delegated* Judge. But the Prince or Pope's Delegate may in his own Perſon execute his own Sentence, becauſe he is in the Place of an *Ordinary* Judge, and may aſſign a Judge, and oblige the *Ordinary* Judge to execute a Sentence pronounc'd by him ‖. And (I think) the ſame holds good in any *delegated* Judge whatever, if ſuch a Power be expreſly committed to him. For tho' the Power of admitting a Perſon into Poſſeſſion of Goods be a Matter of *mixt* Juriſdiction; yet, I ſuppoſe, the ſame may be transferr'd *Mandatâ Juriſdictione*. Wherefore, doubtleſs, even he to whom a Juriſdiction is delegated has a Power to execute his own Sentence, ſince this *Mixtum Imperium* paſſes with a delegated Juriſdiction *. So that what *Accurſius* ſays †, is evidently falſe, *viz.* That *the Execution of a Sentence cannot be delegated, as being a Matter of* Merum Imperium. And Sentence cannot, according to the *Civil-Law*, be demanded to Execution immediately on its paſſing *in Rem Judicatam*; for on the Score of Humanity the *Civil-Law* allows a certain Space of Time both to the Convict, and to Perſons confeſſing, in order to ſatisfy the Judgment: And by the twelve Tables, according to *Aul. Gellius*, a Month or thirty Days was indulg'd. But afterwards this Term was enlarg'd unto two Months: And at length *Juſtinian* granted four Months from the Day of Condemnation; or, in caſe of an Appeal, from the Day of confirming the firſt Sentence to be computed. But this Time is now variouſly limited according to the Cuſtoms ‡, Statutes and Edicts of every Place. But tho' this Term appointed by the *Civil-Law* had Room in *Perſonal*, yet in *real* Actions it had not: But even in *real* Actions if the Poſſeſſor pleaded, that he was not at preſent able to reſtore the Thing in Demand, and deſired a Time to be aſſign'd for the Reſtitution thereof, he might out of his great Humanity gratify him in this Reſpect by granting a moderate Term for the Reſtitution of the Thing demanded of him, within which Term he ought to reſtore it without Fraud ‖. But in *perſonal* Actions the Term of four Months was granted *ipſo Jure* to the Perſon condemn'd; and at the Expiration of this Term he was bound to pay Intereſt after the Rate of five *per Cent.* that the Plaintiff (being in ſome Meaſure injur'd by this Delay) might be reliev'd in another Reſpect *. But, according to the Cuſtom of *Holland*, and ſome trading Countries, neither of theſe two Rules is now obſerv'd.

* D. 1. 21. 5.
† In L. 15. D. 42. 1.
‡ C. 7. 54. 3. 1.
‖ I. 4. 17. 2.
* D. 23. 3. 6. D. 12. 2. 30.

For

† D. 42. 1. 5. & 15.
‡ D. 42. 1. 15. Dd. ibi.
C. 3. 1. 13. 3. x. 2. 2. 4.
‖ X. 1. 29. 16. & 28.

For Intereſt or Uſury on a Judgment is not paid at this Day, unleſs it be deduc'd and allow'd of in the Sentence of Condemnation itſelf. And becauſe Merchant's Affairs, whereby *Holland* flouriſhes, ſeldom admits of Delay, but require great expedition, Sentence is there at this Day immediately demanded to Execution, according to *Merula*'s Practice of the *Civil-Law* *.

* Lit. 4. Tit. 93. cap. 7. n. 5.

The ſecond Thing here to be conſider'd was, in what Order and Manner this Execution ought to be made. And here 'tis to be obſerv'd, That it may be made by either of theſe ways in a Civil Cauſe, *viz.* either by an Action on the Caſe ariſing from the Sentence †; or elſe by the Office of the Judge, which laſt is the way always practis'd in our Eccleſiaſtical Courts; and in Civil Cauſes it is much better to proceed this way than by an Action; becauſe a Libel is not then requir'd, nor any Conteſtation of Suit. But when Execution is made by a Right of Action, it is neceſſary to form a new Proceſs ‡. In the Execution of a Sentence in Civil Cauſes the following Order ought to be obſerv'd, *viz.* *Firſt*, The Officer ought to attach Moveable Goods, then Immoveables, and after that then the Perſon's Account-Books; and if theſe are not ſufficient to diſcharge the Execution, the Perſon of the Litigant may be arreſted ‖: For the Perſon of a Man ought not by the *Civil-Law* to be taken for a Debt, unleſs his Goods and Eſtate has been firſt excuſs'd *; and if upon ſuch an Excuſſion there are not Goods found ſufficient to ſatisfy the Judgment, then his Body may be attach'd, and not otherwiſe †. But (I think) wherever an Execution is made, the Laws and Cuſtoms of the Place ought to be obſerv'd. In the Execution of a Sentence, when a Man deſerts his Appeal, a Citation is always neceſſary; otherwiſe ſuch Execution is not valid ‡: But when an Execution is made in the ſame Thing, wherein the Sentence was pronounc'd, it is not neceſſary to cite the Party ‖. But if an Execution be made againſt the Succeſſor of the Perſon condemn'd, or by a Judge that ſucceeds him who pronounc'd the Sentence, a Citation is always requir'd *. An Eccleſiaſtical Judge in the Execution of his Sentence may proceed either by Suſpenſion, Depoſition, Excommunication or Degradation, according to the State and Condition of the Perſon caſt in the Suit: For if he be a Clergyman, the greateſt Puniſhment that can be inflicted on him is Degradation with Excommunication: And if he be a Layman, then Excommunication But if the Perſon caſt has a Contempt of the Cenſures of the Church, and will not obey the Sentence pronounc'd againſt him, then the Eccleſiaſtical Court may implore the Secular Arm, which is the laſt Remedy it has †.

† D. 42. 1. 6. 3. Dd. ib.

‡ Alex. Conſ. 50. Vol. 2.

‖ D. 42. 1. 15. 2

* Bart. in L. 3. D. 26. 10.

† Abb. in c. 15. X. 27. 2.

‡ Bald. in L. 8. C. 7. 62.

‖ Bart. in L. 15. D. 42. 1. 2.

* Alex. in L. 15. D. 42. 1. 2.

X. 2. 1. 10.

As to my third Conſideration, an Excommunication may be made againſt all Perſons, and in all Things; unleſs the ſame be found prohibited by Law: For 'tis a Rule in Law, that all Things are deem'd to be permitted, unleſs they are found to be prohibited. *Firſt*, An Execution cannot in Civil Cauſes proceed to a Man's Bed, Wearing Apparel and other Things of the like Kind, neceſſary to his daily Uſe; becauſe theſe Things do not paſs under an Hypotheque, nor are a Man's Wearing Cloaths taken away from him, tho' condemn'd to dye as a Criminal ‡. But when a Debtor has no other Goods to ſatisfy the Judgment, his Houſhold Goods and Bed are liable to an Execution; and only the Wearing Apparel on his Back ſhall be left him. Nor is an Execution to proceed or extend to a Scholar's Books, or to a Husbandman's Plow-Team, provided they have other Effects; nor to the Goods of particular Citizens for a Debt of the Corporation ‖; nor to the Goods of a Monaſtery, becauſe an Execution cannot be made thereon for the Debt of

‡ D. 48. 20. 6.

‖ Bald. in L. 5 C. 7. 53.

of a Monk, unleſs the Monaſtery acquir'd ſuch Goods by the Means of the Monk: Nor to the Fruits and Profits of a Prebend or Eccleſiaſtical Benefice, becauſe no Execution lies againſt them, if the Perſon has other Goods; but if he has no other Goods, then an Execution will lye againſt the ſaid Fruits and Profits *. But if any Perſon has been at any Expence about the Funeral of a Scholar deceas'd, he may retain his Books for the Reimburſement thereof, according to *Jaſon* †.

As to my fourth Conſideration, *viz.* Upon what Account an Execution may be ſtopt, it is to be firſt obſerv'd, That it may be ſtay'd upon the Score of a *Nullity* ‡: But when the Exception of *Nullity* is propounded before an inferiour Judge to him that pronounced the Sentence, it never hinders the Execution thereof. *Secondly*, Reſtitution *in integrum* impeaches the Execution of a Sentence ||, unleſs it be pray'd Maliciouſly, and with a Deſign of protracting the evil Day, or elſe that it requires a long and tedious Examination of the Matter.

* Bart. & Dd. in L. 40. D. 42. 1.

† In L. 26. D. 12. 6. 4.

‡ D. 42. 1. 4. 6.

|| C. 2. 4. 32.

Of Expences of Suit, and the Kinds thereof.

TOUCHING Expences of Suit, it is to be obſerv'd, That theſe Expences are due on various Accounts, and for ſeveral Reaſons. For ſometimes they are due on the Account of obtaining a Victory in the Cauſe *, ſometimes on the Score of Contumacy †, and ſometimes on the Account of ſome Delay in the Proceedings ‡: And, again, they are ſometimes due on Account of a raſh and temerarious Citation ||. Some have made this Diſtinction about ſuing for Expences, ſaying *, That ſuch Expences of Suit as are made in Matters Preparatory to the commencing thereof; and in reſtoring a Defendant that has been in Delay, ought to be ſued for by a Right of Action; becauſe they are made before any Conteſtation of Suit; and, therefore, ſhall not be recover'd *Officio Judicis*: For no Demand or Suit ſhall be maintain'd for any Expences made before Conteſtation of Suit, but only for ſuch as were made ſubſequent thereunto. But this Diſtinction is at preſent little regarded by any Court of Judicature, as being too nice and frivolous. And at this Day Expences of Suit may be ſued for either by way of Action, or by virtue of the Judge's Office, if the Judge has tax'd the Bill and allow'd the ſame: And it matters not, whether they are made before or after Conteſtation of Suit. For ſince theſe Expences have their Beginning and Riſe from the Suit, they alſo ceaſe and come to an end with the Suit itſelf, leſt that a Suit ſhould commence and begin from a Suit. Therefore 'tis adviſeable in Practice to ſue for them by imploring and making Uſe of the Judge's Office.

* C. 3. 1. 13. 11. x. 1. 34. 17.

† C. 3. 1. 15. x. 2. 14. 6.

‡ C. 7. 51. 4. x. 2. 14. 5.

|| D. 5. 1. 79. x. 2. 14. 1.

* Gloſſ. in c. 5. x. 2. 14.

If Expences are due by Reaſon of any Contumany, they do impeach and hinder the Proſecution of a Suit, and the contumacious Perſon ſhall be ſet aſide from Pleading, till ſuch Time as he ſhall have paid the Expences of his Contumacy, or (as we ſay) his Contumacy Fees: But if Expences are due *ratione Victoriæ*, or on any other Account, he ſhall not be repelled and ſet aſide †. If the Party ſhall be diſmiſs'd

† C. 3. 1. 15. Dd. ibi.

and acquitted from any further Attendance on the Court by Reaſon of a Lapſe of *Inſtance*, Expences may be demanded and ſued for after the Lapſe of ſuch *Inſtance*; and the Defendant may deſire to be diſmiſs'd and acquitted from any further Attendance of the Court in that Cauſe; praying the Plaintiff may condemn'd in Expences *.

* Cyn. in L. 13. C. 3. 1. in fin.

Touching Expences made before Conteſtation of Suit, the Judge ought not to impart his Office to the Party unleſs the Party requeſts him thereunto, ſince this is a Matter that has no Relation to the Deciſion of a Cauſe, which happens before Conteſtation of Suit: But touching thoſe Expences which ariſe after Conteſtation of Suit, the Judge may *ex Officio*, and without being requeſted thereunto, either abſolve or condemn the Party in them †: Yet he is not bound ſo to do, if he has a Mind not to do it. Therefore, both the Plaintiff and Defendant will do well always to pray Expences. If Expences are once mov'd for, and the Judge ſhall either omit or refuſe to abſolve or condemn the Party in them, the Party may ſue the Judge for a Reſtitution or Payment of ſuch Expences, he being bound on this Account to make Reſtitution or Payment thereof to the Party injur'd out of his own Money: Which ought always to be underſtood, when the Party moves and petitions for Expences ‡. Or elſe Expences of Suit are ſometimes demanded *ex Conventione*, or by the *mercenary* Office of the Judge without a Convention. In the firſt Caſe they may be demanded in any *Inſtance*, if the Judge has not pronounc'd for the ſame in the firſt *Inſtance* ||. And in the ſecond Caſe they may not be demanded by any Means, unleſs it be in a Cauſe of Appeal; becauſe when they are demanded or ſued for by *Convention*, that is to ſay, by convening and commencing a Suit againſt the Party, they do then accrue by the Act and Proviſion of Man, which ought to be deny'd to no one. But when they are not demanded by *Convention*, they do then accrue by the Proviſion of Law; and the Law may take away that Benefit from a Perſon, which it has once conferr'd on him: Becauſe thoſe Expences which accrue by Virtue of the Judge's Office after Conteſtation of Suit, do accrue as Acceſſory to the Principal Cauſe; and, therefore, *ſublato Principali tollitur Acceſſorum.* But when they are demanded by Right of Action, then they accrue *Principally*; and by this Means the foregoing Rule ceaſes.

† Dd. in L. 25. D. 21. 1. 8. & in L. 29. h. t.

‡ C. 3. 1. 13. Gloſſ. & Dd.

|| D. 16. 2. 7. 1

Expences of Suit are only prov'd by the Oath of the Party, by Reaſon of the Difficulty of proving the ſame *: But with this Proviſo, that the Judge does in the firſt Place tax and moderate the ſame according to the Stile and Cuſtom of the Court, before the Party ſwears touching the Truth thereof †: And herein the Judge ought alſo to have a great Regard to the Nature and Quality of the Cauſe itſelf ‡: And herein it is to be obſerv'd, That a Taxation of Expences reſerv'd unto the Judge himſelf under his own proper Name may be made by his Succeſſor; that is to ſay, if the Judge does expreſly by Name reſerve unto himſelf the Taxation of Expences; yet the Power of taxing the ſame does (notwithſtanding) deſcend to his Succeſſors; ſince this does not concern his Perſon, but is only a Matter concerning his Dignity and Office alone ||.

* C. 3. 1. 13. 2.

† Nov. 82. c. 10

‡ C. 3. 1. 13.

|| Bart. in L. 4. D. 49. 1.

I have already noted, that neceſſary *Judicial* Expences do conſiſt in a Fourfold Difference: There being ſome which are *Judicially* made in order to inſtruct the Proceſs, that is to ſay, for the Labour and Pains which the Advocate takes in drawing the Libel, and in framing other Writings and Exhibits, which appertain to the Cauſe itſelf: And

theſe

theſe Writings and Exhibits ought to be tax'd according to the Quality of the Perſons and the Importance of the Cauſe: For little or no Regard ſhall be had to the length of the Exhibits, but to the Learning and Ingenuity of the Advocate drawing the ſame *, ſince it ought to be conſider'd what he ſhall write, and not how much, in a profuſe Stile, and in the moſt impertinent manner; for the Words ought not to be number'd, but Things well conſider'd herein. Under this Head we may alſo reckon ſuch Expences as are given to Proctors for propounding and exhibiting the Pleadings of the Parties as well in Writing as *Viva Voce*. In the *Imperial* Chamber the Proctors have half a Florin tax'd and allow'd them for every *Subſtantial Receſs*, as they call it †: And for *leſſer Receſſes* the fourth Part of a Florin is due. The *ſubſtantial Receſſes* are the Introduction of the Cauſe, the exhibiting of the Libel, an Anſwer to the Libel, Conteſtation of Suit, the Oath of Calumny, the Petition, or Motion, for Commiſſioners to examine Witneſſes, the Publication of the Depoſitions, Accuſation of Contumacy, Concluſion of the Cauſe, and the like, which do appertain to the *Modus Procedendi*, and alſo to the Merits of the Cauſe ‡. The *leſſer Receſſes* are the Recognition of the Seals, the *Petitio Termini*, Motions for a ſecond and third Term Probatory, or for proroguing the Term-Probatory already aſſign'd, and likewiſe ſuch other Motions as are incidently made and propounded in Judgment according to the Practice of Courts ‖. Under the Appellation of theſe *Preparatory* Expences are likewiſe ſuch as are given to Notaries for drawing Inſtruments; and to Meſſengers and Apparitors for executing *Judicial* Proceſſes and Decrees of Court *. And, laſtly, under this firſt Kind of Expences are compriz'd thoſe which are given in *Chancery* for redeeming of Proceſſes, for Copies of Acts, and other neceſſary Writings immediately appertaining to the principal Cauſe.

* D. 50. 13. 1. 10.

† Gail. lib. 1. Obſ. 151. n. 4.

‡ X 2. 19. 11.

‖ Gail. ut ſup.

* D. 50. 13. 1. 10.

Secondly, Thoſe *Judicial* Expences are ſaid to be neceſſary, which are made for the Examination of Witneſſes: And under theſe *Panormitan* includes the *Eatables* and *Drinkables* of Witneſſes; deducting thoſe Expences of Eating and Drinking, which a Witneſs would otherwiſe make at Home †: Provided, he did not live there on ſome Trade and Employment. But this Deduction is ſcarce any where obſerv'd; eſpecially, in the *Imperial* Chamber, and here in *England*.

† Abb. in c. 5. x. 2. 14. n. 31.

Of Fame and Suſpicion, whether and what Evidence in Law.

AMONG the various *Species* of Proof, which is nothing elſe but a Demonſtration of ſome doubtful Matter of Fact made clear and evident to the Court, according to the Rules of Law, we may reckon that of a well-grounded Fame *, aſſiſted by other concurrent Evidence: Which in the ſame Senſe here made uſe of is defined to be the prevailing Opinion of the Vulgar, ariſing from Suſpicion, or (at leaſt) the greater Part

* X. 2. 19. 13.

Part of them conſenting and agreeing to ſome Matter of Fact in the Neighbourhood, and made manifeſt by the Voice of the People *. Now this Definition or Deſcription has a Relation both to a *good* and an *ill Fame*; and when it reſpects an *ill Fame*, 'tis taken for *Infamy*; as when we ſay of any one, that he leads an *infamous* Life by wicked and enormous Practices, or that he has not the Fear of God before his Eyes, or that he keeps a Concubine, and the like. But when 'tis uſed in a good Senſe, as it relates to a Man's Honour and Reputation, it is in *Latin* defined to be *Status illæſæ Dignitatis vitâ & moribus comprobatus*, a State of an untainted Honour approv'd by the good Life and Behaviour of any Perſon: As when 'tis ſaid of any one, That he is an honeſt and a good Man. And for ſuch Fame a Man ought to labour and take Pains in order to aſſume the Name of an honeſt Man, and one of good Report. And thus *Fame* ſignifies the ſame as *Report*, which may either be Good or Evil, according to the Object or Subject thereof; and the Honeſty of the Perſons that do ſpread the ſame Abroad. For a good Fame and Reputation does not only depend on the laudable Actions of a Man himſelf, but on the Lips and Breath of others that publiſh the ſame: And, therefore, if they be not Men of Veracity, Knowledge and Integrity, that publiſh the ſame *, little Regard will be had to their Reports, whether they carry a good or an evil Sound with them.

* Bart. in L. 10. D. 48. 18. n. 7.

*Bart. ut ſup. n. 15.

In each Way or Manner of expreſſing ourſelves Fame ſometimes proceeds from Knowledge, ſometimes from Suſpicion, ſometimes from a certain Thing or Author, and ſometimes from an uncertain Author; and, laſtly, from the Depoſition and Averment of one Witneſs or Perſon alone: Yet, properly ſpeaking, Fame, as here deſcrib'd, proceeds from an uncertain Author, and from Suſpicion only; and herein it differs from what we call a *manifeſt* Fame. Indeed, Fame itſelf is no Proof or Evidence at all in ſtrictneſs of Law †; nor is Suſpicion any Evidence of a Thing done by a particular Perſon: But if there be a Fame concurrent with the Depoſition of one good Witneſs, it is in many Reſpects ſufficient Evidence, according to the *Civil* and *Canon-Law*. Thus if an Exception of Excommunication be objected to the Plaintiff, it may be prov'd by Fame and one Witneſs: For this being an *odious* Exception, it ought not to have too great a Scope and Power given it; and, therefore, one Witneſs ought to concur with the Fame thereof. And the ſame may be ſaid of a *probable* or *likely* Suſpicion, which ariſes from ſome ſtrong and previous Conjectures, and from a growing Fame or Report of ſome Fact; and ſuch a Suſpicion or Preſumption induces a Canonical Purgation ‡: For it being ſtiled a *Preſumption of the Judge alone*, it admits of Proof to the Contrary ||. Now Suſpicion, as deriv'd from the *Latin* Verb *ſuſpicor*, which ſignifies to look on thoſe Things with ſome Fear and Caution, touching which we have ſome Doubt with ourſelves, is defin'd to be an Act, whereby we are drawn into ſome Doubt or Queſtion with ourſelves about ſome certain Matter or other, which we cannot determine without ſome Fear or Dread of Falſhood. And of this there is a Threefold Diviſion, *viz.* a *raſh*, *probable* and *violent* Suſpicion. The firſt deſerves no Credit at all; the ſecond creates a Preſumption, as aforeſaid; and the third induces a Condemnation *. Some Perſons make Suſpicion and Preſumption each of them to import the ſame Thing †: And others add a fourth Kind of Suſpicion or Preſumption, which is called a *neceſſary* Suſpicion or Preſumption; and is a Preſumption *of Law* and *by Law* ‡. And herein it differs from a *violent* Suſpicion, becauſe it does not

† X. 3. 2. 8.

‡ X. 5. 34. 2 & 4.

|| X. 1. 9. 5.

* Bern. in c. 4. x. 5. 34.

† Arch. in c. 9. Q. 6. 1.

‡ X. 4. 5. 6.

not admit of Proof to the contrary: And 'tis, therefore, said to be *of Law* and *by Law*, because it is vehemently presum'd to be thus or not to be thus, and the Law is determin'd on the Score of such a Presumption. But more of this under the Title of *Presumptions* hereafter. A *rash* Suspicion arises from evil Men and from vile Causes: As when they see a Person talking with a Woman, and they immediately from thence suspect an evil Conversation with her, whereas doubtful Matters ought always to be interpreted in the better Part *; and, therefore, such a Suspicion ought not to move the Mind of the Judge, but he ought to repel the same †.

* X. 5. 41. 2.

† 2 Q. 1. 1.

Fame, when it has a solid Foundation, and is well prov'd, is of greater Validity than the Saying or Deposition of one Witness ‡: For (says the Law) *where a Man doubts of any Thing, let him enquire of the Neighbourhood.* So that a publick Fame ought to arise from the Voice of just and honest Men living in the Neighbourhood, and not from the vain and malicious Reports of Persons (perhaps) dwelling at a distance, and (probably unacquainted with the Person defam'd or accus'd ||. But tho' a Fame caused by credible Persons living in the Neighbourhood administers just Cause of Credulity, and in Civil Causes induces a half Proof, yet the most common, publick and divulged Fame never makes a full Proof *: Nor does it always make a half Proof; for it does not make a half Proof in Criminal Causes: For Fame alone is not sufficient to condemn a Man of a Crime without the Aid and Assistance of one Witness (at least) and some other Adminicular Evidence and Circumstantial Proof ‡. Nay, the Fame of a whole Neighbourhood does not prove Carnal Copulation; nor has it Power to destroy and take away a lawful Exception: For Fame has no Operation at all, when the Truth of the contrary is prov'd. Nor is Fame of itself sufficient to dissolve a Marriage, unless such a Fame be supported with some concurrent adminicular Proof and circumstantial Evidence, as aforesaid. But tho' Fame alone be not sufficient to condemn a Man in a Crime of Simony, or any other Crime, yet 'tis enough to bring him to his Purgation-Oath ‡.

‡ X. 4. 14. 2.

|| X. 5. 1. 17. ibi. Inn.

* Socin. reg. 144.

‡ X. 3. 2. 8.

‡ X. 5. 34. 8.

When I say, that a well-grounded Fame makes a greater Proof than one Witness, I mean such a Witness as deposes touching what he has heard from others; as it also does stronger Proof than one Wines deposing without an Oath administred to him. So that if one sworn Witness deposes touching what he has heard from others, and another without an Oath deposes of his own Knowlege, a well-grounded Fame makes a stronger and better Proof than both the other two together. But Fame has less of Proof in it than a Notoriety of Fact: For Fame often deceives us, but a Fact, which is notorious, shews and exhibits itself in such a manner, that it cannot be concealed by any Tergiversation whatsoever. Yet in Matters of Antiquity, and in Matters relating to an occult Obscurity, Fame, together with other adminicular Circumstances, makes full Proof. Thus Fame alone, with other concurring Circumstances, is sufficient to prove a Title for the compleating of a Prescription, and likewise to prove a Man an Usurer, according to some, because Usury is a Matter of an occult Nature. *Sed Quære de hoc.* For it sometimes happens, that Crimes are committed in so secret a manner, that 'tis very difficult, and often impossible to find Witnesses that can depose touching the Truth of such, and sometimes in Crimes that are openly committed; and, therefore, Judges are wont in these Cases, as soon as they have a legal *Constat* that such a Crime was committed, and cannot find a Witness to depose touching the Truth of

X. 5. 1. 15

ſuch a Crime, to interrogate Witneſſes on the Fame thereof, in order to know who is defam'd of ſuch a Crime: And whenever a Suſpicion ariſes againſt one from Informations taken on ſuch an Infamy or evil Report, they proceed farther againſt him by enquiring into the Crime itſelf. Let us ſee, therefore, after what manner ſuch a Fame is prov'd *.

* Jul. Clar. pract. Crim. lib. 5. Q. 6.

And, *Firſt*, 'tis to be obſerv'd, That a Fame may be prov'd even by two Witneſſes only, according to the Gloſs, and the receiv'd Opinion of the Doctors; ſince in the Mouth of two or three Witneſſes every Word ſhall be eſtabliſh'd: But then they muſt depoſe, that they have heard ſo from among divers honeſt and ſober Men †. But to the end that a Fame may be join'd with other adminicular Proofs to make full Evidence, it ought to be perfect *in ſuo eſſe*; and by ſuch a Fame Matrimony may be prov'd. For 'tis certain, that ſuch Witneſſes depoſing touching a Fame, ought to render a ſufficient Reaſon of their Knowlege, elſe they make no Proof of the Matter: For they ought to ſay, That they have heard it from the greater Part of the Neighbourhood; and 'tis not enough to ſay, that they have heard it ſpoken in a Publick Place, but yet by a few.

† Gloſſ. in l. 3. D. 22. 5. 2.

But what if the Witneſſes ſhould ſay, that they have known it from different Perſons; as when one Witneſs names ſome Perſons, and another Witneſs others, or they diverſify in their Depoſitions in Reſpect of Place; as when one Witneſs ſays, he heard it in the Street; and another ſays, that he heard it in a Houſe, and the like: Shall this vitiate the Proof of Fame? *Bartolus* ſays, That it ſhall not ‡. Nor ſhall it, tho' they ſhould diverſify in reſpect of Time; as when one depoſes, that he heard it on ſuch a Day; and another depoſes, that he heard it on ſuch a Day. Fame may alſo admit of a negative Proof; as when 'tis affirm'd, that *Titius* did not do ſo: And *Bartolus* will have this to be an Affirmative, and not a Negative, becauſe publick Voice and Fame ſays, that *Titius* did not do it ‖: But if Fame be proved by one ſide *Affirmatively*, and by the other ſide *Negatively*, we ought to adhere to the more credible Witneſſes; and if the Witneſſes ſhall be of equal Credit, then we ought to abide by that Proof; or that Fame which had its Riſe from the moſt probable Preſumptions. But when a contrary Fame is prov'd in reſpect of different Places, if the Proofs are of equal Credit, a Regard is to be had to neither ſide, otherwiſe the Quality and Character of the Witneſſes ought to be conſidered *.

‡ In l. 10. D. 48. 18. n. 24.

‖ Bart. ut ſup. n. 25.

* Bart. ut ſup. n. 26.

Of Faſting, the ſeveral Kinds and Effects thereof.

THO' Faſting, as far as it relates to moral Abſtinence, was heretofore well known to the ancient Philoſophers by the Light of Nature alone, without any Preſcript of Divine or Human Law to direct them therein, and is ſtill practis'd among the more ſober and thinking Heathens themſelves; it being the Command of right Reaſon that every one ſhould exerciſe Temperance not only to keep his Body in good Health, but alſo to help and illuſtrate the Faculties of his Mind, that

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a Man ſhould not raſhly, thro' too much Intemperance of Eating and Drinking, fall into any Diſtemper of Body or Mind: Yet I cannot learn from any Reading of mine that they ever uſed this as a Means to draw Money out of the Pockets of ſilly ignorant Men by way of Diſpenſations for not keeping the Faſt as the *Romiſh* Church does now in its Communion ‖: Which lays ſo great a Streſs upon it, that with St. *Ambroſe*, their great Patron, the *Papiſts* now ſtile it *an Heavenly Image, the Food of the Mind, the Refreſhment of the Soul, the Life of Angels, the Root of Grace, the Foundation of Chaſtity, the Death of Guilt*, &c. Theſe are the Eulogies and Commendations which that Church gives of Faſting, ſo ſtrictly enjoin'd by the *Canon-Law* not ſo much on a Religious Account, as for ſake of Gain to the Prieſts and the Pope's Treaſury. Indeed, that Law has made Faſting and an Abſtinence from Meats, to be a Kind of Divine Puniſhment, whereby Sin is done away, and the Perſon reconciles himſelf to God, who was an Enemy to him for his Sin: But, I think, the beſt Remedy for Sin is a true Repentence and an Abſtinence from ſuch Inchantments of Pleaſures as may defile the Soul, without which Bodily Faſting is of very little Advantage. For, ſays the Lord, *Turn to me with Weeping, Faſting and Praying; and rent your Hearts and not your Garments*, &c. *. I will not deny Faſting to be a Kind of Pennance for Sin; but then 'tis to afflict the Body, and to humble the Soul for a State of Repentance, to make us think of our Sins, and to bewail them before God, that he may in his great Mercy forgive them: For Faſting alone has no Merit in itſelf without ſuch a Diſpoſition and Humility of Mind.

‖ 82 Diſt. 5.

* Joel. cap. 2. v. 13.

The *Canoniſts* divide Faſting into *Profane* and *Sacred* Faſting. The firſt (they ſay) is, when a Man faſts upon ſome other Account than to take Care of his Soul; and thus he is ſaid to faſt, who endeavours to expel ſome Diſeaſe by not eating, or who has not an Appetite to eat, and the like: And this Kind of Faſting, according to them, carries no Merit along with it; becauſe it does not appeaſe the Anger of God, nor is it done for the Souls Health. For Eating and Drinking are natural Acts for the Repair of the Body that dyes daily. *Sacred* Faſting they divide into *Spiritual* and *Corporal* †. *Spiritual* Faſting is an Abſtinence from Sin, and this is the moſt excellent way of Faſting, which we ought to obſerve all the Days of our Life; and to this end all other Faſts ought to tend. *Judas* kept a Bodily Faſt, but he did not faſt from Sin; and ſo of others. A *Corporal* or *Bodily* Faſt is an Abſtinence from all Things eatable, in order to ſubdue the Fleſh. *We faſt from Wine and Fleſh* (ſays St. *Cyril*, Biſhop of *Jeruſalem*) *not that we hate theſe Things as Abominations, but that we expect a Reward from thence, as deſpiſing Senſualities; and that we may hereafter enjoy a Spiritual and Intellectual Table, ſowing now in Tears that we may in Time to come reap in Joy.* A Corporal Faſt, according to the *Canon-Law*, is either *Penitential* or *Eccleſiaſtical*. The firſt is that which relates to the humbling of the Mind, or (at leaſt) ſhould do ſo; and ſerves to appeaſe God's Anger for Sins committed. Thus the Children of *Iſrael* being about to fight the *Philiſtines*, faſted on that Day wherein they were to engage; ſaying, *We have ſinned, O Lord, againſt thee*‡, &c. And we read, that *David* faſted on the Account of the Sickneſs of his Child, which he had by the Wife of *Uriah* the *Hittite*; and, laying all Night on the Earth, ſaid unto *Nathan, I have ſinned againſt the Lord* ‖. And ſuch were the Penitential Faſts which the *Jews* obſerved, by confeſſing their Sins

† Con. 5 Diſt. cap. 25.

‡ 1 Sam. cap. 7. v. 6.

‖ 2 Sam. c. 12. v. 13. 16.

Sins unto God; and by turning themſelves unto him in weeping and praying; and not ſuch as are now practis'd in the *Romiſh* Church, which may be purchas'd and bought off by the Sinner. An *Eccleſiaſtical* Faſt is an Abſtinence from eating of Fleſh, and other Things forbidden by the *Canon-Law*, to be obſerv'd on certain ſtated Days as there preſcrib'd, with only a moderate Uſe of other Meats * ; and not to be violated without an abſolute Neceſſity †. Or an *Eccleſiaſtical* Faſt (as others ſay) is a *voluntary* Abſtinence from all manner of Food according to the preſcrib'd Order of the Church, or the receiv'd Cuſtom thereof in every Country. And hence it follows, that he who dines at Noon ‡, and ſups in the Evening, (as the *Papiſts* do very plentifully upon Fiſh, and the like) cannot be ſaid to keep the Faſt ‖ ; becauſe he does not entirely abſtain from Meat or Food according to the preſcrib'd Order of the Church: But he that is contented with one Meal only is ſaid to obſerve the Faſt; becauſe he Voluntarily abſtains from Meat, according to the preſcrib'd Order of the Church, or the common Uſage thereof in his own Country. It is called a *voluntary* Abſtinence, to put us in Mind, that the Intention is neceſſary, in order to ſatisfy the Precept of Faſting. Wherefore, he that entirely abſtains from Meat againſt his Will, or does not eat as having nothing to eat, is not ſaid to faſt. And it is in this Definition ſaid *of Meat*; becauſe Faſting conſiſts not in every Kind of Abſtinence: For Man has a Twofold Appetite, *viz. Hunger* and *Thirſt*; and as the one is ſatisfy'd with Drink, ſo the other is principally allay'd by Meat, of what Kind ſoever, whether it be Bread, Fleſh, Fiſh, Apples, Nuts, Herbs, and the like, which are taken by way of Refection for Dinner or Supper. Therefore, as in the *Romiſh* Church an *Eccleſiaſtical* Faſt does not conſiſt in abſtaining from Drink, ſo neither does it in ours (I think) conſiſt in a bare refraining from Fleſh, as ſome Superſtitiouſly imagine.

* Con. 5. Diſt. 18.

† Con. 5. Diſt. 17.

‡ Con. 1. Diſt. 50.

‖ 4 Diſt. 6.

By the *Canon-Law*, and according to the Doctrine of the *Papiſts*, every *Chriſtian*, being Twenty one Years of Age compleat, and *Compos Mentis*, is bound to obſerve the Faſts preſcrib'd by the Church, unleſs he be otherwiſe diſpens'd with, as very frequently he is, if a Man has Money to purchaſe a Diſpenſation: For as every *Chriſtian* is a Subject of the Church, he is as a Subject, bound to obey the Laws thereof that command Faſting. I ſay *Compos Mentis*, becauſe he that wants the uſe of Reaſon, is not capable of any Precepts: And I ſay, *One and Twenty Years of Age compleat*, becauſe tho' *Chriſtians* Naturally ſpeaking are obliged to obey all Laws as ſoon as they come to the uſe of their Reaſon; yet they are not in this Caſe immediately bound, on obtaining the uſe thereof, to obſerve this Law of Faſting enjoin'd by the Church; becauſe when they are in their growing Years they ſtand more frequently in need of Eating, in order to add to their Growth by a more abundant Heat neceſſary hereunto; wherefore that indulgent Church would not impoſe an Obligation till they are able to perform it. The Days of abſtaining from Fleſh in the *Romiſh* Church are *Fridays* and *Saturdays*; and yet they cannot properly be called a Faſt, becauſe they may eat twice or more on thoſe Days, provided they forbear Fleſh ‖ : But if *Chriſtmas-Day* happens on either of thoſe Days, then the *Papiſts* have a Diſpenſation to eat Fleſh thereon, unleſs a Perſon abſtains from thence by Reaſon of a Vow *. But ſometimes Men were not allow'd to faſt on the *Sabbath*, with us called *Saturday*, as appears from the eighth Epiſtle of *Ignatius* to the *Philippians*, if thoſe Epiſtles are genuine: And this is alſo forbidden in the Sixty fifth Canon of the great *Ruſſian* Apoſtle. See *Sigiſmund. Baro*'s Hiſtory of *Muſcovy*.

‖ Othob. Tit. 44.

* X. 3. 46. 3.

Muſcovy. Pope *Innocent* the Firſt order'd *Saturday* to be kept as a Day of Faſting, becauſe *Chriſt*'s Diſciples faſted and mourn'd on that Day for him, whilſt he lay in the Grave (as the *Romaniſts* pretend) as well as they did on the Day of his Death.

The ſtated Days and Times appointed for Faſting by the Church *, are the Time of *Lent* †, the four Seaſons of the Year ‡, called the *Ember-Weeks*, and the *Vigils* of or before ſome Saints Days, commonly called *Holidays*. By the fourth Diſtinction of the *Decretum* in the Body of the *Canon-Law* Faſting is ordain'd and decreed in *Lent*. For by this Law the Clergy who are, or ſhould be the Lord's Inheritance in a particular Manner, are enjoin'd to abſtain from Fleſh, and other Delicacies of Eating for ſeven Weeks compleat before *Eaſter* †: Becauſe, as the Lives of Clergymen ought to be diſtinguiſh'd from the Lives and Converſation of others on the Account of Holineſs; ſo likewiſe ſays that *Canon*) ought they to diſtinguiſh themſelves in the Buſineſs of Faſting. The time of *Lent*, in *Latin* call'd *Quadrigeſima* was, indeed, at firſt only ſix Weeks; but in Proceſs of Time, Pope *Teleſphorus* added a ſeventh Week thereunto, and called this Time *Quinquageſima* As to the *Ember-Weeks* we read, that Pope *Calixtus* ordain'd a ſolemn Faſt, to be obſerv'd three times a Year, on *Saturday* particularly, to pray for a Bleſſing on the Fruits of the Earth, as Corn, Wine, Oyl, *&c.* and eſtabliſh'd theſe three Seaſons in the Fourth, Seventh, and Tenth Month of the Year, beginning the ſame according to the *Jewiſh* Cuſtom, or Calender. But afterwards changing his Opinion, he appointed this Faſt to be kept at four Seaſons of the Year, with a Reſpect had to thoſe of the *Jews*, mentioned in *Zechariah* *, *viz.* in Spring, Summer, Autumn, and Winter; at which Times, in ſucceeding Ages, Holy Orders were conferr'd, which before was only wont to be done in the Month of *Decemb.* Tho' ſome truly attribute this Diſtinction of the four ſtated annual Times of Faſting, called *Ember-Weeks*, to Pope *Urban* the Firſt; which, thro' Mens Ignorance, (ſays *Platina*) were before kept very confuſedly. Others will have it, *Calixtus* inſtituted this ſolemn Faſt, in Imitation of the old *Romans*, who appointed three yearly Solemnities in Honour of their Gods, to bring down a Bleſſing on the Fruits of the Earth, which Cuſtom the *Romiſh* Church did obſerve, 'till it was found more convenient, and for the Honour of the Clergy, to have four ſolemn Times limitted, and ſet aſide for the giving of Holy Orders, which ought not to be conferr'd without Impoſition of Hands, and without Prayer and Faſting.

In reſpect of *Vigils*, they are ſo called from the *Latin* Word *Vigiliæ*, becauſe, according to the *Canon Law*, Men ought not only to Faſt thereon, but likewiſe to watch and pray all Night, immediately before the Feſtival belonging to ſuch *Vigil* ‖. And here we muſt obſerve, that the following Feaſts, or *Holidays* in the Church, have all of them their proper *Vigils* annex'd to them; ſome of which are deriv'd from the Common Law of the Church, as that of *Chriſtmas*-Day, the Aſſumption of the Bleſſed Virgin, the Feaſt of the Apoſtles, St. *Matthews*-Day, the Feaſt of *Eaſter*, † and *Whitſuntide* *. And, beſides theſe, the *Romiſh* Church has appointed the *Vigil* of St *John* the Baptiſt, that of St. *Lawrence*, and the Feaſt of *All-Saints*: Which are rather deriv'd, and eſtabliſh'd from the common Obſervance of the Church, than from the Authority of any Canon. As *Friday* was made a Day of Faſting in Memory of our Saviour's Paſſion, ſo *Saturday* was order'd to be a Day of Abſtinence, or Faſting, in Memory of Chriſt's Burial, ſays the Canon. ‡ ‡ The Reaſon given by the *Papiſts* for Faſting on a *Wedneſday*, is, becauſe the *Jews* on that Day conſpir'd to betray *Jeſus*, and to put him to Death.

* X. 3. 46. 2.
† 4 Diſt. 6.
‡ Con. 1. Diſt. 59.
† 4. Diſt. 3.
* Ch 8. v. 19.
‖ 76. diſt. c. 9.
† 76. at. St p.
* Ibid.
‡ ‡ Can. 3. Diſt. 13.

Of Fees belonging to Eccleſiaſtical Courts, &c.

FEES, according to the Senſe of the Canons of the Church, * and as commonly underſtood with us, are certain rated, and ſtated Allowances of Money paid to Perſons for emergent Services done by them, either in the Buſineſs of Law, or otherwiſe, according to the Nature of the Buſineſs it ſelf: And they differ from *Salaries*, becauſe a *Salary*, properly ſpeaking, was anciently a yearly Payment of Money; which was made, and given to any one for appearing, and defending another Perſons Cauſe. And hence it now ſignifies any yearly Stipend, or Reward, given on the Account of any liberal Art, or Science, as to a Lawyer for his Advice, and to a Phyſician for his Attendance, and the like, according to the Cuſtom of ſome Countries. *Vopiſcus*, in his Life of *Aurelian*, thinks that it was deriv'd from the *Greek* Word Ἀλάριον becauſe they, who receive Salaries, *indè ſe alunt*, do live and maintain themſelves from thence. A *Salary*, was a Sum of Money covenanted, and agreed on between the Parties; but *Fees* are Sums of Money allocated by the Law it ſelf, according to a rated Proportion, and Table made of them ‡. A *Salary* is given *pro Honore*, but a *Fee* is given *pro Labore*. But waving theſe Diſtinctions, as now almoſt antiquated with us, I ſhall here conſider Fees as a certain Remuneration for any Buſineſs done by a Perſon, or Payments of Money to be made him for the Expences he has been at therein.

* Can. 185, 186. &c.

‡ Vide Append.

We have ſeveral Canons and Conſtitutions with us, made to reſtrain the Demand of exorbitant Fees. For we read in *Lindwood*, that *local* Ordinaries heretofore, had rendred themſelves very Grievous and Burdenſome to Executors, *&c.* touching the Probats of Wills, and granting Letters of Adminiſtration, by frivolous Delays, and idle Cavils about the ſame, in order to extort Money out of them, with a better Grace: Wherefore, a Provincial Conſtitution † was made by *Mepham*, Arch-Biſhop of *Canturbury*, forbidding any Demand to be made for the Probat of a *Paupers* Will, whoſe Inventory of Goods did not exceed a Hundred Shillings Sterling. But as the Law does not forbid any Demand to be made for regiſtring and writing the ſame, and for other Buſineſs to be done in relation thereunto, it was eaſily evaded. And as Regiſters, and other Perſons, were not hereby expreſly prohibited the receiving what was offer'd them by way of Gratuity, they had ſeveral Artifices to excuſs Money out of the Pockets of the Poor. But (I think) in this Caſe, even what is offer'd them by way of Gratuity, ſeems to be exacted, ſince this Conſtitution was made in Favour of the Poor, and I am confirm'd in this Opinion, both from the Books of the *Civil* ‖ and *Canon* Law. ‡

† Linw. lib. 3. Tit. 13. cap. 1.

‖ C. 12. 42. 1.
‡ 10. Q. 3, 1. & 7. in fin. Arch in c 9. vi. 1. 3. v. exigat.

The next Provincial Conſtitution I meet with, is that of Arch-Biſhop *Stratford*, * which forbids any thing to be taken by Biſhops, or other Ordinaries for the Probat, or pronouncing of their Decree, touching the Validity of any Wills whatſoever, or for publiſhing, and engroſing the ſame in their Office, commonly ſtiled *apud acta Judicis*: And that the Writing Clerks, or Regiſter, ſhould be allow'd no more than ſix Pence for

* Lindw. lib. 3. Tit. 13. cap. 7.

for their Labour in engroſſing the ſame, unleſs the Inventory of the Goods of the Perſon deceas'd, upon Account was found to exceed the Sum of Thirty Shillings of current Money of *England*, and did not amount to a Hundred Shillings. But, for an Account, and all other Matters touching the ſame, and for Acquittances and the like, Biſhops Ordinaries, and Perſons deputed by them, auditing all Accounts, and their Miniſters intending the ſame might in the whole take twelve Pence and no more. But if ſuch Inventory came up to the Sum of a Hundred Shillings, or did exceed the ſame, and was under Twenty Pounds, then the Perſons intending ſuch Accounts, might take for their Labour, and for the *Quietus*, &c. Three Shillings and no more. But if the Inventory came to Twenty Pounds, or upwards, and was under Forty, then they were allowed to receive Five Shillings only. And likewiſe if ſuch Inventories came to Forty Pounds and upwards, and were under a Hundred, then they were permitted to take Ten Shillings. And if they amounted to One Hundred Pounds, or upwards, and were under One Hundred and Fifty, then their Fees were Twenty Shillings, and with this they were to be contented in reſpect of the Premiſes. And for the Increaſe of every Fifty Pounds beyond this Sum of 150 Pounds, they ſhall take Ten Shillings, beſides the aforeſaid Twenty. And the Clerks for writing every *Quietus*, or Acquittance herein, beſides, were allow'd to receive Six Pence for their Pains. And if a Biſhop by any Cavil whatſoever, did preſume to receive more than the Sum before tax'd, either in Tale of Money, or otherwiſe, he was to reſtore Two fold of what he had taken beyond ſuch Sum towards the Fabrick of the Cathedral Church of that Dioceſs within a Months time, under Pain of being ſuſpended, *ab Ingreſſu Eccleſiæ:* But Perſons inferior to Biſhops, were ſuſpended *ab Officio & Beneficio*, till they made full Satisfaction to ſuch Cathedrals as aforeſaid.

By another Provincial Conſtitution in *Lindwood*, * all ſuch Perſons, whoſe Duty it is on the Mandate of the Biſhop, Archbiſhop, or other, to whom it does of Right or Cuſtom belong to grant Inſtitution to Clerks, and to induct ſuch as are admitted to Eccleſiaſtical Livings thereinto, are to content themſelves with moderate Fees for performing their Office, *viz.* If the Arch-Deacon himſelf ſhall give Induction, he may receive 3 *s.* 4 *d.* But if it be his Official, he then ſhall demand no more than 2 *s.* for his own, and the Expences of his Servants, *&c.* for one natural Days charges, and the Perſon to be inducted, was to chuſe whether he would pay this in Money, or other Neceſſaries. And if Inductors received more than this on the Score of ſuch Induction, or for a Certificate thereof, they were for their Guilt to incur a Suſpenſion *ab Officio*, and *ab Ingreſſu Eccleſiæ*, *ipſo facto*, till they ſhould Reſtore ſuch Sum taken contrary to the ſaid Conſtitution to ſuch as paid the ſame, and ſatisfy the Party for this Offence.

* Lib. 3. Tit. 6. cap. 1.

And thus the Buſineſs of *Fees* depended generally on the Provincial Conſtitutions, for the Certainty of them till Queen *Elizabeth*'s Acceſſion to the Crown, when ſome Alteration was made herein by Arch-Biſhop *Parker*, according to the change of Times, and then they were better aſcertain'd for the Relief of the Subject. But by an Eccleſiaſtical Conſtitution made in the Year 1597 under Arch-Biſhop *Whitgift*, it was in purſuance of ſuch Alteration, provided that no Biſhop, Ordinary, Archdeacon, or their Miniſters, ſhould for the future on any Account take other or greater *Fees*, than ſuch as were uſually taken at the ſaid Queen's Acceſſion to the Throne †. And it was hereby order'd, that a Table of all the particular *Fees*, and Sums of Money relating thereunto, ſhould be Publickly fixt up in every Conſiſtory, and the *Exemplar* of ſuch Table being ſign'd under the Hand of the Ordinary was to be tranſmitted

† Vid. Append.

tranſmitted to the Arch-Biſhop within a Time limited. And now, leſt it ſhould be doubtful, what certain *Fees* were taken 40 Years ago, for the diſpatch of all particular Affairs in each Eccleſiaſtical reſpective Court, unleſs it were declar'd what *Fees* have been uſually taken ſince that time according to Approbation; therefore it was now * decreed, that every Biſhop, or Guardian of the Spiritualities (*ſide vacante*) do take care to have a Table of *Fees* publickly fixt up in the Conſiſtory, or ſome other Place where the Court is held, and ſubſcribed under the Hand of the Judge, and Regiſter, or elſe publickly lodged in the Archives of his Juriſdiction, ſo that every Perſon may have Power to inſpect the ſaid Table of *Fees*. And this Table ought to contain in it the ſeparate Sums of particular *Fees*, which have been uſually taken by the Judge, and all other Officers, and Miniſters of the ſaid Court, from the beginning of Queen *Elizabeth*'s Reign to the 18th Year thereof †. Moreover, every Biſhop, or Guardian of the Spiritualities (*ſede vacante*) was to take care that every Judge ſhould deliver a faithful and authentick Copy of the ſaid Table of Fees, unto his Biſhop, or the Guardian of the Spiritualities, to be kept in the Biſhops Archives or Regiſtry, under the Pain of a Suſpenſion from the Execution of his Office, untill he comply'd herewith according to the Mode and Form thereof. And if any Officers or Miniſters of the Court took greater Fees than were expreſſed in thoſe reſpective Tables, he was to undergo ſix Months Suſpenſion from the Execution of his Office, to be inflicted on him by his Ordinary; and if the Ordinary was Negligent, or omitted to inflict the ſame, then the Archbiſhop might inflict it, and ſubſtitute another in his Room. See the 18*th* of King *James*'s Canons, *verſus finem*, touching any Queſtion that might ariſe about the Certainty of theſe Fees.

* A. D. 1597.

† Vide Append. poſtea.

A Judge, Advocate, Proctor, or Notary in a *Judicial* Cauſe, cannot retain the Proceſs, or Acts of ſuch Cauſe on the Account of their Fees; nor can any retain any Deeds, or Writings deliver'd to them under any Pretence of Fees, or Salaries not paid; they having no Right of Retainer herein. But though a Proctor may not thus retain the Acts, or Inſtruments of Suit *pro mercede ſuâ*; yet he may do it well enough, till ſuch time his Client ſatisfies him for the Coſts and Charges he has been at, and laid out of his own Pocket, tho' he cannot do this for his Fees or Salary. If an Advocate, or other Perſon, that has an Office of Employment, leaves and foregoes the ſame by his own Fault, before he has compleatly fulfilled ſuch Office, he ought not to have the whole Salary for the Time to come, if the Salary be not to be paid at one Payment only; yet, if a Yearly Payment be made thereof, then he ſhall have it (at leaſt for the Year which he has begun, if he did not quit the ſame by his own Fault: And if he dyes, before he has finiſh'd his Office, the whole of ſuch Salary is due to his Heirs, or Executors, by the *Civil* Law †; and thus a Salary becomes due, and ſhall be paid to *Regent* Doctors, or Profeſſors, (as we ſay) *Integraliter* and for the whole Year, tho' they have not read *Integraliter*. But if a Perſon be elected unto an Office, that requires Labour and Pains, as a Pariſh-Clerk, and the like, he ſhall have his Salary, or Wages, only *pro Ratâ temporis*, that he has ſerv'd; for the Law makes a Difference between Matter of ſervile Labour, and Matters of an honourable Employment as that of an Advocate, and a Reading Doctor is ‡ becauſe that, which is given unto a Pariſh-Clerk, is paid as Wages for Work and Labour done; but that which is paid unto an Advocate, or Regent Doctor, is given as a Remuneration for his Learning and Skill in the Law.

† C. 2. 7. 17

‡ Bart. in l. 1. d. 50. 13. 13. N. 6.

Of

Of the Glebe, and whether Titheable or not.

THE Word *Glebe* in Propriety of Speech, according to *Januenſis*, is a hard Turf or Clod of Earth with Graſs growing thereon: But in our Law-Books it is uſed for that Land, wherein the Endowment of the Church conſiſts; and which, according to the Papal-Law, ought to be entirely free and exempt from all Secular Taxes and Payments whatever *, but yet ſuch Glebe ought to pay to the Church. For if there are Lands lying in one Pariſh which do belong to another Church, and are of the Glebe or Endowment of the other Church, the Perſon occupying ſuch Lands ought to contribute to the Repairs and Ornaments of that Church, within which Pariſh ſuch Lands are ſituated. Nor is the Law in the Margin here quoted † any Objection hereunto, which will have ſuch Lands to be free from Taxes; becauſe this Law has only a Reſpect to Secular, and not to Eccleſiaſtical Payments, as it there appears. Therefore in the preſent Caſe Perſons enjoying Glebe-Land ſhall be obliged to contribute to a Church-Rate or Tax; and *John de Athon* in his Annotations on the *Legatine* Conſtitutions ‡ confirms this Opinion. When, I ſay, that the Glebe ſhall be free from Secular Taxes, it is only to be underſtood, that a Parſon ſhall not be charg'd for his *Glebe* to ſend out either Man or Horſe to the *Milita*, and the like; becauſe 'tis a Spiritual Revenue, and held in *Frank-Almogn*.

* X. 3. 39. 1. x. 3. 30. 2.

† X. 3. 39. 1.

‡ Othob. Tit. 17. v. *ad hoc tenentur.*

But as long as the Parſon keeps the *Glebe* in his own Hands, he ſhall pay no Tithes to the Vicar, tho' the Vicaridge be endow'd of all the ſmall Tithes in the Pariſh: But it has been held, that if he demiſes the *Glebe* to a Layman, the Tenant muſt pay the ſmall Tithes to the Vicar, and the great Tithes to the Leſſor ‖. So likewiſe where the Vicar leaſes his *Glebe*, the Tenant muſt pay the great Tithes to the Rector or Improprietor, and the ſmall Tithes to the Vicar: But this muſt be underſtood, where the Land was titheable at the Time of the Endowment. For if it was appropriated to a Priory before the Vicaridge was endow'd, then tho' the Endowment was *de Minutis decimis* of the whole Pariſh, the Vicar ſhall not have the Tithes of the *Glebe* there, tho' he had leaſed the ſame; becauſe it was not Titheable at the Time of the Endowment. 'Tis true, if Tithes have been once paid out of the *Glebe* demiſed by a Parſon or an Impropriator, it ought to be ſo as often as 'tis demis'd: But where ſuch Tithes are demanded, if they were never paid, then either of them may preſcribe, that he and all his Predeceſſors have enjoy'd the *Glebe* Lands by themſelves, and by their Tenants diſcharg'd of Tithes to the Vicar *; and ſuch a Suggeſtion ſhall be a ſufficient Ground for a Prohibition; and the rather, becauſe ſmall Tithes out of *Glebe* Land demis'd by an Impropriator, are not payable of *Common-Right* to the Vicar, becauſe *Eccleſia non ſolvit Decimas Eccleſiæ*. But if a Parſon, where there is no Vicar, leaſes his *Glebe*, it is otherwiſe; eſpecially, if he reſerves only a ſmall

‖ Owens Rep. p. 35.

* 2 Lutw. Rep. 1062.

Rent: For in ſuch a Caſe the Leſſee ſhall pay Tithes of the *Glebe* to the Parſon himſelf.

*An. 14. cap. 17. Before the Statute of *Edward* the Third*, a Vicar had no manner of Freehold in the *Glebe*; and, therefore, he could not have the Writ of *Juris utrum* to recover what had been alienated by his Predeceſſor, which Writ is given to the Vicar by that Statute. During the Voidance of a Church the Fee-Simple of the *Glebe* is not in the Patron, but in Abeyance, *viz.* 'tis only in Expectation, and not in any certain Perſon, † Sect. 643. according to *Littleton* †; becauſe (ſays he) it ſhould not be Subject to any Alienation or Diſcontinuance, which might be made by the Poſſeſſor ſo as to bar the Succeſſor: For ſince the Parſon has the *Cure of Souls*, the Law provides that he ſhould not be deſtitute of that Maintenance, ‡ 1 Inſt. 341. a. which ariſes from the *Glebe* ‡. This the Year-Book is cited to prove; but it was ſaid, that an Eſtate cannot be for Life, unleſs there be alſo a Reverſion expectant upon ſuch Eſtate, which muſt be in ſome Body: And *Babington*, then Chief Juſtice of the *Common-Pleas*, was of an Opinion, That upon a Voidance the Fee-Simple rightfully belongs to the Patron. *Fitzherbert* ſays, 'tis in the Patron and Ordinary; and long before he wrote, it was held, that they might charge it before the Church was full †.

† F. N. B. 49. b. *Laſtly*, If a Parſon or Vicar ſows his *Glebe*, and then demiſes, and does not leaſe the Tithes with the Land; or if he ſells the Corn, and diſpoſes of the ſame, and the Vendee cuts it; yet he muſt pay the Tithes to the Parſon ‡, *&c.* So if the Parſon ſhould dye before the ‡ 1 Rolls Abr. 655. Corn is cut, his Executor ſhall have it; but if another is inducted, the Executor of the deceas'd muſt pay the Tithes of the *Glebe* to the Parſon inducted: But 'tis otherwiſe if the Corn was cut in the Life-time of the former Incumbent; for in ſuch the Executor pays no Tithes. That there may be a perpetual Memory of this *Glebe*, 'tis requir'd by || Bulſtr. Rep. 184. King *James*'s Canons||, that the Biſhops procure a *Terrier* to be taken of ſuch Lands by the View of honeſt Men within every Pariſh of their reſpective Dioceſs, by the Appointment of the Biſhop himſelf, whereof the Miniſter to be one; and ſuch *Terrier* ſhall be laid up in the Biſhop's Regiſtry *. * Can. 87.

Of the Habit or Apparel of the Clergy.

* Can. 74. SINCE the Church has thought fit by her Canons * to enjoin a Decency of Apparel unto Miniſters, that the Prelacy and Clergy may as well in outward Reverence as otherwiſe for the Worthineſs of their Office be regarded and † 21 Q. 4. 5. eſteem'd by the People †, I ſhall here ſay ſomething of Clerical Habits, which ought not to be of a red or green Colour, leſt through Oſtentation, Pride and Wantonneſs it ſhould adminiſter Occaſion of Scandal unto the People ‡. For tho' the Uſe of ‡ Dd. in c. 2. x. 3. 1. Cloaths or Meats is very far from being culpable in itſelf; yea, they || 21 Q. 4. 1. & 5. are for the Suſtenance of Life ||: Yet the Abuſe of them to Pride, Luxury and Vanity is highly condemn'd by all Ages and Men whatever; and much more blameable in the Clergy than in other Men, ſince

ſince the Clergy ought to be more eſpecially humble, ſober, modeſt, temperate and free from Vanity, that they may give a good Example unto their Flock *. But, notwithſtanding what has been ſaid, even Clergymen may uſe theſe Garments, if it be the Cuſtom of the Country, and they be not too gawdy and ſumptuous †; for gorgeous and ſumptuous Apparel (ſays the Scripture) is for King's Houſes ‖: And, therefore, unleſs the Clergy would be thought to be Kings and Princes, they ought not to wear ſuch Apparel. But yet they ought not to dreſs themſelves in too mean a Habit neither, to avoid this Cenſure of the Law, but to conform themſelves to the reſpective Cuſtoms and Faſhions of the Country where they dwell, in Point of Apparel, as it beſt ſuits with their Degrees and Conditions of Life ‡. But why the Law ſhould forbid the aforeſaid Colours of red and green more than any others, no Reaſon (I think) can be aſſign'd; ſince there are other Colours as indecent for a Clergyman to affect as theſe. A Clergyman's Habit ought then, according to *Lindwood*, to be of a plain Cloth, and the like, without any Lace, or Gold or Silver Trimmings, not open at Bottom or at Top, under a ſevere Penalty to be inflicted on the Infringers of the Provincial Conſtitution *. Which enjoins all Perſons having Eccleſiaſtical Livings within the Province of *Canterbury*, and ſuch eſpecially as are in Holy Orders, to wear ſuch Cloaths as are ſuitable to their State and Condition of Life †. And if any of the Clergy within the ſaid Province ſhall publickly within the ſame appear in any Cloſe-body'd Coat, or wear any other outward Garment than a Gown with long Sleeves, or with exceſſive and wide Sleeves, or ſhall go with long Hair and large Beards, or wear any other Rings on their Fingers than ſuch as are ſuitable to their Dignity; as Biſhops, Archbiſhops, *&c.* And, being Guilty of any Exceſs in the Premiſes, ſhall not on a Monition ſtand corrected within ſix Months from the Time of ſuch Exceſs committed, and effectually lay aſide ſuch irregular Habits, they ſhall *ipſo facto* (on having any Eccleſiaſtical Livings) incur a Suſpenſion *ab Officio*; and if they perſiſt herein for three Months longer, they ſhall, after nine Months, without any farther Admonition, be *ipſo Jure* ſuſpended from their Benefices. Nor ſhall they be abſolved by their Dioceſan, to whom this Power of Abſolution is reſerv'd from the ſaid Sentences, till they have paid a fifth Part of the Yearly Profits of their Livings to the Poor of the Pariſh where their Benefices are, to be tax'd by their Dioceſans, and to be paid within three Months afterwards. And if they ſhall during the Time of ſuch Suſpenſions celebrate Divine Service, or adminiſter in their Benefices as before, they ſhall from the Time of ſuch Celebration or Adminiſtration be *eo ipſo* depriv'd thereof by a Declaratory Sentence. And ſuch Clergymen as are not benefic'd, if they ſhall offend in any of the Premiſes, ſhall *eo ipſo* be render'd incapable for four Months to obtain any Benefice, unleſs they ſhall within ſix Months after an Admonition ſtand corrected. By another Provincial Conſtitution of Archbiſhop *Peccham* ‡ founded on that of Cardinal *Othobon* ‖, the Pope's Legate here in *England*, the Clergy in Holy Orders were forbid to wear an outward Habit like unto that of Soldiers or Laymen *, under Pain of Suſpenſion *ab Ingreſſu Eccleſiæ*. So that it evidently appears both from the *Canon-Law* in general, and from our own Provincial Conſtitutions in particular, what Care the Church took in former Times to have a Clergy grave and modeſt in their outward Habits; and it had been well if ſhe had taken the ſame Care to have reform'd the inward Habits of their Minds, and not ſuffer'd them to have kept Concubines, and the like. But tho' Clergymen

* 41 Diſt. c. 2 & 5.

† 21 Q. 4. 1.

‖ Luk. cap. 7. v. 25.

‡ 21 Q. 4. 2. 41 Diſt. 1. Sect. fin.

* Lindw. lib. 3. Tit. 1. c. 3.

‡ Lindw. ut ſup. c. 2.

‖ Tit. 5.

* 21 Q. 4. 3

men were forbidden to wear Cloaths of certain Colours and Faſhions; yet I do not find, they have any Habit preſcrib'd them in Law to wear out of the Church, either in reſpect of Colour or Faſhion: And, therefore, they may uſe any ſort whatſoever ſuitable to their State, provided it be not expreſly forbidden them, as red and green heel'd Shoes, red Stockings, Boots and the like were *. The Twenty ſecond and Twenty third of the *Laodicean* Canons forbids the Inferiour Clergy to wear the *Orarium*, which was a ſort of Scarf, or (as *du Pin* calls it) a *Stola*, which the Biſhops and Prieſts might wear on each Shoulder, but the Deacon could only wear it on the left Shoulder, and the Sub-deacon on neither. The Uſe the Deacon made of it, beſides that of the Diſtinction of his Order, was to give Notice to the People and Clergy, what they were to do or ſay by the ſeveral Motions that he made with it. And 'tis probable, that the Word is of a *Latin* Original, and deriv'd from the Verb *orare*, to pray; becauſe by this the Deacon gave Signals to the People, when they were to make their Reſponſes, and perform their Parts in the publick Acts of Devotion. The *Greek* derive it from the Verb Ὁρῶ, to obſerve. But this is only Conjecture. By the *Canon-Law* Prieſts are not to appear out of their Houſes without their Sacerdotal Habit, leſt they ſhould be affronted and ſuffer Inſults, like the Laity: And he that ſhall be found acting contrary hereunto, ſhall be Subject to Canonical Puniſhment †.

* Lindw. ut ſup. cap. 3. v. *expreſſatis.*

† 21 Q. 4. 4.

Of Hereſy, and the Puniſhment thereof.

THE *Engliſh* Word *Hereſy*, in the *Greek* called Αἵρεσις, according to St. *Jerome* in one of his Epiſtles, denotes an *Election*; becauſe an Heretick chuſes that Opinion, which he conceives to be beſt for himſelf *. For the Word αἵρεσις is deriv'd from the *Greek* Verb αἱρέω, ſignifying to *chuſe*; and from hence comes αἵρεσις, in *Latin* tranſlated *Hæreſis*, and in *Engliſh* term'd *Hereſy*: Which in Propriety of Speech ſignifies an Election, tho' common Uſage has given it another Senſe by cauſing it to be now taken almoſt ever in *Malam partem*, *viz.* for an Erroneous Opinion touching ſome Article of the *Chriſtian* Faith. Among the ancient Philoſophers it ſignify'd the Inſtitutions of ſome particular *Dogma*; or Opinion, and thus it denoted a Sect or Diviſion of them in Point of Opinion. St. *Paul* in his firſt Epiſtle to *Timothy* † calls it Ἑτεροδιδασκαλία; which, according to the Context, imports a pertinacious Teaching of falſe Doctrine: So that an Heretick is he that obſtinately perſeveres in any erroneous Doctrine, which is contrary to the Chriſtian Faith; and as ſuch St. *Peter* deſcribes it, ſaying ‡, *There were falſe Prophets among the People, even as there ſhall be falſe Teachers among you, who ſhall bring in damnable Hereſies*, &c. And, again, an Heretick is ſtiled a Blaſphemer of the Truth, one that brings in damnable Hereſies contrary to the Doctrine of the Apoſtles, erring and leading others into Error; ſuch as has erred and cauſed Diverſity of

* 24 Q. 3 27.

† Cap. 6. v. 2 & 3.

‡ 2 Epiſt. cap. 2. v. 1.

of Opinions contrary to the ſound Doctrine which he has learn'd: And thus an Heretick is one, that deſpiſes all Admonitions; and will not ſubmit himſelf to ſound Doctrines. Some derive *Hereſy* from the old *Latin* Verb *Herciſcor*, ſignifying the ſame as *Divido*: And hence (ſay they) Hereſy is a Diviſion from the Unity of the Faith*: And others will have it, that Hereſy is ſo called from the two *Latin* Words *Hæreo* and *Error*, defining Hereſy to be an adhering to ſome Error in Point of Faith. For the *Canoniſts* ſay, that an Error of itſelf, and in its own Nature, does not make a Man an Heretick; but his adhering thereunto renders him ſuch.

* Azo. in ſum. C. 1. 5. 1. Q. 1. 4.

By the Papal Law a Perſon may be ſaid to be a Heretick ſeveral ways, *viz.* ſometimes in reſpect of Words, and ſometimes in reſpect of Deeds. For he that teaches falſe Doctrine in reſpect of the Chriſtian Faith, or thinks otherwiſe than Mother Church inſtructs him, is by that Law deem'd an Heretick, whether his Thoughts or Doctrine regard Baptiſm, the Body of *Chriſt*, Confeſſion of Sins, Matrimony, or any other of the *Romiſh* Sacraments or Articles of Faith †. For to ſo great a Length does the *Romiſh* Church extend the Notion, that a Man does not only incur the Guilt thereof, by impugning any of the Articles of the Chriſtian Faith; but alſo if he impugns any of the Determinations of the Church, tho' they do not concern Articles of Faith ‡: For he is deem'd a Heretick by the *Canon-Law*, who does not believe as the Church does ‖, tho' he has often made contrary Determinations touching Matters of Faith. But this Law makes a Diſtinction (in Point of Name) between ſuch as beget Errors of Doctrine, and ſuch as only follow them: For he is properly an Heretick, who begets Errors, and pertinaciouſly defends them *; and the other is only called a Follower of Hereſy, and is more gently dealt withal than an Arch-Heretick, as the firſt is often ſtiled. Again, a Perſon may be ſaid to be a Heretick, who underſtands or expounds the Holy Scripture in any other Senſe than the Holy Ghoſt deſign'd it †. In a large Acceptation of Hereſy, every Perſon may be ſaid to incur the ſame, who is cut off from the Church by an Excommunication; and ſo likewiſe the Papiſts ſtile him an Heretick, who denies the Pope's Supremacy, and endeavours to rob the *Romiſh* Church of its great Privilege of being the Head of all other Churches ‡. But by the *Civil-Law* only ſuch is deem'd a Heretick, who does not receive and believe the Doctrines which are preach'd and taught by the four Evangeliſts ‖; or in other Terms, he who is diſcover'd to deviate from the Fundamental Doctrines of the Catholick Faith *: And this I apprehend to be Hereſy with us here in *England*.

† X. 1. 1. 1. x. 5. 7. 9. 23 Q. 1.

‡ X. 5. 7. 9. pr. Cl. 5. 3. 3. ‖ 11 Diſt.

* 24 Q. 3. 32.

† 24 Q. 3. 27. 37 Diſt. 14.

‡ 22 Diſt. 1.

‖ C. 1. 5. 8.

* C. 1. 5. 2.

By the *Canon-Law* a Favourer of Hereſy renders himſelf vehemently ſuſpected of Hereſy; and from ſuch Suſpicion, according to that Law, an Inquiſition may be form'd againſt him †, and a Purgation enjoin'd him at the Diſcretion of the Inquiſitors: And if he ſhall fail in his Purgation, he ſhall be condemn'd as an Heretick ‡; yea, by that Law ſuch Perſon is liable to an Excommunication *ipſo Jure*. And after a Perſon has been thus excommunicated, he is render'd Infamous and Inteſtable both *Actively* and *Paſſively*; and all Acts of Law are entirely interdicted him ‖. Receivers of Hereticks are ſuch Perſons as do willingly receive and entertain Hereticks in their Houſes, knowing them to be ſuch Perſons; and do conceal them in ſuch a manner as that they may eſcape the Hands of the Judge; and 'tis enough to render a Man liable to the Penalty of the Provincial Conſtitution *, if he only receives them knowingly: But if a Man entertains his Kinſman, that

† 13 Q. 3.

‡ X. 5. 7. 13. 3. x. 2. 23. 14. x. 5. 34. 10.

‖ X. 5. 7. 13. 6.

* Lindw. lib. 5. Tit. 5. cap. 1

is an Heretick, he ſhall be puniſh'd in a gentler manner. And thus a Perſon may be ſaid to be a *Defender* of Hereticks two ways. *Firſt*, When he does in a publick Manner defend them, together with their Errors: And ſuch a Perſon is ſtiled a *manifeſt* Heretick * ; and ſometimes an *Arch-Heretick* †. *Secondly*, He is ſtiled a Defender of them, who does not defend the Error, but only the Perſon of the Heretick, leſt (perhaps) he ſhould fall into the Judge's Hands: And this a Man may do either by giving him Aid and Aſſiſtance, or elſe by hindring ſuch as are willing to arreſt an Heretick, and the like. The firſt of theſe, who is ſtiled a Defender of Hereſy, ſhall be condemn'd as an Heretick ‡: And the ſecond, who is only a Defender of the Perſon, ſhall only in ſome Meaſure be condemn'd as an Heretick, and a Purgation ſhall be enjoin'd him as one ſuſpected of Hereſy ||. Yet 'tis to be obſerv'd, That if the Perſon thus defended ſhall be of Kin to the Perſon defending him, he ſhall be puniſh'd in a leſs ſevere manner *, being only *ex tanto* and not *a toto* Guilty thereof, ſince ſeveral Things are often tolerated in reſpect of Blood and Kindred, which otherwiſe would not be ſuffer'd †.

* X. 5.40.26.
† 24 Q. 3. 32.
‡ X. 5.40.26.
|| Arch. in c. 2. vi. 5. 2. v. *defenſor.*
* D. 47.16.2.
† D. 26.10.9.

As the *Species* of Hereticks are various and ſeveral, (for the *Canon-Law* reckons up no leſs than Eighty eight *Species* or different Sorts of Hereſy ‡) ſo likewiſe the Puniſhments invented for them are manifold and different, to the end that they may be ſufficient to coerce this profligate Sort of Men, born to diſturb the Peace of the State and the Tranquility of the Church. Wherefore, the Cognizance of this Crime appertains both to the Civil and Eccleſiaſtical Judge ||: For tho' Hereſy be a Matter to be adjudg'd of by the Church, *viz.* according to the *Canon-Law* and the Senſe of the Inquiſitors after Heretical Pravity, and to be determin'd, whether ſuch a Doctrine and the Perſons embracing the ſame be Heretical or not; yet, it being the Duty and Office of Secular Magiſtrates to defend Religion and maintain the Precepts thereof, they may animadvert on, and cenſure him, whom the Church adjudges to be an Heretick. And hence it is, that the Puniſhments of this Crime are either *Canonical* or *Civil*. *Canonical*, as when Hereticks in their Life-time are excommunicated and cut off as dead and rotten Members from the Church *; and ſo likewiſe are their Favourers and Defenders, as aforeſaid. *Secondly*, Their Children are by the *Canon-Law* render'd incapable of Eccleſiaſtical Benefices, even to the ſecond Generation †. A *third* Eccleſiaſtical Puniſhment due to this Crime is Degradation: For when Clergymen will not repent of their wicked Errors, they ſhall be condemn'd as Hereticks, and their Eſtates are confiſcated ‡; and, hereupon, by the Papal-Law, they are remitted to the Secular Judge, to be puniſh'd with Death, as Perſons (ſays that Law) worthy thereof. *Laſtly*, A *fourth* Kind of Canonical Puniſhment due to Hereticks perſevering in their Hereſy, is a Denial of all Chriſtian Burial to them after their Death ||, and even then by that Law they may be excommunicated; tho' by the *Civil-Law* *, Hereticks are bury'd as other Chriſtian Perſons are.

* X 5. 7. 9.
† 24 Q. 3. 9. & 13.
‡ X. 5. 7. 10.
|| X. 5. 7. 13. 6.
* C. 1. 5. 9.

The Puniſhments inflicted on Hereticks, according to the *Civil-Law*, are many. As, *Firſt*, They cannot convene or implead any Perſon in a Court of Judicature, make Litanies, celebrate Divine Service, or diſpenſe and adminiſter the Sacraments †; much leſs can they ordain Biſhops or other Eccleſiaſtical Miniſters ‡. Again, by the *Civil-Law*, notorious Hereticks loſt the Freedom of the City of *Rome*, and were render'd infamous Perſons: And, therefore, were made wholly incapable of attaining to any Honours in the State, and could not

† C. 1. 5. 3. 1. L. 5 & 6. h. t.
‡ C. 1. 5. 2. in prin. L. 14 h. t.

net be admitted to the Sacraments or any Dignities in the Church *; yea, they were depriv'd of ſuch as they had already obtain'd, and were alſo ſtrip'd of all other Privileges therein. An Heretical Woman loſt her Prerogative and Preheminence of being preferr'd to her Husband's Creditors in reſpect of her Dowry or Marriage Portion, as otherwiſe ſhe might be. By the *Civil-Law* Hereticks are alſo inhibited and reſtrain'd from buying, renting and poſſeſſing any Eſtate or Goods belonging to the Church †, and even from Trafficking or having any Work-Houſes, Shops, Ware-Houſes, *&c.* within Church-Yards, or the Bounds of the Church, to trade in; this being only granted to the Orthodox ‡. Beſides, that Law denies them the Power of making laſt Wills and Teſtaments, the entire Alienation and Adminiſtration of their Eſtates, and likewiſe the Acquiſition of all Inheritances, Executorſhips and Legacies ||. Nor is the Evidence and Teſtimony of a Heretick admitted againſt an Orthodox Perſon, tho' he may give Evidence in Favour of him *. *Laſtly*, The *Civil-Law* orders all Hereticks to be baniſh'd the State, leſt other Perſons ſhould be infected with their Errors. By a Conſtitution of *Frederick* the Emperor, they are deem'd infamous and proſcrib'd Perſons on a Suſpicion of Hereſy alone, unleſs they purge themſelves from ſuch Suſpicion. But ſuch as endeavour'd either publickly or privately to draw others into their Heretical Errors by teaching or writing Heretical Books, were puniſh'd with Death, and their Books order'd to be burnt; and ſuch as kept Books of this Kind were condemn'd to perpetual Deportation or Baniſhment.

* C. 1. 5. 1 & 7.

† C. 1. 5. 10.

‡ C. 1. 5. 20.

|| C. 1. 5. 4. 18 & 22.

* C. 1. 5. 21. Nov. 45.

The Chriſtian Church, or (at leaſt) the Polity and Government thereof never pretended to inflict Capital Puniſhments on the Score of Religion for above a Thouſand Years after *Chriſt*. For *Arius*, *Macedonius*, *Neſtorius*, *Eutyches*, *Dioſcorus* and other Arch-Hereticks, and their Followers, in the Primitive Days of Chriſtianity were by the Church treated with no other Kind of Puniſhment than Excommunication, and by exauctorating and depriving them of their Degrees therein. For the Power of inflicting Civil Puniſhments was left to Civil Magiſtrates and Princes, who were only wont to puniſh Hereticks with Baniſhment and Deportation †, or elſe by and with Pecuniary Mulcts, after the Emperors became Chriſtians, and were, thro' a ſtrange Weakneſs, prevail'd on by the Clergy to do that for them, which they were then aſham'd to do for themſelves: And 'tis well known, that the Emperors, as Weak as they were, would never be induc'd to eſtabliſh any Capital Puniſhment againſt Hereticks till *Juſtinian* the Emperor's Time ‡, which was above Five hendred Years after the firſt preaching of the Goſpel. For the Sixty fifth Law in the *Theodoſian Code*, from whence the fifth Law in the *Juſtinian Code* ||, *touching Hereticks*, was taken, and which was enacted by the Emperors *Theodoſius* and *Valentinian*, has been interpolated and corrupted (as many think) in ſeveral Particulars by the Clergy and their *Amanuenſes* in ſucceeding Times; and in the fifth Law of the *Juſtinian Code* theſe Words were afterwards added, *viz. Et ultimo ſupplicio tradendis*, as this is found by collating ſeveral ancient Manuſcripts of the *Theodoſian* and *Juſtinian Codes*, with the printed Copies thereof; and even by ſome of the printed Copies themſelves, wherein theſe Words are omitted. But now the Court of *Rome* arrogates a Power to itſelf of decreeing and inflicting Capital Puniſhments on Hereticks, and even on Kings themſelves. For by the Papal *Canon-Law* the Crime of Hereſy is a Matter ſo merely Eccleſiaſtical, that the Secular Judge cannot by any means take Cognizance of it; but can only have the naked Execution and Puniſhment of it com-

† C. 1. 5. 6.

‡ C. 1. 5. 12.

|| C. 1. 5. 5.

committed to him. Indeed the *Arians*, *Donatiſts*, *Vandals* and others whom the Orthodox Chriſtians in thoſe Ages of the Church would never imitate, held, That Religion ought to be maintain'd and propagated *Vi & Armis*: And for this Reaſon *Athanaſius* and *Hilary* do heavily complain of the Emperor *Conſtantine*, for that he maintain'd and propagated Religion *Vi & Armis*; that is to ſay, by coercive Laws in reſpect of pure Matters of Faith. But 'tis Time for me to conſider how our Laws here in *England* have puniſh'd and dealt with Hereſy from Age to Age, which to go thro' them all would take up more of this Work than I have Room for within the Compaſs of my Deſign: And, therefore, I ſhall confine my ſelf to the more modern Laws.

* Lindw. lib. 5. Tit. 5. cap. 2.

By a Provincial Conſtitution of Archbiſhop *Arundel* *, a Preacher was to utter nothing in his Sermon, and the like, touching the Sacraments, either beſides or contrary to the Determination of the Church, nor was he to call any Thing into Queſtion that was or had been defin'd or decreed by the Church, under the Pain of Excommunication *ipſo facto*, and was not to be abſolv'd till he had abjur'd his Hereſy, unleſs in caſe of Death: And if he relaps'd thereinto, his Eſtate and Goods were to be confiſcated, and he was to perform a Pennance enjoin'd him by the Law, according to the Form of this Conſtitution.

† Lindw. ut ſup. cap. 3.

And by another Conſtitution of the ſaid Archbiſhop †, all Perſons were forbidden to diſpute or call in Queſtion any Thing that was or ſhould be done by General or Provincial Councils, unleſs it were to come at the true Senſe of their Decrees: So that the Clergy had the Laity hereby entirely under their Girdle. And leſt Hereſy ſhould ſpring up in our Univerſities from the curious Search of Perſons, that deſired the Truth,

‡ Lindw. ut ſup. cap. 4.

another Conſtitution was made by the ſame Archbiſhop ‡, commanding all Heads and Governors of Colleges and Halls in our two Univerſities, once every Month (at leaſt) to enquire, whether any one had offer'd any Propoſition which was contrary to ſound Doctrine or the Catholick Faith, of which they themſelves were to be Judges; and to proceed againſt ſuch Perſons thereupon in a ſummary Way. And thus ſtood the Eccleſiaſtical Law here in *England*, ſupported by the *Canon-Law* in general in

‖ 2 H. 4. cap. 15.

Reſpect of Hereſy. For before the Statute of *Henry* the Fourth ‖, a Biſhop could not commit any one for Hereſy. The Proceedings againſt him were by the Cenſures of the Church, according to their Law; and after the Archbiſhop had convicted him in a Provincial Synod, he was then by the ancient Law to be deliver'd to the Sheriff, who, by Vertue of the King's Writ *de Hæretico Comburendo* was to burn him. But it being found Troubleſome to ſummon a Convocation upon this Occaſion, that Statute provided, That every Biſhop might in his Dioceſs convict an Heretick; and if this was done in the Sheriffs Preſence, (as was uſual in thoſe Days) for the Biſhop would ſend for him on Purpoſe, then, immediately on Conviction, the Heretick was deliver'd to the Sheriff, who burnt him without the aforeſaid Writ: But if it happen'd (as it ſometimes did) that the Sheriff was not preſent at the Conviction, or if the Heretick was order'd to be burnt in a County other than where he was convicted, the Sheriff in ſuch Caſes could not burn him without the ſaid Writ. I don't find that a Heretick convicted had any other way to ſave himſelf from the Fire, but by abjuring his Opinion; and this was only on the firſt Conviction: For if he relaps'd, and was convicted a ſecond time, then he was ſurely burnt, for the Clergy in thoſe Days ſhew'd no Mercy.

And

And this was *William Sawtree*'s Caſe, who being condemn'd by Archbiſhop *Arundel* in a Provincial Council * for a relapſed Heretick, a Writ was directed to the Mayor and Sheriffs of *London* to burn him; and this being by the Advice of the Lords Spiritual and Temporal in Parliament aſſembled †, the Writ was ſubſcrib'd *per ipſum Regem & Concilium*. And this was the firſt Perſon that was burnt in *England* for Hereſy, on a Sentence given in a Council, and by Virtue of the aforeſaid Writ, which ſee in *Fitzherbert* ‡. 'Tis called there, indeed, the *uſual Puniſhment*; but this muſt relate to the Uſage beyond Sea; for it was ſeldom or never uſed here at the Biſhop's Requeſt till now, tho' Burning was the Puniſhment at the Common Law for this Crime; but the Proceedings againſt the Offender was in the Temporal Courts, upon Indictments, *&c.* About the beginning of the Thirteenth Century the *Albigenſes* in the South Parts of *France* preaching againſt the Corruptions of the *Romiſh* Clergy, were for that Reaſon reputed Hereticks; and St. *Dominick* coming out of *Spain* to convince them of their Errors, but without any Effect, he therefore perſwaded the Magiſtrates to burn them. But, as yet there being no Law for it, the Fourth *Lateran* Council decreed, That Hereticks ſhould be deliver'd to the Magiſtrates to be extirpated, which is a very ſoft Word for Burning; and if they neglected it, they were to be excommunicated. Princes were alſo depos'd by the Pope, and their Subjects abſolv'd from their Allegiance; and this Tyrannous Behaviour of the Clergy towards them was ſo terrible, that they rather choſe to deliver up their Subjects to this Kind of Death, than to be thus plagued with a troubleſome Prieſthood.

* An. 2. H. 4.

† 2 Roll. Abr. 220.

‡ F.N.B. 269.

* A. D. 1198.

In *Wickliff*'s Time a Bill paſſed the Lords Houſe *, tho' never ſent to to the *Commons*; That upon a Certificate made by the Biſhop to the Court of *Chancery*, of the Names of ſuch of *Wickliff*'s Followers as preach'd without Licence, and drew great Aſſemblies together, the Chancellor might iſſue out Writs to the Sheriff to ſeize and impriſon them, till they juſtify'd themſelves according to the Laws of the Church. But in the next Paliament †, the Commons by a Bill declar'd, that they never aſſented to that Act; and, therefore, deſired it might be look'd on as void. But when *Richard* the Second was depos'd, then in Gratitude to ſuch of the Clergy as aſſiſted *Henry* the Fourth in coming to the Crown, this King procur'd a Law ‡ to paſs both Houſes of Parliament; which having the Royal Aſſent, the Purport of it was, that none ſhould preach without Licence, nor deliver any Doctrines contrary to the Determinations of the Church; and if any Perſon was ſuſpected of acting contrary hereunto, he was then to be impriſon'd by the Ordinary till he was either convicted or abjur'd his Opinion; and if he refus'd or relaps'd after Abjuration, he was then to be deliver'd to the Sheriff to be burnt: But firſt his Conviction was to to be certify'd into *Chancery*; whereupon a Writ was iſſued out to burn him. But afterwards this Writ *de Hæretico comburendo* was taken away by Parliament ‖ as a moſt inhuman Proceeding; and Hereſy made puniſhable by the King's Eccleſiaſtical Laws, either by Excommunication, Deprivation, Degradation, or other Church Cenſures not extending to Death.

* An. 5. Ric. 2.

† An. 6. R. 2.

‡ 2 Hen. 4. cap. 15.

‖ 29 Car. 2. cap. 9.

In reſpect of Juriſdiction relating to Hereſy, the *Canon-Law* conſiders three Things in General, *viz. Firſt*, The Thing itſelf. *Secondly*, The Perſon: And, *Thirdly*, The Action. In reſpect of the Thing itſelf, we ought to conſider the *Dogma* or Opinion which is aſſerted and maintain'd by the Heretick; and likewiſe the Crime itſelf. In reſpect of the Perſon it conſiders not only the Perſon of the Criminal, but likewiſe that of the Judge, *viz.* In relation to the firſt, whether the Perſon

that has offended be a Biſhop or the like, who ought not to be adjudg'd by an Ordinary Inquiſitor, but to be admoniſh'd by the Pope himſelf ‖, or whether he be any other Perſon of his Court and Juriſdiction. In reſpect of the Action, it conſiders the Nature and Quality of the Aſſertion, and the manner how ſuch Hereſy was publiſh'd, the Favour ſhewn to Hereticks, the Defence and Maintenance of ſuch wicked Doctrines, the Preaching thereof, and the like; and, *laſtly*, Whether ſuch Hereticks aſſembled in an arm'd and tumultuous Manner. The firſt Cognizance of this Crime (ſays that Law) belongs to the Eccleſiaſtical Judge, and the laſt to the Secular Judge, according to the *Canoniſts*, if we may believe their Interpretation of St. *Matthew* * and St. *John*'s † Goſpels. For the *Papiſts* ſay, That if a Perſon continues obſtinate in his Hereſy, or relapſes thereinto, after he has abjur'd the ſame, he ought to be cut off from the Church, and put to Death, according to the Form preſcrib'd by God himſelf (as they expound the Text) ſaying, *If a Man abide not in me, he is caſt forth as a Branch, and is wither'd, and Men gather them into the Fire, and they are burned* ‡. For by the Words *caſt forth*, they ſay, he means the Puniſhment of Excommunication; by the Word *wither'd*, he underſtands a *Perſeverance*; by the Words *Men gather them*, he intends the Secular Judgment that follows a Heretick; and by the Words *they are burned*, they will have him to mean the Puniſhment of Death. But before they give Sentence, let them find an infallible Judge upon Earth.

‖ VI. 5. 2. 16.

* Cap. 18. v. 15. &c.

† Cap. 15. v. 6.

‡ Joh. cap. 15. v. 6.

The *Papiſts* err very much in one Extream, thinking, That Hereticks ought to be proſecuted with Fire and Sword, whenever they ſhall judge Men to fall into Hereſy: And they meaſure Hereſy by a Diſſent from their own Faith, and not from the Doctrine of the Holy Scriptures. And this their Clergy maintain, that they may ſtir up and excite Princes by this Means to butcher ſuch as are of the Reform'd Religion. But touching this Matter (I think) we ought not to offend either by a prepoſterous Severity, or to encourage Men of bad Principles by too much Lenity. For we ought to diſtinguiſh well between the Seduc'd and the Seducers, between ſuch as err in light Matters, and ſuch as obſtinately offend in Matters of the higheſt Conſequence to Religion. The firſt ought to be inſtructed with Gentleneſs and Lenity, and the latter ought to be puniſh'd in a ſharper manner, as Diſturbers of the Publick Peace. We ought to diſtinguiſh between ſuch as only impeach one or two Articles, and (perhaps) of Man's Invention too; and ſuch as endeavour to pull down and overturn the very Foundations of the Chriſtian Religion; between ſuch as offend out of meer Ignorance, and keep their Errors privately to themſelves, and all ſuch as poiſon and infect whole Nations with their pernicious Errors, and ſuch as they converſe with. For no Man can doubt, but that we may proceed with ſome Severity, tho' not with Death, againſt ſuch Arch-Hereticks, Blaſphemers, and Diſturbers of the Publick Tranquility of the Church and State, by the Means of impious Doctrines obſtinately defended, and occaſionally ſcatter'd and divulg'd among the People, in order to ſtir up Tumults and Seditions in the Commonwealth, under the veiled Pretence of Religion. For, ſays St. *Paul*, *Haſt thou Faith? Have it to thy ſelf before God* *: *and trouble not the Church with thy Faith. Let us therefore follow after the Things which make for Peace; and Things wherewith one may edify another.* And we ſhall not then perſecute the unhappy Diſſenter, becauſe he does not think and believe as we do.

* Rom. c. 14. v. 22.

Of

Of Hoſpitals, and the Care of them, &c.

AS all Men are deſcended from one Common Stock, and by Nature of Kin unto each other; ſo there have been, in all Ages among Heathens as well as Chriſtians themſelves, Men of Piety and Compaſſion towards their own Species, who have built certain Houſes for the Maintenance of the poor diſtreſſed Part of Mankind, and ſettled Eſtates and Revenues thereon for their Relief: And theſe Houſes are with us commonly ſtiled *Hoſpitals*, and ſometimes *Infirmaries*. The ancient *Romans* had their Hoſpitals for Orphans and poor fatherleſs Children; and for Infants expos'd and caſt away by their Mothers under ſeven Years of Age: The firſt the *Civil-Law* ſtiles *Orphanotrophium* *, and the Maſter or Governor of ſuch a Houſe by the Title of *Orphanotrophus*: And the other was called *Brephotrophium* † as appears in the *Juſtinian Code*. They had alſo their Hoſpitals for Beggars and other indigent Perſons, who thro' Age or other Infirmity, could not live by their Labour; and ſuch a Houſe was term'd *Ptochotrophium* ‡, *&c.* And becauſe the Care of the Poor is the Cauſe of God, according to the *Old* and *New* ‖ *Teſtament*, therefore the Clergy in ſucceeding Ages, under a Pretence of Religion, and being God's Stewards, got the Guardianſhip of theſe Pious Foundations into their Clutches *; leſt Sloth and Irreligion ſhould be cheriſh'd under a Colour of Charity towards the Poor. And thus in *Popiſh* Countries they have continued ever ſince to be under the Biſhops Juriſdiction and Protection; and no one can build ſuch Houſes of Piety without his Licenſe or Authority †, or any Oratory therein for the Publick Celebration of Divine Service. Moreover, ſometimes an Hoſpital is annex'd to a Church, and on the other Hand, a Church is ſometimes annex'd to an Hoſpital; and in this Caſe, according to *Felinus* ‡, ſuch Hoſpital enjoys the Privilege of an Eccleſiaſtical Benefice: But *Joh. de Selva*, in his Treatiſe of *Benefices*, ſays ‖, That before an Hoſpital be called an Eccleſiaſtical *Benefice*, tho' it be a Religious Houſe, 'tis neceſſary it ſhould be ſpiritualiz'd and collated to on the Preſentation of a Layman.

* C. 1. 3. 32. C. 1. 2. 19.

† C. 1. 2 19.

‡ C. 1. 2. 19.

‖ Mat. c. 19.

* 5 Q. 5. 2. Gloſſ. in c. 1. v. *non poſſunt.* 82 Diſt.

† X. 3. 36 4. 18 Q. 2. 10.

‡ In c. 4. x. 2. 26.

‖ Cap. 3. Q. 57.

The Care of Hoſpitals then, according to *Petrus de Ancharano*, as they are govern'd and viſited by Biſhops, does of *Common Right* by the *Canon-Law* belong to Epiſcopal Juriſdiction, and not to the Care of Lay Magiſtrates: Yet if the Biſhops and their Vicars-General ſhall behave themſelves very negligently in the Care of them, it is a receiv'd Doctrine among the *Canoniſts* themſelves, that the Ordinary Magiſtrates may interpoſe and take Cognizance thereof. But by a Conſtitution of *Francis* the Firſt, King of *France*, all Juriſdiction over Hoſpitals is granted to the King's Ordinary local Judges, or to ſuch as live near unto ſuch Hoſpitals, to viſit the ſame, and to make Statutes for the Government thereof: And with us here in *England*, all ſuch Hoſpitals as have been built ſince the Reformation are Viſitable by the King or Lord-Chancellor, if there are no particular Feoffees or Viſitors appointed for that end by the Founder him-

himſelf: For if the Government of an Hoſpital be not deem'd an Eccleſiaſtical Benefice, as it often happens not to be, either thro' the Order of the Patron, the Authority of the Civil Magiſtrate, or from the Law and Nature of the Foundation itſelf, ſuch Government or Adminiſtration is granted without the Biſhop's Advice or Conſent: But if it be a Benefice with the Right of Patronage, the Biſhop gives the Maſter or Governor thereof Inſtitution on the Patron's Preſentation. For there are ſome Hoſpitals of a publick, and others of a private Nature. Among the firſt they reckon ſuch as were granted to the Hoſpitallers *in Titulum Beneficii*; and in reſpect of the latter we mean ſuch as are only granted *ratione Adminiſtrationis* *. The firſt becomes an Eccleſiaſtical Benefice either by the Conſtitution of its Founder, as for the moſt Part; or elſe by having a Church therein with a Belfry and Bells to call People together on the Score of Divine Service †; or if there be any Altar fix'd and conſecrated therein ‡; and, *laſtly*, Whenever any Part of the Revenue is ſettled on the Maſter on the Account of reading Divine Service, and doing other Offices therein, and the like. For otherwiſe, if thoſe Things do not concur, ſuch Hoſpital may rather be called a Place of Charity than an Eccleſiaſtical Benefice ‖.

* Felin. in c. 4. x. 3. 26.

† Abb. in c. 10. x. 5. 33.

‡ Felin. in c. 4. x. 3. 26.

‖ Gloſſ. in c. 2. Cl. 2. 1. v. *Beneficiis.*

It has been ſaid, that by the *Canon-Law* Hoſpitals erected with a Church, Chapel or Altar therein contain'd, or by and with the Biſhop's Authority are ſaid to be Religious Places, and ſubject to the Biſhop's Juriſdiction: And 'tis to be further obſerv'd, that a Biſhop, by deputing a Prieſt or Chaplain to adminiſter the Sacraments to the Perſons therein, may correct and remove him for his Demerits; but yet he ought not to demand or exact any Thing from him *ultra Solitum*. It has been alſo ſaid, that by this Law no one ought to build an Hoſpital without the Biſhop's Leave or Licence firſt obtain'd: And, therefore, if a Layman appoints an Heir or an Executor, and charges him in his Will to build an Hoſpital within a Year after the Teſtator's Death, under Pain of being *ipſo Jure* depriv'd of his Heirſhip, *&c.* he ſhall not by that Law be depriv'd thereof, if he cannot obtain the Biſhop's Leave or Licence for ſo doing; becauſe he ought not to build it without ſuch Leave or Licence had. But yet if the Biſhop will not grant his Leave, he ought to build after ſuch a manner as he may, *viz.* as an Oratory, or as a *profane* Hoſpital. Becauſe if he cannot build it after that manner as the Teſtator appointed, yet he is bound to execute the Teſtator's Will after the beſt manner he may: And ſuch an Hoſpital built without the Biſhop's Leave, and not having the Form of a Church, is deem'd a *profane* Hoſpital. And by the *Canon-Law* not only the Biſhop's Leave and Conſent is requir'd, but the Biſhop may change the Place wherein it ought to be built, even contrary to the Teſtator's Will and Intention; and the Heir or Executor is bound to execute the Teſtator's Will in the Place commuted by the Biſhop. Again, tho' an Hoſpital ſhould be built by a Layman on this Condition, *viz.* That it ſhould not be a Religious Place, or become Subject to the Biſhop, as aforeſaid; yet it ſhall be a Religious Place, and be under the Biſhop's Care and Juriſdiction, becauſe a Layman cannot do any Thing contrary to the Laws of the Church.

Baldus ſays, That an Hoſpital is then ſaid to be a *profane* Thing, when the Biſhop does not lay the firſt Stone; becauſe to the end (ſays he) that it ſhould be an Eccleſiaſtical Foundation, it ought to be founded by the Biſhop's Authority: And, therefore, ſuch Hoſpitals which are in the Houſes of Laymen, are ſaid to be *profane* and *lay* Foundations.

Of

Of an Inhibition, and the Force thereof.

AN *Inhibition* is the Precept or Mandate of a Superiour Judge iſſuing out of his Court, and directed to an Inferiour Judge or Court on the Interpoſition of an Appeal; forbidding ſuch Inferiour Judge to proceed any further in the Suit or Cauſe formerly depending before him, and now appeal'd to a Superiour Judge, during the Courſe of ſuch Appeal *: And this Mandate or Precept is uſually decreed and granted with ſome Penalty or Cenſure of Law annex'd to it. In the *Imperial* Chamber, as well as in other Courts, when it is appeal'd from a *Diffinitive* Sentence, or an *Interlocutory* having the Force of a *Diffinitive* Sentence, this Inhibition is decreed upon the Appellant's Motion, together with a Citation of the Party Appellate †, and an Intimation to the Judge *a Quo*, commanding him to tranſmit the Proceſs or Acts done in the inferiour Court to the Judge *ad Quem*. And 'tis to be obſerv'd, That ſuch Intimation may and ought to be iſſued forth of *Common Right* *, becauſe an Appeal from a *Diffinitive* Sentence, or an *Interlocutory* (as aforeſaid) devolves the Cauſe immediately to the Judge *ad Quem* and reduces it to that State, in which the Principal Cauſe was after Conteſtation of Suit†. And tho' there is no need of an Inhibition, when the Judge *a Quo* ſubmits himſelf to the Appeal; becauſe he has by ſuch Deference to the Appeal abdicated his own Juriſdiction in the Cauſe: Yet in the *Imperial* Chamber an Inhibition is always granted on a Motion or Petition (as above remember'd): And ſo it is practis'd here in *England*, becauſe, according to that Maxim in Law, *abundans Cautela non nocet*. Moreover, 'tis to be obſerv'd, That an Inhibition ought not to be decreed in an *Extra-judicial* Appeal, as it is in a *Judicial* one ‡: Becauſe, an *Extra-judicial* Appeal being only a Provocation to a Cauſe, it does not ſuſpend what is gone and paſt, but only ſubmits the Cauſe *in futurum* to the Protection of the Superiour Judge, and has only a Reſpect to what ſhall hereafter happen, leſt any one ſhould be unduly moleſted ||. Nor ought an Inhibition, together with a Citation, to be decreed and granted immediately in an Appeal from an *Interlocutory* Sentence *ſimply* ſo called, tho' the ſame be appealable: Becauſe in Reſpect of an Inhibition the Judge ought to have a *Conſtat* of the Grievance, that he may know the Truth thereof; for the Cauſes of a Grievance ought not only to be expreſs'd in the Inſtrument of the Appeal, but alſo the Truth of ſuch Grievance ought to be verify'd from the Acts of the Inferiour Judge *. And from hence the Judge *ad Quem* ought to conſider, whether the Cauſe be devolv'd or not: For as long as the Cognizance continues before him, whether he ought to receive the Appeal or not, and whether the Cauſe be devolv'd or no, he ought not to inhibit the Inferiour Judge. Therefore, if the adverſe Party makes a Queſtion or Matter of Doubt *in Puncto Competentiæ*, whether the Judge *ad Quem* has Juriſdiction, the Judge *a Quo* ought not to be inhibited till ſuch Time as this is clear'd and remov'd by the Interpretation or Interlocution

* VI. 2. 15. 7.

† Alex Conſ. 91. Vol. 2.

* Gail. lib. 1. Obſ. 144. n. 1. X. 2. 28. 5. 2 & 3.

† C. 7. 13. 13. Bart. & Bald. ibid.

‡ X. 2. 28. 5.

|| Abb. in c. 13. X. 1. 33. n. 4.

* Gail. ut ſup. n. 4.

*X. 2. 28. 5. of the Judge *ad Quem* pronouncing for his Jurisdiction *. And thus there is Difference to be made between a *Diffinitive* and a *simple Interlocutory* Sentence, in respect of decreeing an Inhibition. For in the first Case an Inhibition is indistinctly and immediately granted, whether the Judge *a Quo* be wont to proceed to an Execution or not: But in the other Case it ought not to be granted any otherwise than till after such time as he has taken Cognizance of the Cause of Appeal.

It has been a Question among some, whether a Judge of an Appeal can indifferently inhibit the Judge *a Quo* not to proceed, before the Merits of the Appeal have been heard and try'd? But according to *Innocentius* † In c. 13. x. he cannot †. For in the first Place he ought to take Cognizance about 1. 33. the Admission of the Appeal; and if he receives the Appeal as emitted on a probable Account, he may afterwards inhibit the Judge *a Quo* not to proceed; because as a Metropolitan has not Jurisdiction over the Subjects of his Suffragans, unless it be in a Cause of an Appeal, so he ought not to inhibit, because he has not receiv'd the Appeal as emitted *ex Causâ probabili*. And if need be he ought to take Cognizance of the Truth thereof; because he begins the same again. But *Speculator* is of a quite contrary Opinion, saying, That the Jurisdiction of the Judge *a Quo* is not immediately suspended by an Appeal from an *Interlocutory* Sentence even on the very Article on which it was appeal'd, but that the Judge may proceed *ad ulteriora*: And the Validity of the Process depends on a future Event; because if the Appeal shall be pronounc'd to be unlawful, the Process shall be valid.

If the Judge *ad Quem* receives an Appeal *ex certâ Scientiâ*, he may send an Inhibition without any such Cognizance: But if the Grievance be not expressly mention'd in the Appeal (as aforesaid) he ought in the first Place to take such Cognizance before he decrees and emits such an Inhibition. Therefore, in decreeing an Inhibition with a Citation, the Judge of the Appeal ought to consider with himself, whether the Sentence appeal'd from be *a simple Interlocutory*; which inflicts such a Grievance as cannot be repair'd by an Appeal from a *Diffinitive* Sentence; or whether it be from an *Interlocutory*, that has the Force of a *Diffinitive* Sentence. In the first Case he ought to read over and consider whether it be rightly appeal'd as *in scriptis*; or whether the Causes of the Grievance be express'd or not on Account of the aforesaid Reasons: For an Inhibition ought not to be otherwise decreed and granted in an Appeal from an *Interlocutory*. But if the *Interlocutory* has the Force of a *Diffinitive* Sentence, then an Inhibition with a Citation may be decreed, if there be no Defect of the Formalities. In a Cause of Appeal, when it is principally appeal'd on the Account of some Nullity, an Inhibition with a Citation ought not to be decreed, because after Sentence has pass'd *in Rem Judicatam*, it establishes and ‡ Gail. lib. 1. Obs. 127. n. 10 gives a Right between the Parties ‡: And the Process of a Nullity ought not to retard or hinder the Execution of a Sentence. And, moreover, there lies a Presumption in Favour of such a Sentence not only in respect of the Justice of it, but also in regard to the regular Process thereof. And hence there is a *Constat* of a Presumption of Law in Favour of the Judge and his Proceedings, till such time as the Nullity of the Sentence be set forth, and plainly appears: And, therefore, no Regard ought to be had to the naked and simple Narrations of the Supplicant, in respect of decreeing an Inhibition. And this is observ'd as a Rule in the *Imperial* Chamber, *viz.* That an Inhibition ought not to || Mynsi. cent. 4. Obs. 64. be decreed in Causes of Nullities ||, because a Nullity is not presum'd, unless it be prov'd, nor ought an Inhibition to be decreed, when Causes

Cauſes are null and void; becauſe a Nullity is not preſum'd, unleſs it be prov'd, as aforeſaid.

Of Inſtitution and Induction into Benefices.

BECAUSE *Inſtitution* and *Induction* into Eccleſiaſtical Benefices have ſo near a Relation to each other, I ſhall here place them both under one and the ſame Title, though treat of them aſunder: And firſt of Inſtitution, becauſe in reſpect of Order it precedes Induction. Now Inſtitution is nothing elſe but a transferring or conferring the Right of an Eccleſiaſtical Benefice, ſubject to the Right of Patronage, on the Perſon preſented thereunto for Inſtitution; and it is made by the Ordinary of the Dioceſs on the Patrons Preſentation of a fit Perſon to be inſtituted thereunto, if the Ordinary admits him to be qualify'd for the Cure of Souls *. And thus Inſtitution is only a particular way or manner of giving Eccleſiaſtical Benefices or Prebends not much Diſtinct from Collation itſelf: For Biſhops having by the *Canon-Law* the Right of diſpoſing of all Eccleſiaſtical Benefices attended with the Cure of Souls, did reſerve the Right of Admiſſion and Inſtitution unto themſelves, tho' they granted unto Patrons and Founders of Churches, the Power of recommending a fit Clerk for the Cure thereof: But tho' Biſhops have this Right reſerv'd to them by the *Canon-Law*, yet it is no more than a Truſt veſted in them for the Good of the Pariſhioners to ſee that the Cure of Souls be well ſupply'd and provided for. They may not refuſe the Perſon preſented to them for Inſtitution upon Caprice or Humour, or thro' Hatred, and the like, if he be duly qualify'd: For tho' (perhaps) at firſt they only deſign'd to give the Patron the bare Nomination of a Clerk, in order to encourage the building and endowing of Churches; well knowing that in after Ages they might, by the Help of this Reſervation of Right, ſecure to themſelves the entire Diſpoſal of all Livings, under a Pretence of Diſability: Yet our Laws have fenced againſt this manifeſt Breach of Truſt and Power in the Ordinary, by making him a Diſturber if he does not give Inſtitution upon the Fitneſs of a Perſon preſented to him, or (at leaſt) give Notice to the Patron of the Diſability of his Preſentee, that he may preſent another upon his unfitneſs: And herein Inſtitution differs from Collation; becauſe the Ordinary is oblig'd to confer the Living on the Perſon preſented, whether he will or not; provided the Preſentee be qualify'd: But in collating to a Benefice, he is not bound to confer it on this or that Perſon againſt his Will; but may give it to whom he pleaſes, provided he be a Perſon qualify'd in Law. Inſtitution is by the *Canoniſts*, in reſpect of the Ordinary, ſtiled a *Transferring of Right*; becauſe the Patron has not *plenum Jus* in the Living, as not having a Spiritual Right therein: And it may be defin'd to be an *involuntary* Transferring; becauſe the Ordinary muſt transfer his Right in ſuch Benefice whether he will or not, as aforeſaid.

* Abb. in c. 2. x. 3. 8.

The

The Biſhop of the Dioceſs had anciently all the Churches therein veſted in him as univerſal Incumbent thereof; and ſent out Curates and Deacons to officiate therein with ſuch Salaries as he pleas'd to allow them out of the Profits that he receiv'd himſelf, which were then only Offerings of Devotion, as Mr. *Selden* obſerves in his Hiſtory of Tithes *: And hence it is, That the Inſtitution of fit Perſons to be admitted into vacant Benefices, and the Cuſtody of ſuch Livings do of *Common-Right* belong to the Biſhop of the Dioceſs, where ſuch Livings lye †. But Inſtitutions and the Cuſtody or Guardianſhip of vacant Churches, which follows the Right of Inſtitution and Collation, may of *Special Right, viz.* by Privilege or Preſcription, belong to a Perſon that is not a Biſhop; and ſuch a Perſon, pending Suit with the Dioceſan, ſhall be defended in the Poſſeſſion thereof ‡. Between the Archbiſhop of *York* on one ſide, and the Archdeacon of *Richmond* on the other, the Queſtion was touching the Inſtitution of Clerks to Eccleſiaſtical Livings, and the Cuſtody of vacant Churches. And this Queſtion devolving to the Pope on the Part of the ſaid Archbiſhop, it was alledg'd, That as well of *Common-Right* as by General Cuſtom the Inſtitution of Perſons, and the Cuſtody of vacant Benefices in his Dioceſs did belong to him: But that ſome of his Predeceſſors had delegated this Power of Inſtitution and Right of Guardianſhip *perſonally* to ſome of the Archdeacons of *Richmond*. Whereupon the Archbiſhop's Proctor demanded, That the Archdeacon ſhould quit Claim, and yield up all Right thereunto. 'Twas anſwer'd on the Archdeacon's ſide, That the Archbiſhop did not make a *perſonal*, but a *real* and *perpetual* Grant, not only of Inſtitutions, but likewiſe of the Guardianſhip to vacant Churches, and that this was done by the Chapters Conſent; and that the Archdeacon had been in a continu'd Poſſeſſion of theſe Rights in the Times of ſeveral Archbiſhops and Archdeacons: And that the Archdeacon had this Right granted him from the Archbiſhop without any *Salvo Jure* to Inſtitution and Guardianſhip. But the Archbiſhop reply'd, That he granted him the Archdeaconry with a *Salvo Jure* to Inſtitution and Guardianſhip as aforeſaid; and, further, that the Archdeacon had abjur'd theſe Liberties and Dignities. The Pope, upon hearing the Matter, pronounc'd, That the Archdeacon ſhould be confirm'd in the Poſſeſſion of theſe Liberties, till the Archbiſhop prov'd the ſame to be only a *perſonal* and not a *real* Grant. See Pope *Gregory*'s Decretals ‖.

* Cap. 6. pt. 3. fol. 80. cap. 9. pt. 2. fol. 253.

† X. 8. 7. 3.

‡ X. 3. 7. 6.

‖ X. 3. 7. 6.

But tho' Inſtitution into Eccleſiaſtical Benefices does of *Common-Right* particularly belong to the Biſhop, to the end that it may be deem'd Canonical *; yet it may belong to any other Eccleſiaſtical Judge or Prelate, to whom the Admiſſion of ſuch Curates as are charged with the Cure of Souls, does likewiſe appertain; for Biſhop's Officials and Chancellors may by Commiſſion grant this Inſtitution, as is commonly practis'd. And ſo likewiſe may a Chapter (*ſede vacante*) grant the ſame: For tho' a Chapter cannot collate unto Eccleſiaſtical Benefices belonging to the Biſhop's Collation, during the Vacancy of a See; yet a Chapter may lawfully admit and inſtitute into Benefices ſuch Perſons as are preſented by Patrons, if they are fitly qualify'd *; and by this Means a Chapter may try a *Jus-Patronatus*. But tho' it appears by the Laws of the Church, that neither Kings, Princes, nor any Laymen can give Inſtitution to Clergymen in reſpect of vacant Benefices without the Biſhop's Conſent; yet with his Conſent even Laymen may do it: And thus with us in *England* Lay-Chancellors, Vicar-Generals, and the like, grant Inſtitutions. A Deanery does not ſtrictly come under

* X. 8. 7. 3.

* VI. 3. 6. 1.

der the Notion of an Eccleſiaſtical Benefice, as the Deanery of St. *Martins le Grand* in *London*, and other Deaneries of Royal Donation, and in the Gift of Lay Patrons *: And, therefore, the Perſons that occupy ſuch Deaneries have not Inſtitution from the Biſhop, nor Induction from any Spiritual Authority; but all Matters relating thereunto are diſpatch'd and expedited by the King himſelf, and other Lay Patrons, by virtue of their Mandate or Commiſſion. And as ſuch Deans do not receive Canonical Inſtitution from any Biſhop, or from any other Eccleſiaſtical Ordinary Judge; ſo they are not ſubject to the Biſhop's Power or Viſitation. And hence it appears, that Deaneries of this Kind are not Eccleſiaſtical Benefices; becauſe that, which is properly ſtiled an Eccleſiaſtical Benefice, cannot be obtained without Canonical Inſtitution †.

* Lindw. lib. 3. Tit. 2. cap. 1. v. *Beneficiati.*

† VI. 5. de Reg. Jur. 1.

Inſtitution may be perform'd by the Biſhop under the Epiſcopal or any other Seal beſides that of his Office, according to ſome Mens Opinion; and tho' he be not in his Dioceſs: For (ſay they) 'tis the Act of the Biſhop, which makes the Inſtitution; and the Inſtrument under the Seal is only a Teſtimonial of what has been done by him; to which Inſtrument ſome Witneſſes ſhould ſubſcribe their Names. *Sed de hoc Quære* hereafter under the Title of *Seals*. If Inſtitution be granted by the Vicar-General, or any other Subſtitute, their Acts are taken in Law to be the Acts of the Biſhop himſelf, and he muſt anſwer for any Irregularities committed by them. But the ‡ Canon forbids a Biſhop to inſtitute a Clerk, that has been ordain'd by any other Biſhop, without ſhewing his Letters of Orders. By Inſtitution the Clerk has only *Jus ad Rem* *, and not *Jus in Re* † (as the Lawyers ſay): And, therefore, he can do no Act to charge the *Glebe*, tho' confirm'd by the Patron and Ordinary, till he is actually inducted into the Living, ſince he has not till then a Freehold in the *Glebe*, as I have already related. Nor can he ſue or bring any Action for his Tithes, and the like, before Induction, as I ſhall obſerve by and by.

‡ Can. 39.

* Plow. Com. p. 528.

† X. 3. 38. 5.

At the *Common Law* an Inſtitution even upon a wrongful Preſentation gave the Incumbent ſuch a Right, that if he had been poſſeſs'd of the Living for the Space of Six Months, this was ſuch a Plenarty, that he could not be remov'd; becauſe he came in by a Judicial Act of the Biſhop, whom the Law entruſts to take Care in this Matter ‡: And ſince by the Writ of *Quare Impedit* it ſelf it appears, that the Law requires a fit Perſon to be Incumbent in every Pariſh, when the Biſhop has admitted one to be qualified, that implies him to be a fit Perſon ||; and then the Law has its final Intention, that is to ſay, the Church is then ſufficiently provided with a Clerk. And it being *plena & conſulta*, it puts the rightful Patron out of Poſſeſſion, tho' not without a Remedy; for he might have a Writ of Right of Advowſon, and recover that which he was diveſted of by this Uſurpation. The Books are plain, that upon an Inſtitution the Church is full againſt a Common Perſon, and likewiſe againſt the King, if he has no Title but what he derives from a Subject; becauſe the Incumbent has then a Freehold, which is begun, tho' not compleated till Induction. And to give an Inſtance that the Church is full upon an Inſtitution, I will put this Caſe, *viz.* If the Grantee of the next Avoidance preſents his Clerk, who after Admiſſion and Inſtitution dies before Induction, ſuch Grantee ſhall not preſent again; for his Grant was ſatisfy'd by the Inſtitution of his Clerk, which proves that the Church was then full. But a bare Inſtitution without Induction does not make a Plenary againſt the King, where he has a Title to preſent in his own Right *, or by Virtue of his Prerogative:

‡ 2 Inſt. 356.

|| Roll. Abr. 349. 294. 312. 1. Roll. Rep. 191. 227. 4. Rep. 72.

* 2 Inſt. 356. 9 Rep. 132.

And, therefore, if his Preſentee ſhould dye before Induction, he may preſent again, as already hinted; becauſe he had not the full Effect of his Preſentation. But tho' it makes no Plenary againſt the King; yet if a Perſon thus inſtituted, tho' not inducted, takes a ſecond Benefice, it ſhall make the firſt Void; becauſe by the very Inſtitution he is ſaid to have *accepted* of a ſecond Benefice: And the Words of the * Statute are, *viz. If a Parſon having one Benefice with Cure accepts of another*, &c. And if in ſuch Caſe there ſhould be a Diſpenſation to hold both the Livings, it will not ſerve, as coming too late after Inſtitution; becauſe the Church is full by it, and both the Patron and Ordinary having executed their Authority, can never revoke the ſame: For the Inſtitution is a Matter of Subſtance, and the Induction which is to follow no more than a Ceremony to give the People Notice of the Incumbent's Poſſeſſion of the Living. And, *laſtly*, Inſtitution is properly cognizable in the Eccleſiaſtical Court: But if after Induction a Man is ſued there, ſuppoſing his Inſtitution to be void, that ſhall be try'd in the *Common Law* Courts; becauſe by the Induction of the Perſon he had a Freehold in the Benefice, which muſt be try'd in the Temporal Courts †, I ſhall, therefore, next treat of *Induction*.

* 21 H. 8. cap. 13.

† 2 Rolls. Abr. 282 & 294.

Now *Induction* is nothing elſe but the admitting or a putting of a Perſon inſtituted or collated to a Benefice, into the Poſſeſſion of ſuch an Eccleſiaſtical Preferment, whereby he is made compleat Incumbent of the Living; and it is the ſame in the *Canon-Law* as *Livery* and *Seiſin* at the *Common Law*: And tho' of *Common Right* it belongs to the Archdeacon to do this Act of Induction ‡, or to give Poſſeſſion of an Eccleſiaſtical Benefice; yet he ought not to do it without the Biſhop's Mandate directed to him for inducting a Perſon into the Corporal Poſſeſſion of ſuch Benefice ||. For (ſays the Law) Induction into the Poſſeſſion of a Benefice ought not to be perform'd by the Archdeacon or any other Perſon, unleſs it be *ad Mandatum Inſtituentis*: And this Mandate the Archdeacon is bound to obey. And if the Biſhop ſhall be negligent in this Matter concerning Induction, the Archbiſhop may then upon Complaint command the Archdeacon to induct ſuch a Clerk *, But if the Archbiſhop ſhould inhibit the Archdeacon to induct a Clerk thus inſtituted, he may do it notwithſtanding ſuch Inhibition, and the Induction ſhall be good. This Induction is in our Books of the *Canon-Law* frequently in *Latin* ſtiled *Miſſio in Poſſeſſionem*: And it follows Collation as well as Inſtitution.

‡ X. 1. 23. 7. & 9.

|| X. 1. 23. 4. & 7.

* VI. 1. 8. 1.

Now the Perſons, whoſe Buſineſs it is to give Induction, or who undertake for the ſame, ought by Letters of Certificate to certify to the Biſhop or the Ordinary, whether they have really and truly inducted the Perſon thus inſtituted or not, according to the Precept or Mandate directed to them *: And theſe Letters of Certificate are in a vulgar way of Speech often ſtiled *Letters of Induction* in reſpect of the Perſon inſtituted or collated; becauſe they do by way of a Teſtimonial give Evidence of the Induction of ſuch Perſon. And this corporal Induction is ſaid to be *Pars Tituli*, or Part of the Title; becauſe Canonical Inſtitution cannot be compleatly finiſh'd without it, tho' it be Canonical Inſtitution that gives a Title to the Perſon Benefic'd to come at Induction †: And a Perſon occupying an Eccleſiaſtical Benefice without ſuch a Title, that is to ſay, without coming to the Poſſeſſion thereof by the Authority of the Superiour Power, is deem'd an Intruder ‡. A Clerk may (according to ſome Perſons) by his own proper Authority, immediately after Confirmation or Inſtitution, obtain the Poſſeſſion of an Eccleſiaſtical Benefice, and have the Adminiſtration thereof in Temporals and Spirituals.

* Lindw. lib. 3. Tit. 6. cap. 4. v. *Certificatorias Literas.*

† Dyn. de Reg. Jur. vi. 5. 1. Arch. in c. 18. vi. 3. 4.

‡ Arch. in c. 5. vi. 1. 6. v. *Confirmetur.*

rituals *: And *Paulus* on the *Clementines* †, is of this Opinion, laying down the Reaſons hereof, and quoting ſeveral Laws that make for both ſides of the Queſtion. And in this Concluſion he there ſays; That the Law does not of Neceſſity require Induction, in order to give a Man the aforeſaid Poſſeſſion; eſpecially, where a Right is acquir'd from Inſtitution, and not from the Delivery of Poſſeſſion ‡: But 'tis otherwiſe, where Livery of Poſſeſſion is neceſſary to transfer or alienate a Property ||.

About this Matter of Induction the Archdeacon further obſerves *, That where the Pope, or any Archbiſhop or Biſhop confirms or gives Inſtitution *Jure Ordinario*, the Perſon thus inſtituted may then have the ſaid Adminiſtration without any other Induction; which is a *Salvo* to the Opinion of *Innocentius* †, and his Followers: But 'tis otherwiſe, when the Ordinary of the Place does not confirm and give Inſtitution to the Clerk, but ſome other Perſon does it; for then Induction is neceſſary, which ought to be perform'd by the Authority of him, who preſides over the Cure, and has the Government of ſuch Benefice ‡. In Prebends and the leſſer Benefices Induction or Inſtallation, which is the ſame Thing, is requir'd; unleſs there be a Cuſtom to the Contrary: For in ſuch a Caſe we ought to obſerve and abide by the Cuſtom ||. But in Curacies, as to the Effect of Miniſtration, or of bringing a Cauſe into Judgement, Induction is neceſſary by the *Canon-Law*: For the commencing of Actions and the Right of Adminiſtration by that Law does not ariſe from the Title, but from the Poſſeſſion of the Thing *. By our *Common-Law* Induction ſettles and fixes the Freehold in the Incumbent; for as to the Temporalties, the *Glebe-Land*, and the like, the Parſon has no Freehold in them till Induction had and obtain'd, according to my Lord *Coke* †. And Induction likewiſe, according to *Plowden* ‡, makes a Prebendary to have the actual Poſſeſſion of the Prebend; for before that he has no Freehold either in Deed or in Law. As *Inveſtiture* is, in reſpect of the greater Benefices in the Church, the ſame with *Inſtitution*; ſo is *Inſtallation*, in reſpect of Eccleſiaſtical Dignities, equivalent unto *Collation* in reſpect of *ſimple* Benefices.

'Tis provided by a Provincial Conſtitution in *Lindwood* ||, That when a Prelate does *de Jure proprio* collate to any Church or Prebend, he ſhall in no wiſe preſume to uſurp unto himſelf the Fruits and Profits of ſuch Church or Prebend not yet collected, under any Pretence of Inſtitution or Induction; or for Letters of Inſtitution; nor extort any Thing on the Score of Collation, Inſtitution or Induction, as formerly practis'd; nor ſuffer any Demand to be made by his Officers or Archdeacons. And at this Day if the Perſon that does this be be a Biſhop, he ſhall be ſuſpended *ab Ingreſſu Eccleſiæ*, till he makes Reſtitution of his unrighteous Gains: For the Fruits of ſuch Church ought either to be apply'd to the Advantage of the Church, or elſe reſerv'd for the Succeſſor, as now obſerv'd, unleſs it be otherwiſe provided either by Privilege or Cuſtom. But if the Perſon be inferiour to a Biſhop, he ſhall be ſuſpended *ab Officio & Beneficio* till he ſhall refund the ſame. And by another Provincial Conſtitution *, Perſons giving Induction are enjoyn'd to receive only a moderate Fee or Reward for their Trouble and Expence therein, *viz.* the Archdeacon is forbidden to demand more than Three Shillings and Four-Pence, and his Official is not to receive more than two Shillings under Pain of Suſpenſion *ab Officio*.

* Hoſt. & Bern. inc. 15. x. 1. 6.

† In c. 2. Cl. 1. 6. v. *pacificè*

‡ VI. de Reg. Jur. 5. 1.

|| C. 2. 3. 20. I. 2. 1. 40.

* In c. 1. 16. Q. 2.

† In c. 5. Diſt. 92.

‡ X. 5. 33. 19. in fin. 16. Q. 5. 1.

|| Pet. de Anch.. in c. 4. X. 3. 8.

* X. 3. 38. 19.

† 4 Rep. 79. a.

‡ 2 Plow. 529. 530.

|| Lib. 3. Tit. 6. cap. 1.

* Lib. 3. Tit. 6. cap. 4.

Of

Of Inſtruments and Deeds, and the Validity of them.

AS there is one Kind of Evidence made by Witneſſes, ſo there is another which is made by Deeds and Inſtruments: And of this I ſhall here diſcourſe. Now under the Appellation of Inſtruments ſome comprehend all ſuch Matters whereby a Cauſe is prepared and inſtructed for a Sentence: But this is an abſurd Notion of an Inſtrument; becauſe then we ſhould have no Occaſion for particular Rubricks and Titles in Law to diſtinguiſh Proof made by Witneſſes from ſuch as is made by Inſtruments. An Inſtrument in the general Senſe thereof ſignifies a Houſhold Implement ‡, or ſomething made uſe of on an Eſtate, as the Stock thereof ‖; and, moreover, it likewiſe denotes, whatever a Man makes uſe of to accompliſh his Work and Deſign: But in the moſt proper Acceptation of it, as uſed here, 'tis taken for a Writing, which conduces to the Proof of any Thing in Controverſy, in reſpect of preparing and inſtructing a Cauſe for Sentence *. Thus a private Writing, which gives Evidence of a Thing, is called an *Inſtrument*; becauſe it inſtructs the Mind of the Judge touching the Merits of a Cauſe before him. So that under the Name of *Inſtruments*, we may reckon every Writing that informs the Judge by letting him into the true State and Knowlege of a Cauſe; as Inſtruments and other publick and private Writings are often produc'd in Judicature *in vim probationis*. An Inſtrument is ſometimes put for a *Charter*, ſometimes for a *Feudal* Deed of Conveyance, and ſometimes for a Deed of Caution given.

‡ D. 33. 7. 12. 15.
‖ & 6.
* D. 22. 4. 1.

Among Inſtruments theſe are the principal Names, *viz.* an *Original* and *Authentick* Inſtrument; and that which is called *the Copy* of an Inſtrument †. An Original is in other Terms ſtiled the *Protocol* ‡, or *Scriptura Matrix*; and if the *Protocol*, which is the Root and Foundation of the Inſtrument, does not appear, the Inſtrument is not valid; becauſe 'tis the *Protocol* which gives Evidence and Teſtimony to the Truth thereof: And, therefore, if there be no *Protocol*, ſuch Inſtrument is liable to great Suſpicion of Falſhood. An Authentick Writing or Inſtrument is that which has Credit given to it from its own Nature and Authority, and which requires no foreign Aid to ſupport it as valid ‖: And to this end the Appoſition of an *Authentick* Seal is ſufficient, or any other Authentick Method whatever. The Prince cannot by Virtue of his *Ordinary* Power *ex poſt Facto* give Credit to a Writing which is not *Authentick*, in Prejudice of any Perſon. An Exemplification of an Inſtrument, is what our Common Lawyers call an *Inſpeximus*, and ſometimes a *Vidimus* or *Innoteſcimus* *. By the *Civil* and *Canon-Law* in Exemplifications of Inſtruments the Subſcription of a Notary, and the like, is not neceſſary, if ſuch Exemplifications are not made uſe of for the Proof and Evidence of a Thing: But 'tis otherwiſe, if they are. Tho' Inſtruments be an *Inartificial* Kind or *Species* of Proof, yet they do not entirely reject and diſallow of all Art, as I ſhall obſerve in the ſequel of this Title.

† D. 22. 4. 2.
‡ Nov. 44. cap. 2.
‖ C. 6. 23. 2. Dd. ibi. x. 2. 22. 12.
*Cok. 5. Rep. fol. 52.

Inſtru-

Inſtruments are alſo divided into *publick* and *private* Writings †. The firſt is that which is made by a Notary or Publick Perſon, with proper Solemnities requiſite to prove the ſame ‡, or ſign'd with a Publick Seal, according to the *Canon-Law* *. And 'tis to be obſerv'd, that every Publick Inſtrument is an Authentick Writing or Inſtrument, tho' every Authentick Writing is not a Publick Inſtrument. A Private Writing or Inſtrument is that which wants the Hand of a Notary Publick, and cannot be ſtiled an *Authentick* Writing till ſuch time as 'tis acknowledg'd or ſworn to by Witneſſes: But afterwards it may be ſo called. A Writing made by an Officer touching Matters relating to his Office is not a Publick, tho' it be an Authentick Writing; becauſe 'tis not made by a Notary Publick with the proper Solemnities neceſſary thereunto. And 'tis the ſame Thing of an Inſtrument or Writing laid up in a Publick Archive: For tho' the Marks of a Publick Inſtrument are not to it (as aforeſaid) by the Appoſition of a Publick Seal, and the like; yet it may be called an Authentick Writing †, tho' not a Publick Inſtrument, thro' want of a *Notarial* Evidence. Therefore, every Writing which has not Credit of its own Nature, is not a Publick or Authentick Writing, till it receives Credit from ſome other due and proper Method. And Credit is ſo long given to an Inſtrument till the ſame is diſprov'd; which may be done ſeveral ways. For legal Proof may be made againſt the Credit of the Inſtrument either by Letters, Witneſſes or by the Parties Confeſſion: But an Inſtrument is no Proof againſt an Inſtrument, unleſs ſuch Inſtrument impugns and becomes contrariant to itſelf ‡.

† C. 4. 19. 5. & 6.

‡ C. 7. 52. 6. Nov. 73. c. 2.

* X. 2. 22. 2. X. 2. 19. 5.

† Auth. *ad hæc.*

‡ X. 2. 22 13.

Firſt, The Credit of a Witneſs to an Inſtrument may be leſſen'd or deſtroy'd by an Exception againſt the Perſon of the Notary himſelf, that made it, if his Condition, State, Manners and Credit be unknown to the Party *Excipient*; for an Inſtrument has its Force and Subſtance from the Credit of the Notary himſelf *: Therefore, if theſe Requiſites are wanting, ſuch Inſtrument is gone and deſtroy'd; for an Inſtrument made by a Notary excommunicated is null and void by the *Canon-Law* †. And the ſame Thing may be ſaid of a ſuſpected Notary, and the like. *Secondly*, An Exception lies againſt the Tenor of an Inſtrument by other Proofs and Evidence in Writing: And this Method (among others) is the beſt way of reprobating an Inſtrument. For an Inſtrument is diſallow'd of, if any ſuch Thing be prov'd, on the Proof whereof either ſuch Inſtrument cannot ſubſiſt, or (at leaſt) that which is contain'd in ſuch Inſtrument, cannot ſubſiſt. *Thirdly*, An Inſtrument may be annull'd and deſtroy'd for want of due Solemnities, *viz.* If the Notary be not requeſted to make or ſign the ſame ‡; and, according to modern Practice, if there be not an Invocation of the Divine Name, the Year of *Chriſt*'s Birth or Incarnation, according to the Cuſtom of the Place; the *Roman* Indiction, the Day and Month of the Thing done; the Name of the Prince or Emperor ‖, in whoſe Dominion the Inſtrument is made; a Detail of the Matters tranſacted; and the Names of the Witneſſes, *&c.* * But theſe Solemnities, or many of them, depend entirely on the Cuſtom of the Country. But all Publick Inſtruments (I think) ought to contain the Day, Year and Month of executing the ſame, and the Names of the Witneſſes neceſſary thereunto, together with that of the Prince, otherwiſe ſuch Inſtruments are not valid †. But 'tis not neceſſary to exhibit a Copy thereof with the Prince's Name, and the Day of the Month when exhibited, leſt it ſhould occaſion an Opportunity or Means of forging the ſame. A Notary that makes an Inſtrument between two *Jews* or more, may invocate the Name of *Chriſt*, if he pleaſes *; becauſe

* Gloſſ. in l. 6. D. 2. 13.

† Abb. in c. 7. x. 3. 49. n. 13.

‡ Paul. de Caſtr. in l. 2. C. 4. 19. n. 9.

‖ D. 2. 13. 1. 2.

* X. 2. 22. 2.

† Nov. 27. c. 7.

* Bart. in l. 6. D. 2. 13. 6. n. 7.

becauſe ſuch Inſtrument is not made by the Parties, but by the Notary who is a Chriſtian. But tho', according to *Baldus*, an Inſtrument is not valid without ſuch an Invocation; yet the common Opinion is againſt him, becauſe this Solemnity is not found among the Subſtantials of an Inſtrument; and as this is reputed a light Solemnity, the Omiſſion thereof does not vitiate an Inſtrument *. But Indiction and the Year of our Lord are Matters of Subſtance †; becauſe they denote the Time, which ought neceſſarily to be inſerted in every Act: And hence an Inſtrument may be reprobated as a Matter of Forgery, if it ſhall be prov'd, that ſuch Inſtrument was not made, or ſuch Act done at the Time inſerted therein. In Publick Inſtruments likewiſe ſome general Place ought to be ſet down and added, where the Act is done or Contract executed ‡; as that it was done at *London*, *Briſtol*, or ſome other Place, which is general: But then the Place named in ſuch Inſtrument muſt not be too general and indeterminate; as that it was done in the Dioceſs of *London* or *Briſtol*; for if the Place mention'd be too general and indeterminate, it vitiates the Inſtrument or Contract. But the ſpecial Addition of a Place is not neceſſary, unleſs Cuſtom will have ſuch an expreſs Mention to be made thereof for the Validity of an Act. But an Inſtrument, according to ſome, is not hereby render'd naught and vicious, but only becomes ſuſpected, if a ſpecial and particular Place be not inſerted: And 'tis Incumbent on him, who produces ſuch Inſtrument to declare and prove the particular Place where it was ſped and executed, if the ſame be demanded of him by the adverſe Party. And the Reaſon why an Inſtrument is not valid without inſerting the particular Place's Name where it was made is, becauſe by Circumſcription of Time and Place the Matter is render'd more certain and leſs ſuſpected: For if this was not done, no Ways and Means would appear, whereby we could diſcover the Falſity, Nullity and Vicioufneſs of ſuch Inſtrument. And this is true, unleſs it may by other manifeſt Proofs appear, where ſuch Inſtrument was ſped or Matter tranſacted: For then the inſerting of the Place is not ſo much of the Subſtance of the Deed, but that it may be valid without ſuch a ſpecial Addition.

* Bart. in l. 6. D. 2. 13. 6. n. 7.

† Bart. in l. 31. D. 12. 2.

‡ Bart. in Nov. 47. cap. 1.

As there is a great Preſumption in Favour of an Inſtrument *, ſo from an Inſtrument two Preſumptions do ariſe. *Firſt*, That it is a *true* Inſtrument: And, *Secondly*, That it is a *ſolemn* Inſtrument †. In reſpect of the firſt 'tis preſum'd, that thoſe Things which the Notary has wrote therein, were truly ſpoken and tranſacted by the Parties therein nam'd; and that which he wrote therein was the Will and Conſent of the Parties expreſs'd, and thus written down: For it would not be a true Inſtrument if what was wrote therein, did not proceed from the Will and Conſent of the Parties. Now theſe Preſumptions have this Effect and Operation in Law, *viz.* That we ought to give due Credit to ſuch Inſtruments, and abide by them, till the contrary appears and is well prov'd. Yea, a Publick Inſtrument is ſo far preſum'd to be true, that it contains *Probationem probatam* ‡, as the Lawyers call it, which is to ſay, an approv'd Evidence: And this holds good till ſomething be objected to the Truth and Credit thereof. For tho' the Matter ſhould not then be clear and evident, yet there is ſtill a Preſumption extant in Favour of ſuch Inſtrument, till ſome Matter contrary thereunto be prov'd: And ſo far is this extended in Favour of an Inſtrument, that a Diverſity of Time and Place is rather preſum'd than that an Inſtrument ſhould not be true ‖. But this Preſumption, according to ſome, only proceeds and obtains in reſpect of the *diſpoſitive* Words of an Inſtrument, and not in regard of the *enunciative* Terms thereof: As *Titius* the Son

* Menoch. lib. Q. 99. n. 14.

† Dec. Conſ. 36. n. 6.

‡ Bald & Dd. in l. 1. D. 1. 39. n. 10.

‖ Bald. in l. 18. D. 1. 5.

Son of *Sempronius*: For such *enunciative* Words do not induce a Presumption, that he was the Son of *Sempronius* *. Again, this Presumption does not hold good, when an Instrument is false in any Part thereof; for then 'tis presum'd to be false in the whole. *Thirdly*, This Presumption does not take Place, when any Patent or manifest Flaw appears in the Instrument it self; as the cancelling and erasing of it, and the like; or when any latent Flaw appears in it, and is thus prov'd †. When an Instrument is presum'd to be true, solemn and valid (as aforesaid) I would be understood to mean, that this Conclusion must be proved, *viz.* That if he who wrote such Instrument was a Notary Publick, the same is presum'd to be true and solemn, especially if it be an ancient Instrument.

* Angel. in l. 7. D. 2. 14. 12.

† Menoch. ut supr. n. 21.

Secondly, An Instrument is presum'd to be true and solemn, when it has all the Solemnities the Law requires it to have, and wants no Judicial Examination to support it; and in this Case likewise such Instrument is said to be *Probatio probata:* For an Instrument is said to be *Probatio probata*, when the adverse Party acquiesces and makes no Objection thereunto; but 'tis otherwise, if an Objection be made to it. But tho' an Instrument in a doubtful Case be said to be true, yet this is not a Presumption *of Law* and *by Law:* And, therefore, Proof is admitted against the Truth of such Instrument. If any one should say, That such Instrument is not cancell'd or abolish'd, he is bound to prove it by producing the same: And he that produces an Instrument, and does not prove the Truth thereof, is presum'd to be a *Falsarius*; and may be punish'd as such. A Person producing an Instrument is not only deemed to approve the same, tho' such Instrument produc'd should want the Solemnities which the Law requires ‡, but is also presum'd to confess and approve such Things as true, which are contain'd therein ‖: And the Production and Approbation of such Instrument as true, shall not only be to the Behoof of the Person present, and against whom it is produc'd, but it shall likewise extend to the Advantage of a third Person absent; and all this holds good as well in respect of a Private Writing as a Publick Instrument. And not only the Person producing such Instrument is presum'd to approve the same, but also the Party that desires to have the same produc'd and exhibited *: But the Production of an Instrument shall be of no Prejudice to the Person producing the same, if the adverse Party impugns the Truth and Solemnity of it. If an Instrument be produc'd with a Protestation in respect of those Parts of it which make in Favour of the *Producent*, and the adverse Party does not contradict the same, it shall be constru'd to the Advantage of the *Producent*; for then such a Production induces an Approbation only in respect of those Things, which are in the *Producent*'s Favour *.

‡ Fald. in l. 8. C. 6. 35.

‖ Dd. in c. 6. X. 2. 25.

* Cravat. Conf. 275. n. 2. & 3.

* Jas. in l. 8. D. 39. 1. 6. n. 27.

In respect of a Private Writing 'tis to be observ'd, That it is good Evidence against the Writer himself, tho' not in Favour of him, as his Book of Accompts, and the like: But a Publick Instrument is Evidence for each of the Parties therein concern'd; and we must abide by the Credit of such Instrument, till the contrary is prov'd. But tho' entire Credit ought to be given to a Publick Deed or Instrument even after the Death of the Notary that made it, and of the Witnesses that were present at the making and signing it; yet the same cannot be said of a Private Writing, which is no Proof in Law, nor ought any Credit to be given thereunto without an Oath confirming the Truth of it, either before or after the Writer's Death. But this shall be sufficient Evidence, if two or more Witnesses shall on the Production of such

ſuch Private Writing depoſe touching the *Tenor* and *Contents* thereof, (tho' they have not ſubſcrib'd themſelves thereunto) by affirming, That what is therein contain'd was ſo acted and done in their Sight and Preſence, as the Writing it ſelf ſets forth and declares; for this is to prove the Thing by Witneſſes after the manner of a legal and ordinary Proof: Yet ſometimes the Witneſſes do not depoſe touching the *Contents* thereof, but only ſay, *viz.* That they ſaw the ſame written and ſubſcrib'd by the Parties, or by him againſt whom 'tis produc'd; and this is properly called a *Recognition* of Witneſſes, of which hereafter. For 'tis not enough for Witneſſes (how legal ſoever they be) to ſay, That they certainly know ſuch Writing to be written by the Hand of *Titius*; unleſs they know it to be ſuch, becauſe they ſaw *Titius* write it.

All Exemplifications and Things regiſter'd make Proof after the ſame manner as their Originals, and no farther: And hence 'tis, that whatever Objection lies againſt the Original, the ſame may be made to the Matter exemplify'd*. But ſuch an Exemplification of a Record or Matter regiſter'd is of no Credit or Evidence, unleſs it has been collated and compared with the Original in the Preſence of the adverſe Party being cited thereunto. An Inſtrument copy'd or exemplify'd by the Notary without the Judge's Authority is good Proof and Evidence by Conſent of Parties, tho' not otherwiſe. If an Original Inſtrument be loſt, and the *Tenor* of it be prov'd by Witneſſes, that on reading over the ſame do depoſe touching the *Tenor* thereof, and that it is was *ſine vitio*; the Copy of ſuch Inſtrument may in ſuch a Caſe be given in Evidence. If an Inſtrument exhibited be a ſpecial Inſtrument particularlarly belonging to that Cauſe which is depending in Judgment, it ought not to be reſtor'd to the Party demanding the ſame, becauſe Originals ought to remain with the Judge to prevent fabricating of falſe Inſtruments, and the falſifying of true Ones: But if ſuch Inſtrument be of a general Nature, and not confin'd to any particular Cauſe depending in Judgment, but extending its Efficacy even to other Cauſes, then the Original ought to be return'd; and only a Copy thereof to remain with the Judge *apud Acta Curiæ*, that the Party may uſe the ſame in other Cauſes: And this Copy ought to be exemplify'd by the Notary or Scribe of Court, *viz.* It ought to be collated with its Original, in order to ſee that all Things therein contain'd do agree with the Copy, which ought to be given in Evidence. And, moreover, it ought to be ſubſcrib'd and atteſted by the Notary or Scribe of the Court: And after this is done, ſuch Copy ſhall be of equal Proof with the Original it ſelf. *Jacob. de Butrio* ſays, that when the Copy of an Inſtrument is produc'd, that has no Original Extant, or produc'd without referring to ſuch Original, it adminiſters Cauſe of Suſpicion in reſpect of ſuch Inſtrument or Writing, becauſe it does not appear from whence it had its Original.

*Bart. in l. 27. D. 35. 1. n. 1.

There are three Things which render a Writing or Inſtrument ſuſſpected, *viz.* *Firſt*, The Perſon producing the ſame, as having been accuſtom'd to produce falſe Inſtruments or Writings. *Secondly*, The Perſon that frames or writes it; for that he has been wont to make falſe Inſtruments or Writings*. And, *Thirdly*, The interlining and raſing out of Words contain'd in ſuch Inſtrument †. And, on the other Hand, there are three or four Things which do ſtrengthen and confirm the Credit of the Inſtrument, *viz.* *Firſt*, The Integrity and good Character of the Perſon producing it. *Secondly*, The Credit and fair Reputation of the Notary or Perſon himſelf, that makes it, who ought to be ſuperiour

* Menoch. ut ſup. n. 18.
† Gloſſ. in l. 1. D. 37. 11.

ſuperiour to every Exception; for if the Notary be a Man of ill Fame, and conſequently of little Credit, ſuch Inſtrument ſhall be looked on as a ſuſpected Inſtrument or Writing on the ſole Diffamation of ſuch Notary. And, *Thirdly*, Such a Writing ought to be clean and free from any Cavil or Vituperation of Raſure. If an Inſtrument be vitiated, the Notary may make another, which ſhall not be vitiated, if it be made on the ſame Fact or Footing, tho' it cants or ſpeaks in another manner: And an Inſtrument may be drawn, and ſpeak in the *Præterperfect* Tenſe, tho' the Act or Contract be made or done in the *Preſent* Tenſe; and ſo likewiſe it may be drawn either in the firſt or third Perſon *. A Publick Inſtrument has always a Preſumption in Favour of it, as I have already remember'd; and, therefore, Proof is incumbent on him, that alledges any Thing in Defeazance of ſuch Inſtrument: But an Inſtrument is not firm and valid, if there be any Diſability found in the Witneſſes, after the ſame is ſped and executed; tho' it be not entirely neceſſary that the Witneſſes do ſubſcribe themſelves thereunto.

* Bart. in cap. 1. Nov. 47.

If one Man ſhall produce an Inſtrument againſt another, and the other ſhall ſnatch it out of his Hands and tear it, he ſhall abide by the Oath of the *Producent* in reſpect of the *Tenor* thereof; and the Perſon thus rudely treating ſuch Inſtrument ſhall be liable to the Ordinary Puniſhment of Forgery. And this is true, if he ſhall cancel ſuch Inſtrument with mature Thought and Deliberation, or any wiſe damn the ſame; provided it be not done out of Paſſion or wrathful Indignation: But if it ſhall be done *ex iracundiâ*, he ſhall then only be liable to the extraordinary Puniſhment of Forgery, and not to the other. But if I do by my own Act of Anger and Paſſion throw my own Inſtrument, which I had againſt you, into the Fire and burn it, I ſhall not thereby loſe my Debt, for the Law pardons my weak Condition, and admits me to prove the Contents thereof by Witneſſes: But yet if I can only prove the *Tenor* thereof by one Witneſs, I ſhall not be admitted to the Suppletory Oath through a Defect of Evidence, becauſe I have robbed my ſelf of liquid Proof by my own Act †. Inſtruments *Judicially* exhibited, are not of the Acts of Courts; and, therefore, may be re-deliver'd on the Requeſt or Demand of the Perſon that exhibited them. A Perſon that impugns the Credit of an Inſtrument, loſes the Advantage which he might receive from the ſame ‡: And, therefore, Advocates ought to be very careful how they impeach the Credit of an Inſtrument, whether they do it in the whole, or only in ſome Part; for an Inſtrument may be falſe in ſome ſubſtantial Part thereof, and yet it ſhall not be preſum'd to be falſe in the whole; becauſe *Separatorum ſeparati ſunt effectus*. Though the viſible Flaws and Defects of Inſtruments do hinder and obſtruct the Exemplification of them; yet the Inviſible do not.

† Paul. de Caſtr. in l. 1. C. 4. 21.

‡ Bart. in l. 5. D. 34. 9. n. 6. & 9.

In the Exemplification of Inſtruments the Notary or Perſon that does exemplify the ſame, ought to put his Seal, or ſet his Mark thereunto, to atteſt that he has compar'd the ſame with the Original ‖; and then ſuch Inſtrument exemplify'd ſhall be full Proof againſt the Perſon that produces it. All Publick Inſtruments ought to be written *claris & apertis Literis*, in Words at length, and not in Cyphers or Words of Abbreviation: And ſuch Clauſes ought to be inſerted therein, as are uſually put therein, otherwiſe they are not valid; and they may be produc'd after Publication of Depoſitions, even till a Concluſion be had in the Cauſe *.

‖ Bart. in c. 2. Nov. 73. n. 5.

* Bart. in c. 8. Nov. 90. n. 3. & 32.

Of an Inventory, and the Law relating thereunto.

AN *Inventory*, in the common Acceptation of it, is defin'd to be a Writing, wherein all the Goods and Chattels which are found in a Man's Cuſtody or Poſſeſſion at the Time of his Death, are written and recorded * ; and it was introduc'd by the *Civil-Law* in the Place of the *Jus Deliberandi* among the old *Romans:* For, ſays that Law, " If the " Heir be in Doubt with himſelf, whether he ſhall accept of the Heir- " ſhip or not, let him not think Deliberation neceſſary, but let him " take the Heirſhip on himſelf by making an Inventory.*" And in that Law we meet with various ſorts of Inventories, according to the Nature of the Thing deſcrib'd therein, *viz. Firſt*, There is an Inventory, which Tutors and Curators are obliged to make of their Pupil's and Minor's Eſtates†. *Secondly*, There is an Inventory which Biſhops and other Prelates are bound to make of the Goods and Eſtates of their Churches ‡. And, *Thirdly*, There is an Inventory, which an Heir, by us ſtiled an Executor, is obliged to make of the Teſtator's Goods, if he will be ſafe in his Adminiſtration ‖ : And the Biſhop was alſo heretofore bound to make it as Executor in Law *. And as this laſt Kind of Inventory is a Matter, that admits of ſome Nicety according to the Forms of the *Civil-Law* ; ſo ſome Perſons that have taken much Pains in making it, have often been deceiv'd and miſtaken therein : For

* 12 Q. 2. 45.

* C. 6. 30. 22. 2.

† C. 5. 37. 24.

‡ 12 Q. 2. 20.

‖ C. 6. 30. 22.

* C. 1. 3. 28. 2

By the *Civil-Law* an Inventory requires ſeveral joint and concurring Solemnities to the perfect compleating thereof : But three Things are by that Law principally requir'd herein, *viz. Firſt*, that Law conſiders the Time when ſuch Inventory was begun, and the Month when 'tis ended : For regularly ſuch an Inventory ought to be begun and ended within ſixty Days after the Executor has taken the Office of an Executor on himſelf †; which is not regarded here in *England*. *Secondly*, The Executor ought to have a Reſpect to the ſolemn Form, *viz.* There ought to be the Intervention or Preſence of one Notary (at leaſt) in order to reduce it into Writing ; and ſuch Executor ought to ſubſcribe himſelf thereunto ‡: But if he cannot write himſelf, he ought then to make uſe of a ſecond Notary to this Purpoſe ; and in *Popiſh* Countries the Sign of the Croſs is made thereon, tho' this Solemnity is not neceſſary. But none of theſe Formalities are neceſſary with us beſides ſubſcribing the ſame. And, 'tis neceſſary by that Law, that all Creditors and Legataries be by a general Proclamation cited in order to ſee the ſame duly made (for a ſpecial Citation is not neceſſary) ; and in the Place of ſuch as are abſent three known Witneſſes ought to intervene : And likewiſe ſuch Perſons ought to be ſummon'd hereunto, who do either know of, or elſe are poſſeſs'd of any Part of the Teſtator's Subſtance. So that by the *Civil-Law* there ought to be two Witneſſes to prove the Inventory, and three Witneſſes by their Preſence to ſupply the Abſence of Creditors and Legataries : Therefore, according to the Doctrine of that Law, five Witneſſes are neceſſary to an Inventory. But this was only in reſpect

† C. 6. 30 22. 2 & 3.

‡ C. 6. 30. 22. 2.

ſpect of a *publick* and *ſolemn* Inventory, which was made in the Preſence of the Magiſtrate, or ſome Publick Perſon, as a Notary is: But a *ſimple* Inventory was not attended with theſe Solemnities, but might be made by a Private Perſon, and ſuch an Inventory I am here to treat of.

By a Provincial Conſtitution in *Lindwood* *, as well as by the *Civil-Law*, the making of an Inventory is requir'd, before an Executor intermeddles or lets himſelf into the Poſſeſſion of the Teſtator's Goods and Chattels; at leaſt he ought to do this for his own Safety, that he be not made liable *ultra vires bonorum*, or Aſſets, as we ſtile them†. And this Inventory ought to be made not only of all Corporeal Goods, but even of Incorporeal Rights, if they appear to have been in the Hands of the Perſon deceas'd at the Time of his Death: For Bonds and other Deeds and Writings ought to be mentioned and inſerted therein ‡. But 'tis not neceſſary to inſert thoſe Debts which the Deceas'd ow'd unto others in the Inventory, becauſe they cannot be called the Goods and Chattels of the Deceas'd ‖, but are deduc'd in the Account, whenever render'd; yet they may be inſerted, if it be thought expedient. Moreover, 'tis not neceſſary to inſert in the Inventory ſuch Debts as were owing to the Deceas'd at the Time of his Death, if the Bonds or Specialities are loſt and cannot be found, in ſuch a manner as they may be ſu'd (at leaſt) and recover'd*. But after ſuch Debts are receiv'd, they ought to be added to the Inventory as Things accruing *de novo*.

* Othob. Tit. 14.

† Lind. lib. 3. Tit. 13. cap. 5.

‡ Lindw. ut ſupr. v. *dictis bonis.*

‖ C. 5. 50. 2.

* I. 2. 1. 18.

It has been a Queſtion among ſome, whether a Teſtator may in his Will remit the making of an Inventory to his Executor. And it is the receiv'd Opinion of the Doctors, that he cannot *ſimply* and *abſolutely* remit this Duty to his Executor. Yet this Matter ought not to be underſtood without a Diſtinction. Wherefore, we ought to conſider, That ſeveral Effects do ariſe in Prejudice to Executors from not making an Inventory: And, among theſe, ſome relate to the Benefit of the Creditors of the Deceas'd: For if the Executor does not make an Inventory, he is liable to Creditors *ultra vires bonorum*, as aforeſaid; and ſhall by this Means be oblig'd to ſatisfy all Debts and Legacies out of his own proper Eſtate. But, I think, that a Teſtator may remit the making of an Inventory†, if there be no Debts and Legacies to be paid; unleſs the Judge ſhall on ſome reaſonable Account think fit to order it otherwiſe in confirming the Executorſhip on the Perſon appointed ‡: And even Cuſtom it ſelf in ſuch a Caſe excuſes the Executor herein ‖. And thus in the like manner may the Ordinary remit the making of an Inventory, when 'tis not convenient to publiſh the Sum and Extent of the Teſtator's Eſtate*. For tho' the Statute † ſays, That the Executor ſhall bring in a true and perfect Inventory, and the Executor ſwears ſo to do; yet as the Ordinary may diſpenſe with the Time of bringing it in, ſo he may diſpenſe with the Inventory itſelf upon good Cauſe, even in the Senſe and Expoſitionof this Statute by our Common Lawyers. And when a Legacy is given to A. to be paid at three ſeveral times of Payment; and the Executor making two Payments takes Releaſes thereof and offers to pay the third Portion, but the Legatee refuſing to accept the third Payment, cites the Executor before the Judge in the Eccleſiaſtical Court: In ſuch a Caſe, according to their Expoſition of that Statute, the Ordinary may diſpenſe or remit the bringing in of any Inventory at all. For the Intention of the Statute was for the Advantage of Creditors and Legatees; and here the Legacy was tender'd, and no Creditor complains: And, therefore, ſuch Inventory may be remitted‡. *Note*, That an Inventory by the aforeſaid Statute is only to conſiſt of Goods, Wares, Merchandizes and Chattels; and not of Things in Action, as by the *Civil-Law* it ought to do.

† Dd. in l. 13. C. 5. 51. 1.

‡ Dd. in l. 7. D. 26. 3.

‖ Dd. in l. 32. D. 1. 3.

* D. 38. 17. 2. 44.

† 21 H. 8. c. 5.

‡ Raym. Rep. p. 470. 471.

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In making an Inventory with us the Preſence of the Judge is not neceſſary; nor is the Executor obliged to make uſe of thoſe other Solemnities which the *Civil-Law* did formerly require, becauſe all ours are *ſimple* Inventories. But 'tis convenient, tho' not neceſſary, to call one or more of the Creditors or Legatees to the making thereof, if he thinks he ſhall have any Controverſy with them upon a Failure of Aſſets, after Funeral Expences, and the like, are deducted. Nor have we any prefix'd and limited Time for making an Inventory aſcertain'd by our Law. Some will have it, that it ought to be made within four Months: But the Gloſs ſays *, that it ought to be made as ſoon as poſſible, according to the Diſcretion of the Executor, which ought to be govern'd according to Perſons, Things and Places.

* In l. 13. C. 5. 37.

Of an Inteſtate, and the Conſequences thereof.

HAVING already treated of *Inteſtate* Succeſſion under the Title of *Adminiſtration*, I ſhall only here conſider who may be properly ſaid to dye Inteſtate, and what are the Conſequences thereof. Now he is ſaid to dye Inteſtate, who tho' he had the Power of making a Will, yet made none, or (at leaſt) none appears to have been made. *Secondly*, He is alſo ſaid to dye Inteſtate, who made a Will, but his Executor refus'd to prove the ſame, and to take the Executorſhip on himſelf. And, *Thirdly*, He dies Inteſtate, who tho' he has made a Will, yet ſuch Will is irritated and made void *. But he, who cannot make a Will, is not properly ſaid to dye Inteſtate, becauſe ſuch Perſon ought rather to be ſaid to dye *Inteſtable* than *Inteſtate*: Yet, by common Uſage of Speech, even ſuch Perſons are reputed to dye Inteſtate; and herein we muſt rather follow the common way of Speech than the Propriety of the Term †. And ſuch Perſons are ſaid to be Inteſtable, as are not yet arriv'd at the Ageof Puberty, Madmen, Prodigals, and the like, who have the Adminiſtration of their Eſtates interdicted them by the *Civil-Law*. For tho', ſays *Bartolus*, a Statute ſhould be made, ordaining, That the Biſhop of the Dioceſs ſhould ſucceed him who dies Inteſtate, when the Will is made void after the Teſtator's Death, or when the Executor nam'd therein refuſes the Executorſhip: Yet herein, according to the proper meaning of the Word *Inteſtate*, the Biſhop ſhall not ſucceed; becauſe at the Teſtator's Death he was not *Inteſtate*, but a Perſon *Teſtate*; yet, according to the common Uſage of Speech, by which ſuch Perſons may improperly be ſaid to be an Inteſtate, the Biſhop ſhall ſucceed ‡. Hence it is, that if univerſal Executors, that are in the Place of an Heir, will not take the Executorſhip on themſelves; and if each of them refuſes it, then the Perſon ſo dying ſhall be accounted a Perſon Inteſtate, to the Effect that the Execution of the Will, or the granting of Letters of Adminiſtration belongs to the Biſhop. Whenever a Statute grants Adminiſtration of the Goods of Perſons dying Inteſtate unto the Ordinary, the Ordinary ſhall under this Word *Inteſtate* likewiſe have the Adminiſtration of the Goods of Perſons dying Inteſtable; becauſe the Word *Inteſtate*, in the Senſe of the Law, belongs even to ſuch Perſons as are *Inteſtable* ‖.

* D. 38. 16. 1. in prin.

† D. 32. 1. 52. 4.

‡ Bart. in l. 1. D. 38. 16.

‖ I. 3. 1 in prin.

Of a Judge.

Of a Judge, his Power, Duty, and the like.

A Judge is in *Latin* ſtiled *Judex*, *quaſi Jus dicens populo*; becauſe 'tis his Duty and Buſineſs to pronounce Law to the People: And he is a Perſon, who, either by his own proper Juriſdiction, or elſe by a delegated Juriſdiction committed to him, has a Right and Power of taking cognizance in ſuch Cauſes as are litigated before him in Judgment. And he, that has this Power in virtue of his own proper Juriſdiction, is called an *ordinary* Judge †; and he, that has it by virtue of a delegated Juriſdiction, is term'd a *delegated* Judge, or *Judex extraordinarius*; tho' the Word *Judex* is ſometimes improperly uſed in the *Digeſts* *. A Judge is alſo in *Latin* call'd *Jus animatum*, and in the *Greek* Tongue μεσιδικος, a Mediator of *Juſtice*; becauſe he ought to be a Miniſter and Mediator of Juſtice between both Parties in a Suit: For a good Judge ought not to do any Thing according to his arbitrary Will and Pleaſure, but to pronounce Sentence, and other Matters in Law, according to the Direction of the Laws themſelves. Only ſuch Perſons can appoint and make a Man a Judge, who have this Power granted them by the Law ‖; as the Prince, or other ſuperior and ſovereign Magiſtrates: But in ſome Matters, according to *Angelus*, we ought to have a regard to Cuſtom, which has a Power of delegating a Judge, as in Caſes of Arbitration, and the like. But if a Juriſdiction does not accrue to a Perſon either by ſome Act of Law, or by the Prince's Grant, or by ſome other Means, he has nothing to do to give Judgment; as the *Hebrews* truly verify'd this againſt *Moſes*, ſaying, *Who made thee a Judge over us* *?

† D. 2. 1. 5.

* D. 4. 8. 41.

‖ D. 5. 1. 12.

† Ex. cap. 2. v. 14.

Judges heretofore were not raſhly choſen without any regard had to the Merit, Integrity, and Abilities of the Perſons elected, as is too frequently practiſed in theſe Days. For the firſt Conſideration among the *Romans* was, what Eſtate the Perſon to be appointed had: And hence 'tis, that *Cicero*, in an Oration againſt *Mark Anthony*, ſays, That in the choice of a Judge, both the Fortune and Dignity of the Perſon ought to be well conſider'd. Yea, *Aſconius* informs us, that, according to the *Pompeian* Law, none could be elected Judges, but Perſons of the greateſt Eſtates: And hence *Pliny* in his Proem to the 14th Book of his *Natural Hiſtory*, makes this Complaint, *viz.* "Afterwards, when Princes and States began "to make Conqueſts, and to grow rich and mighty, Poſterity ſmarted "thereby: For then Men began to chuſe a Senator for his Wealth, to "make a Judge for his Riches, and ſo on." The ſecond Care, was the Age of the Perſon to be choſen: For a Judge ought at the Time of his Election to be twenty five Years of Age at leaſt; and, according to *Suetonius*, *Auguſtus* would have his Judges to be two and thirty Years of age, and under this (I think) none could be choſen. And a third Qualification neceſſary to a Judge was, and (I hope) ſtill is, a ſufficient and thorough knowledge in the Laws, with which he has to do: for an illiterate Judge, to whom a Cauſe is committed, may, by the *Civil* Law, be repell'd and ſet aſide by a Recuſation of him. But of this I ſhall diſcourſe hereafter.

† X. 1. 36. 10. According to the Inſtitution both of the *Civil* and *Canon* Law †, Judges ought to be ſo far from encouraging Suits, that they ought to interpoſe their good Offices and beſt Endeavours between the Parties *litigant*, in order to bring them to a good Agreement (if poſſible) *pro bono Pacis*: And if the Parties ſhould be willing to adjuſt the Matter among themſelves without the aſſiſtance and mediation of the Judge, they ought not to be hindred; nor ought Judges to exact or demand any thing from them on this account; nor even their Miniſters and Servants. Every Judge is ſaid to be God's Miniſter upon Earth, and, therefore, his Judgment is deem'd to proceed *de cultu Dei*: But nothing can proceed from thence but Truth and Juſtice; for God ſays, *I am the Way, the Truth, and the Life* *. And again, 'tis ſaid, *The Ways of the Lord are Mercy and Truth* †, &c. Therefore, whilſt a Judge follows *Truth* and *Juſtice*, he is God's Miniſter; but if he commits *Injuſtice*, he is the Devil's Servant, and not properly a Judge: For he can be no longer called a Judge, according to *Caſſiodorus* ||, than he is deem'd to be a juſt Judge. *Baldus* ſays, that a Judge ought to have *Duos Sales*: the one called *the Salt of Knowledge*, and without this, he is *Judex inſipiens*; and the other, *the Salt of Conſcience*, and without this, he is *Judex diabolicus*. Yea, a Judge that acts contrary to Juſtice, is not only ſaid to be no Judge at all, but to be a Madman, and is reckon'd among brute Beaſts. For as *Ariſtotle* obſerves in his *Politicks*, that as Man under the Uſe and Enjoyment of the Law is the beſt of all Animals; ſo, being deſtitute of Law and Juſtice, he is the worſt of all living Creatures.

* Joh. cap. 14. v. 6.
† Pſalm. 25. v. 10.
|| Lib. 3. Ep. 18.

It has been already hinted, that there are two *Species* or Degrees of Judges, *viz.* an *ordinary* and a *delegated* Judge *. The firſt is he that has *ordinary* Juriſdiction, and receives his lawful Power and Commiſſion from the Emperor, or ſome other Sovereign Prince: And the ſecond is he that has a *judicial* Power and Authority of hearing and determining ſome certain Cauſes not in his own Right, but in virtue of a Commiſſion granted to him by ſome other Perſon. And hereunto we may add a *ſub-delegated* Judge, to whom only ſome part of the meſne Proceſs in a Cauſe is committed in the ſecond Place by a delegated Judge, as Commiſſioners to receive and take an Anſwer, to examine Witneſſes and the like: But though a Sub-delegate is ſometimes a delegated Judge; yet being a Perſon to whom ſome part of the meſne Proceſs is committed, he cannot, in this reſpect, be properly call'd a *delegated* Judge, but an *Auditor* or *Commiſſioner* only. I ſay an *ordinary Judge*, as when any Perſon preſides and is ſet over the entire and univerſal Juriſdiction of any State, Province, or Country, and the like: for he is *eo ipſo* deem'd to be created an *ordinary* Judge, in that an univerſality of Buſineſs is committed to him by one, that has the Power of committing, unleſs it be expreſly ſaid in his Commiſſion, That *he makes him only his Delegate, or delegates Cauſes to him*, and the like. A Judge, who may pronounce a Sentence either as an *ordinary* or as a *delegated* Judge, is, in a doubtful Caſe, preſumed to have pronounc'd the ſame in the quality of an *ordinary* Judge. By the *Civil* Law †, an *ordinary* Judge cannot be recuſed by way of Exception, how ſuſpected ſoever he be; yet if he be a ſuſpected Judge, an Aſſeſſor or Co-adjutor ſhall be aſſign'd him, and this Aſſeſſor ſhall ſee that all *judicial* Proceeding go fairly on without ſuſpicion: But by the *Canon* Law ||, even an *ordinary* Judge may be recuſed; though a Judge recuſed even by this laſt Law, cannot take cognizance of ſuch Recuſation; becauſe an exception of Suſpicion affects him much, provokes him to Anger and Reſentment, and renders him uncapable of Judging; and, therefore, he ſhall not have cognizance either of the principal Matter, or of any Incident thereunto belonging,

* D. 2. 1. 5. 16. & 17.
† D. 3. 1. 16.
|| X. 2. 2. 4.

longing, leſt he ſhould injure the Party recuſing him, to whom nothing can happen more grievous than to litigate under a ſuſpected Judge.

No Perſon ought to be preferr'd and advanc'd to the Dignity of a Judge in his own Country *, unleſs it be by the expreſs Will and ſpecial Appointment of the Prince, leſt he ſhould be induced to be partial in his Proceedings either through Hatred or Affection: nor ought a Judge to take cognizance of that Cauſe, wherein he himſelf has been an Advocate, leſt Pride, or ſome other evil Paſſion, ſhould warp and byaſs his Judgment; but in ſuch a Caſe, he ought to delegate the Cognizance thereof to ſome other Perſon. And as no one ought to be a Judge in his own proper Cauſe †, ſo neither ought he to be a Judge in the Cauſe of his Children, Family, or Conſanguinity ‖: for natural Reaſon will not ſuffer a Father to be a Judge, unleſs it be in the private Affairs of his Family, wherein the Father may have the Son for a Judge, as the Son may have the Father. But a Judge may proceed and pronounce Sentence among his Conſanguinity of the ſame Degree. But here I ſpeak of an *ordinary* Judge, who cannot give Judgment in the Cauſe of his own Children, though a *delegated* Judge, in point of Law, is not forbid to be a Judge in the Cauſe of his Son, nor a Son to be a *delegated* Judge in the Cauſe of his Father; becauſe a *delegated* Judge may be recuſed *primo Limine*, at firſt ſetting forth in the Cauſe *: and hence a Litigant may blame himſelf, if he does not recuſe the Father being made Judge in his Son's Cauſe. And, therefore, the Reaſon why an *ordinary* Judge is by the *Civil* Law expreſly forbidden to be a Judge in the Cauſe of his Children, is, becauſe by that Law he cannot be recuſed, how ſuſpected ſoever he be. But though no one is a fit and proper Judge in his own Cauſe (as aforeſaid) ſo as to puniſh an Injury done to himſelf in his private Capacity, which ought to be redreſs'd by a ſuperior Judge; yet even among inferior Judges, a Judge may, by his own proper Authority, puniſh an Injury done to his Juriſdiction, when the ſame is impeach'd and moleſted by any one: For regularly 'tis granted to every Judge to defend his own Juriſdiction by a Penal Judgment or Sentence, eſpecially if the Injury be great and notorious †.

* D. 1. 22. 3.

† C. 3. 5. 1.

‖ D. 2. 1. 10.

* C. 3. 1. 16.

† D. 2. 3. 1.

Thus alſo a Biſhop cannot take Cognizance in a civil and private Cauſe of a Biſhop, when 'tis peculiar to himſelf as a Biſhop; but Arbitrators or Umpires ought to be choſen for that End and Purpoſe ‖. But if the Cauſe or Injury be of ſuch a Nature as concerns the Church committed to ſuch Biſhop's Care, he may, according to the *Canon* Law, puniſh the ſame by his own proper Authority *; and in this Caſe, he does not become a Judge in his own Cauſe, but in the Cauſe of the Church †. And this is true, when the Matter in Controverſy belongs to the Church, and the adverſe Party does not deny the ſame: For then a Biſhop may Excommunicate ſuch a notorious ſacrilegious Perſon ‖, without being a Judge in his own Cauſe; and the Matter being notorious, he need not take any Cognizance thereof, but is rather an Executor than a Judge *. But if the adverſe Party denies the Matter, touching which the Action is commenced, to be a Matter relating to the Church, by ſhewing ſome Cauſe why this Matter is doubtful; as becauſe the Juriſdiction is diſputed, or that a Privilege of Exemption is produced: then (I ſay) ſuch Perſon ſhall not have Cognizance of the Matter, but the Superior ſhall be the Judge thereof †. Yet we ought to diſtinguiſh in this Caſe, *viz.* When the Diſpute or Action is touching the Affairs of his own Church, as about the Biſhop's own proper Table and the like: for if the Diſpute relates hereunto, he ſhall not be a Judge ‖; for that it does not ſeem to be the Cauſe of the Church, but the Biſhop's own proper Cauſe †. 2*dly*, When the Diſpute and Action is about ſome criminal Cauſe committed by the Biſhop himſelf, and then he

* 45 Diſt. 11. 23. Q. 4. 30.

† Inn. & Hoſt. in c. 9. x. 1. 6.

‖ 2. Q. 7. 16.

* vi. 5. 2. 18.

† 11. Q. 3. 30.

‖ 11. Q. 2.

† C. 3. 5. 1.

he cannot be a Judge, wherein he is ſaid to have committed a Crime. But if the Crime be committed againſt him as an Injury done to him, then he may, by his own proper Authority, puniſh it in his own proper Subjects, and even in extraneous Perſons (tho' the ſame only concerns the Biſhop's Perſon, and not the Church) if the Injury be notorious or otherwiſe manifeſt, ſince ſuch extraneous Perſons do offend in his Juriſdiction. * 11. Q. 2. 2. But if the Injury be occult and private, then he cannot puniſh it himſelf *, but ought to proſecute it before his Superior. But tho' he cannot in this Caſe puniſh ſuch a Perſon, yet he may impriſom him, and reſerve the † 23. Q. 4. 27. Cognizance of the Cauſe to his Succeſſor †. But an *ordinary* inferior Judge cannot by any means puniſh an Injury done to himſelf, but the ſuperior || Arch. in c. 11. Diſt. 42. X. 5. 37. 11. Judge is to puniſh the ſame ||, becauſe an inferior Prelate may have an eaſy Acceſs to the Biſhop who is near at hand. But 'tis not ſo in an Injury done to a Biſhop or Superior, eſpecially by any one dwelling out of the Dioceſs, where recourſe cannot be had to any of the Dioceſs in reſpect of the Offence, unleſs it be to him. I have publiſh'd this Paragraph, though it has no relation to *Engliſhmen*, in order to ſhew the great Power of the Eccleſiaſticks, where the Papal Law governs.

In a doubtful Caſe, when the Word *Judex* is *ſimply* pronounced and made uſe of, it relates to a Secular, and not to an Eccleſiaſtical Judge: And for this Reaſon (perhaps) according to the *Canoniſts*, *viz.* Becauſe Eccleſiaſtical Judges are commonly in the Books of the *Canon* Law ſtiled *Prelates*, and have their Denomination from the Dignity and Prelacy which they bear in the Church: As Archbiſhops, Biſhops, Abbots, and the like. Yet there is a Text in the Law that makes againſt this Opini- * X. 2. 28. 41. on *, where only an Eccleſiaſtical, and not a Secular Judge is included under the Word *Judex*: For if a Secular Judge was only comprehended, the Word *Laicus* in that Text would be vainly added. But in my Opinion, this ought to be meant and underſtood according to the ſubject Matter treated of: For in Depoſitions touching Eccleſiaſticals, Clerks are compriſed, unleſs the ſubject Matter perſuades otherwiſe; but, in Depoſitions touching Seculars, only Seculars are included.

A Judge is a Perſon that preſides over Cauſes, and has the Determination of Law-Suits between Litigants by way of a judicial Sentence, and may follow his own Conſcience, and Senſe of Matters, in the deciſion of a Cauſe, if he prejudices no one thereby; eſpecially in a Caſe where the † Anch. Conſ. 210. Law is doubtful, and various Opinions do ariſe thereupon †: And if, by following one of theſe ſeveral Opinions, he has an eminent Doctor on his ſide, he ſhall be excuſed from the Expences of Suit, and does not make the Suit his own. For he that gives a wrong Judgment by reaſon of a diverſity of Opinions among Lawyers, ſhall be pardon'd, or (at leaſt) more gently puniſh'd than a Judge, who errs againſt a clear and evident || Gloſſ. in §. J. 1. 4. 5. Law ||: For no Judge can plead Ignorance of Law as an excuſe for a wrong * J. 4. 5. 5. Judgment *. I ſay, in a variety of Opinions, where the Law is doubtful, and the Judge follows that of an eminent Doctor, he ſhall be excuſed *from the Expences of Suit, and does not make the Suit his own:* For the Judge *ad Quem* in the Appeal, may embrace another of theſe Opinions; and yet the firſt Judge ſhall not be puniſh'd, ſince (perhaps) he may have follow'd the more equitable Opinion. But if a Judge maintains one Opinion at one Time, and a contrary Opinion at another Time, without correcting and informing himſelf upon very ſubſtantial Principles, he ſhall render himſelf liable to Blame, tho (peradventure) in no wiſe obnoxious to Puniſhment: For no Man is forbidden to change his Advice and Opinion for the better. By the Cuſtom and Uſage of modern Times, a Judge does not make the Suit his own, by giving a wrong Judgment, unleſs

unleſs this be done thro' Fraud and Deceit*; as by Corruption, and the like. Nor by the Law of *England*, will an Action lie againſt a Judge for what he does in his judicial Capacity, tho' he ſhould act erroneouſly; but if he does any thing Injuriouſly or thro' Corruption, he may be complain'd of to the King, in whoſe Name all Judgments at the Common Law here in *England* are given; the Judges being delegated by him to do Juſtice.

* Groenv. de LL. abrogat.

A Judge, who takes on himſelf the Cognizance of a Cauſe, and acts as a Deputy doing the Office of another Perſon, cannot in that Cauſe pronounce two different Sentences: For a delegated Judge may ſub delegate his Power and Office to his Collegue, and thus the Collegue proceeds in his own Name as a Delegate, and his Collegue's, as a Sub-delegate; and thus he may, by a different Authority, proceed as one and the ſame Perſon in the ſame Cauſe. And by the ſame Conſcience that he thinks any Thing to be juſt in his own Name, he ought to conceive the ſame Thing to be juſt in his Collegue or Con-delegate's Name. If there be ſeveral Judges in the ſame Cauſe, all of them have Juriſdiction *in ſolidum*, tho' they have the Exerciſe of that Juriſdiction only ſeverally and in part: So that one or either of them may proceed, if the reſt of them will not or cannot be preſent. *Sed de hoc quære.* But if there be more Judges than one aſſign'd with a Clauſe of *ſi non omnes*, &c. one of them may certainly act and proceed without the other †: Tho' 'tis otherwiſe, if this Clauſe be not inſerted in the Commiſſion; for then one cannot act on the Death or Abſence of his Collegue ‖.

† X. 1. 29. 21.

‖ D. 42. 1. 39. Abb. in c. 14. X. 1. 29. 5.

Though a Judge ought to be courteous and eaſy of Acceſs, and may ſuffer the Litigants to come to his Houſe, yet he ought not go to the Houſe of either of the Litigants for Entertainment and the like, leſt it ſhould give Umbrage of his Partiality; nor ought he to declare to the Parties in private, what Sentence he intends to pronounce; eſpecially when the Perſon againſt whom he gives Judgment is able to raiſe a Clamour and Difficulty againſt the ſame. Nor ought a Judge, in taking cognizance of a Cauſe, to ſhew any Anger or Reſentment* againſt ſuch Perſons as he conceives to be his Enemies, nor to be prevailed on by the Tears and Prayers of calamitous Perſons, nor ought he to affect to be thought Good-natured or Moroſe, Merciful or Severe, but let him act with Calmneſs as the Law directs ‖; and laſtly he ought not to do all that he may do in a Cauſe without being requeſted thereunto; but in all Cauſes to have a ſupreme Equity before his Eyes, which muſt be underſtood of ſuch Matters as cannot be collected from the Laws themſelves. A Judge cannot be ſaid to be without a Juriſdiction, ſince nothing can be ſaid to be adjudg'd by him, who wants a power of judging and declaring touching Right and Wrong: For if you take away the Foundation of his Power, *viz.* his Juriſdiction, whatever is built on his Judgment muſt fall to the Ground at once. The Authority of a Judge and a Teſtator is equal, or (at leaſt) alike*: And, therefore, an Argument from a *judicial* to a *teſtamentary* Act is valid. A Judge has juriſdiction over a Perſon that is not truly ſubject to his Juriſdiction †, in reſpect of a Crime committed within the ſame, and may either condemn or acquit him upon hearing of the Evidence: And, in the like manner, he may either puniſh or acquit a Delinquent that is ſubject to his Juriſdiction, for an Offence ſuppos'd or really committed out of his Territory, as well as a Pariſh-Prieſt may abſolve his Pariſhioner for an Offence done out of his Pariſh.

* 11. Q. 3. 67, 68, &c.

‖ D. 48. 19. 11.

* C. 5. 52. 2.

† 6. Q. 3. 1.

A Judge, who has the cognizance of the *principal* Cauſe, may alſo take cognizance of any Thing *incident* thereunto, tho' the Incident be ſuch, touching which, he cannot otherwiſe have cognizance *principally* ‖: And

‖ Paul. de Caſtr. in l. 3. C. 3. 1, N. 1.

And a Cauſe or Matter is ſaid to be an Incident, when it is not mov'd or commenc'd by way Action, but only by an Exception, Replication, and the like. Thus in a *pecuniary* Cauſe controverted before an inferior Judge, ſuch Judge may try the State of the incident Matter, though he cannot try the principal Cauſe. Though a Preſumption lies in favour of a Judge, when he proceeds *Judicially*, that his Proceedings are according to Juſtice; yet 'tis otherwiſe, if he ſhall proceed *extra-judicially*: and a Judge, by proceeding to an extra-judicial Act of Injuſtice, cannot any more proceed *Judicially* in that Cauſe, becauſe he has render'd himſelf ſuſpected therein, by acting as a private Man.

I have ſaid before, that a *Judge ought always to have a ſupreme Equity before his Eyes* *: But yet he ought not to recede and depart from written Laws on the account of unwritten Equity, unleſs it be through the Authority of him, to whom this alone belongs, *viz.* in order to limit and reſtrain a ſevere written Law. But a Judge may ſupply thoſe Things in Law, wherein the Advocates of the Parties are greatly deficient in their Informations: As when an Advocate makes Allegations or Quotations of Law, which do not ſatisfy the Mind of the Judge, and the Judge himſelf remembers ſome Law or Statute which rightly determines the Queſtion, he may in ſuch a Caſe found his Sentence on ſuch a Law or Statute, and not judge herein *ſecundum allegata & probata*; and herein he ſhall not be ſaid to judge raſhly and of his own head. For though a Judge is bound to enquire into the Condition of a Cauſe by *Informations* (as the *Civilians* ſtile them) and to take the Advice of Advocates thereon; yet he is not oblig'd to follow the ſame in ſuch a manner as to give entire Credit to them: And when he has ſatisfy'd his own Conſcience hereby, he may put an end to the Informations and Allegations of Advocates whenever he pleaſes. A Judge ought to take care and ſee, that all Solemnities of Law be obſerv'd †: but by a Conſent of Parties, he may hear and determine Cauſes in a ſummary way of Proceeding.

* D. 13. 4. 4.

† D. 2. 15. 8. 17.

Every Judge, in pronouncing Sentence, ought to have a principal Regard to Truth and Equity (as aforeſaid) always adhering thereunto, and deſpiſing the Quirks and Subtilties of the Law *: For tho' theſe may ſometimes be tolerated in Pleading, yet in pronouncing of a Sentence and Judgment in Law, they ought to be entirely rejected and laid aſide. And as a Judge ought to labour and take pains in the ſearch after Truth (as Truth is his chief Concern) ſo when he has any Caſe of Difficulty before him, he ought to conſult and adviſe with the ſuperior Judge therein; and, not through a great Conceit and Opinion of his own Knowledge in the Law, to deſpiſe the Advice of Men (perhaps) more learned and skilful therein than himſelf. In the Deciſion of Cauſes, he ought to obſerve and have a reſpect to the Statutes of the Place where a Contract is executed, or any other Matter done and tranſacted. And where there are many and ſeveral Judges appointed, they are all underſtood to pronounce Sentence and give Judgment in a Cauſe, if they are all preſent, though one of them ſhould diſſent thereunto: for if one of them ſhould ſwear, that the Matter does not thus appear to him; yet the others may proceed, and the diſſenting Judge ſhall be included †. A Judge of a foreign Territory or Juriſdiction, cannot regularly execute a Sentence pronounc'd by another Judge, unleſs it be at the requeſt of that Judge who pronounc'd the ſame: But this (I think) is limited in a twofold Reſpect, as I ſhall remark hereafter. A Judge may, according to the common Opinion of the Doctors, take cognizance, about his own Juriſdiction, as often as the ſame is diſputed by the Parties cited by him; and examine, whether

* Paul. de Caſtro in L. 2. c. 2. 1. N. 5.

† D. 42. 1. 36. X. 1. 29. 21.

whether he has Juriſdiction or not, that is to ſay, whether he be a competent Judge or not *: And if, on lawful Cognizance had touching this Matter, he ſhould pronounce himſelf to be an incompetent Judge, yet he may condemn the Party caſt, in Expences of Suit, becauſe he is a competent Judge in reſpect of this Matter. And, therefore, if the Defendant, in the preſence of the Eccleſiaſtical Judge, does, by way of Exception, aver ſuch a Cauſe to be of a *feudal* or ſecular Nature; the Ordinary, or Eccleſiaſtical Judge may take Cognizance touching the Truth of this Exception, *viz.* Whether the Cauſe be *Feudal* or Secular, or not; and if he finds it to be ſuch, he ought to pronounce himſelf to be an incompetent Judge, and to diſmiſs the Cauſe with Expences †.

* D. 5. 1. 2. 6.

† X. 2. 1. 5.

'Tis a Rule in Law, that he, who acts and does a Thing by the Command and Order of the Judge, does not ſeem to be *in dolo*, or guilty of any Malice, becauſe he ought to yield Obedience to the Judge's Command ‖; and ſuch a Neceſſity tolls a Preſumption of Malice and Deceit, and induces a contrary Preſumption, *viz.* That no ſuch Malice or Deceit can be preſum'd. As for Example; If a Man, that has left a *Depoſitum* in my Hands, at the Time of his death, leaves four Heirs behind him, and I do, by the Judge's Order, reſtore this *Depoſitum* to one of them; I ſay, in this Caſe, I ſhall not be liable to the others by an Action *ex Depoſito*, becauſe all Preſumption of Fraud and Male-engine ceaſes through the Authority of the Judge. And the ſame may be ſaid in reſpect of Mandataries, Executors and Apparitors, who execute *judicial* Precepts and Sentences legally decreed and pronounced *. But 'tis ſaid by way of Objection hereunto, that he, who does any unlawful Act (tho' by the Judge's Order) is not excuſed; yea, 'tis imputed to him as a Crime, if he does not reſiſt a Judge commanding an unlawful Thing to be done. As for Inſtance, If a Judge ſhould order a Man here in *England*, to be put to the Rack, the Officer ought not only to diſobey, but even to reſiſt the Judge's Order; and, in ſuch a Caſe, according to the *Civil* Law, he is puniſhable for his Non-reſiſtance, if ſuch Order extends to a *Decurio*, who ought not to be put to the Rack. And, therefore, we muſt diſtinguiſh whether the Judge's Precept be evidently contrary to Law, or according to Law; or whether in theſe two reſpects, the Matter be doubtful †. In the firſt Caſe certainly he ought not to obey; yea, he ought to reſiſt: for a Judge may be reſiſted by private Men, when he acts contrary to Law. In the ſecond Caſe, the Officer is puniſhable for his Diſobedience. And in the third Caſe, he ought to obey the Judge in virtue of the Sentence or Precept of the Court; ſince in a doubtful Caſe, there lies a Preſumption of Law in favour of ſuch Sentence or Precept: And in this Caſe, the Perſon obeying the ſame, is not preſum'd to be guilty of any Malice and the like; but by his Obedience, he is exempt from all ſuſpicion of Male-practice ‖.

‖ vi. de reg. Jur. 24.

* C. 10. 1. 5. Dd. ibi.

† Dyn. in l. 13. D. 2. 4.

‖ D. 36. 1. 65. 2.

In Caſes not expreſly ſpecify'd in Law, a Judge ought always in inflicting Puniſhments to be inclin'd to the more humane and equitable Part; and ſometimes, he may and ought, to detract from the ſeverity of the Law, by receding from the Puniſhments appointed thereby, if a lawful Cauſe offers itſelf; as when there is a multitude of Delinquents in the Caſe; ſince a multitude cannot be puniſh'd without great Scandal: and thus a Puniſhment inflicted by ſome Statute or Written-Law, may be moderated by the Judge upon good Cauſe aſſign'd. For tho' a Judge may not extend a Puniſhment beyond the Letter of the Law, yet he may mitigate the ſame according to the Equity of the Caſe; and if he cannot warrantably do this, he is to report the ſame to the Prince for his Mercy.

Mercy. But where the Law appoints no Puniſhment at all, there the Judge may impoſe the ſame *ad ſui Arbitrium*; becauſe, in Matters not determin'd by Law, recourſe is always had to the Will and Diſcretion of the Judge ‖: and this proceeds not only in inflicting of Puniſhments, but in all other Matters not determin'd by Law, as here ſaid. In inflicting Puniſhments, a Judge ought to conſider, whether the Law has aſſign'd ſeveral Puniſhments for one and the ſame Crime, and then if all thoſe Puniſhments may concur, he ought to inflict them: But if they cannot all of them have a Concurrence, or if the Law ſpeaks *alternatively*, he ought then to follow the Diſtinction of the Gloſs, *viz.* That they are either impos'd for the ſame Offence according to the Order and Diſpoſition of the ſame Law or Statute, and then they may all of them be inflicted, if they may have a Concurrence, otherwiſe not: For one Law often applies ſeveral Puniſhments in hatred and deteſtation of the Crime committed *, becauſe ſingle Puniſhments do not ſeem ſufficient: And ſometimes there are various Puniſhments for the ſame Crime in divers Laws and Statutes. But more of this in another Place. But whenever a Judge inflicts a Puniſhment arbitrarily, he ought to have a regard to the Perſons, Places, Cauſes, Times, *&c.* having an Equity always in view.

‖ Abb. in c. 4. X. 1. 29. N. 1.

* X. 5. 20. 7. vi. 5. 9. 5. 16. Q. 1. 55.

A Judge has many Remedies againſt Diſobedient and Contumacious Perſons; for he may on the Score of Contumacy, or for any other juſt Reaſon, according to the *Civil* Law, order the Doors of ſuch a Perſon's Houſe to be ſhut up and ſeal'd †; and may not only mulct and fine Litigants, but even Advocates, Proctors, and Witneſſes themſelves, if they do not yield Obedience to his lawful Commands in Matters of Judicature. And on the Account of Contumacy he may deny Audience to the Contumacious Perſon, though he cannot thereupon condemn him in the whole Cauſe or Suit, unleſs it be as before obſerv'd under the Title of *Contumacy*.

† D. 28. 7. 2.

Though a ſecular Judge may in a Crime merely Eccleſiaſtical adminiſter the ſecular Arm at the Requeſt of the Eccleſiaſtical Judge; yet, according to the *Canoniſts*, he ought not to intermeddle in the Cognizance of ſuch Crime, but only to execute the Sentence of the Ordinary; for that he is no more (by their Law *) herein, than an Executioner of their Sentences: yet by the *Civil* Law, according to *Bartolus* †, and the received Opinion of all the *Civilians*, 'tis otherwiſe; and that for theſe three Reaſons, *viz. Firſt*, Becauſe a meer Executor has ſome kind of Cognizance in criminal Cauſes of a ſpiritual Nature, leſt he ſhould (according to *Felinus*, the *Abbot* and others ‖) execute the unjuſt Sentence of a Superior, and hereby render himſelf guilty of an irreparable Miſchief to ſome Perſon or other. 2*dly*, Becauſe Clergymen are on the ſcore of Hereſy even ſubject to the Juriſdiction of a Secular Judge *. And, 3*dly*, Becauſe when Hereticks are deliver'd over to be puniſh'd by the Secular Judge for a Relapſe into Hereſy, they are to be left entirely to him without any further Audience from the Eccleſiaſtical Judge †. Nay, ſo far does the *Canon* Law carry this Matter of ſpiritual Juriſdiction, that an Eccleſiaſtical Judge may compel a Secular Judge to ſurceaſe and deſiſt from ſuch Things as are in contempt and deſpight of the Eccleſiaſtical Juriſdiction ‖, and oblige him to obſerve the Canons of the Church in reſpect of Eccleſiaſtical Cauſes, under the Pain of an Eccleſiaſtical Cenſure for his Diſobedience *. And, moreover, he may, by that Law, inhibit a Secular Judge from proceeding in a Cauſe even between Laymen, when the Matter is before-hand depending in the Eccleſiaſtical Court. And a Secular Judge is bound to releaſe a Clerk or Religious Perſon (for there

* vi. 5. 2. 18.

† In. l. 12. D. 2. 1.

‖ In c. 8. X. 1. 29.

* 23. Q. 5. 1.

† X. 5. 2. 4.

‖ vi. 2. 12. 2.

* vi. 2. 2. 2.

there is in the *Romiſh* Church, a diſtinction between theſe Perſons) without the Precept of the Eccleſiaſtical Judge, or any Letters of Requeſt from him, tho' ſuch Perſon was condemn'd by the Secular Judge, before he became a Clerk or a Religious; becauſe the Execution of the Sentence in ſuch a Caſe belongs to the Eccleſiaſtical Judge †, and the Knowledge of the Eccleſiaſtical Judge has the Force of Letters of Requeſt. But yet if the Sentence has paſs'd *in Rem Judicatam*, recourſe cannot be had to the Eccleſiaſtical Judge to ſtay Execution; unleſs it appears from the Party that ſuch Sentence is unjuſt, or the Injuſtice thereof is notoriouſly evident by other Means ||. An Eccleſiaſtical Judge, is made a Judge in reſpect of Laymen (ſays the *Canon* Law) whenever Laymen have a Cauſe in common with the Clergy: And no doubt in ſuch a Caſe, the Eccleſiaſtical Judge will do the Layman Juſtice. The *Canoniſts* have another Fetch to get Cauſes before the Eccleſiaſtical Judge, which otherwiſe do not belong to his Cognizance, *viz.* by the Expoſition of an Oath. But of this hereafter.

† Fed. de Sen. Conſ. 300.

|| Alex. Conſ. 149. N. 6.

Of Juriſdiction, and the ſeveral Kinds thereof.

Juriſdiction, is a judicial Power and Authority given to a Perſon by the Publick for the ſake of adminiſtring Juſtice by the Hearing and Examination of a *judicial* Cauſe, by pronouncing Sentence thereon, and by a decreeing of an Execution thereof †: or a Power and Authority introduced by publick Right for the Benefit of the Commonwealth, with a Neceſſity of pronouncing Sentence according to Law, and of making Decrees according to Equity. Now this Power and Authority was firſt introduced by the Publick, on common Conſent, for the good of the whole Community in general, and for the Advantage of every individual Member therein contain'd in particular: And if it be an *ordinary* Juriſdiction, it requires a Territory or Precinct; but if it be a *delegated* Juriſdiction, then the Power is radicated and grounded on the Commiſſion of the Perſon only, that delegates the ſame *. I ſhall here, *firſt*, treat of the ſeveral *ſpecies* of Juriſdiction in general. *2dly*, I ſhall conſider its various Effects. And, *laſtly*, I ſhall make ſome neceſſary Obſervations thereon.

† Bart. in L. 1. D. 2. 1. N. 3.

* X. 5. 7. 9.

Now, according to the *Civil* Law, there are three *Species* of Juriſdiction. The firſt is in *Latin* called *Imperium merum* †; the ſecond is ſtiled *Imperium mixtum*; and the third is term'd *ſimple* Juriſdiction †. The firſt is the Power of the Sword, and the Authority of executing publick Puniſhments; and, according to *Bartolus*, may be defin'd to be that Juriſdiction, which is diſcharg'd by the *noble Office* of the Judge, or by way of Accuſation; and is ever exerciſed for the publick Wealth. And in this Senſe thereof, we may alſo reckon the Buſineſs of making Laws to be a matter *meri Imperii*. Therefore, this firſt *Species* of Juriſdiction is abſolutely plac'd in the Prince or Sovereign Magiſtrate, whether he be a Temporal or Spiritual Magiſtrate: And from hence is derived the Power of Legitimation, Reſtitution *in integrum* on *mere Grace*, the Power of taking away another's Right by way of Forfeiture, or for ſome very reaſonable Cauſe, the Power of reſtoring a Man to his

† D. 2. 1. 3.

Credit and Reputation again after he has been pronounc'd *Infamous*; and many other things of the like Nature, which we here in *England* ſtile the Prince's Prerogative. For by the *Civil* Law, the Prince or Supreme Magiſtrate may proceed in Judgment without obſerving any Form or Order of Law; his Preſence alone ſupplying all Defects and Forms of Law, and the like. Theſe Matters are ſaid to be Matters *ſummi meri Imperii*, of the higheſt Juriſdiction; becauſe this *merum Imperium* has ſeveral degrees of Power veſted in it. And as Juriſdiction comprehends Matters both of an arduous and light Importance, as may appear from the degrees of Puniſhments inflicted thereby; ſo, according to this *Theſis*, it is either granted *fully* and *abſolutely*, or elſe by way of *Limitation* and *Reſtriction*. A full and abſolute Juriſdiction, is that which is either from itſelf, or elſe from the Grant and Favour of the Prince, or ſome other Sovereign Power, extended to a full and entire Cognizance of any Cauſe whatever: And this kind of Juriſdiction, in its own nature, chiefly belongs to Kings, Princes, and ſome Dukes having no immediate Superior. A reſtrain'd and limited Juriſdiction, is that which is not full and abſolute, but of a mix'd and limited nature: And this kind of Juriſdiction, is that Power which is deriv'd from the Prince's Authority, without having the Cognizance of all Cauſes committed to it; but has that Power and Authority, which the Sovereign Prince alone, or ſome other Superior Magiſtrate has (by way of Delegation) conferr'd on any one either *plenarily* or with ſome Limitation and Reſtriction. So that as Judges are diſtinguiſh'd in a twofold manner, *viz.* into *ordinary* and *delegated* Judges, ſo likewiſe is Juriſdiction divided in the ſame manner.

Secondly, I call that by the Name of *mixtum Imperium*, which, tho' exerciſed by the *noble Office* of the Judge alſo, yet it only reſpects the Advantage of private and particular Men *. And hereunto we may refer thoſe Matters which are of a *voluntary* Juriſdiction, as the Probat of Wills, granting of Adminiſtrations, Viſitations, Inſtitutions, and ſuch like Matters as are diſpatch'd *ſub quâdam officii Excellentiâ*, but yet without any Action or *judicial* Proceſs annex'd to them. As for Example, the admitting of a Perſon to an Eccleſiaſtical Living upon an extra-judicial Examination of him, and ſometimes without any ſuch Examination; Reſtitution in *integrum*, on an extra-judicial hearing of a Cauſe; the granting of Sequeſtrations unto vacant Benefices: which are all Matters of *voluntary* Juriſdiction, and require no *judicial* Cognizance of the Cauſe. This kind of Juriſdiction is in *Latin* ſtiled *mixtum Imperium*, in reſpect of the *noble Office* of the Judge; and in ſome meaſure differs from the former, and is join'd with the enſuing *Species* of Juriſdiction in reſpect of ſome Cognizance had in the Cauſe, and in regard of the private Advantage of ſome particular Men. And therefore truly, to this kind of Juriſdiction, by the *Civil* Law, there belongs the Aſſignment of Guardians to Pupils, the inflicting of all ſuch grievous Puniſhments as are not Capital: For Mutilations, Relegations, and the like ſevere Corrections do hereunto belong; and theſe things Judges may diſpatch in virtue of their *noble Office*.

* D. 2. 1. 3.

Thirdly, *Simple* Juriſdiction is that which only reſpects civil Matters, and is a Power introduced by publick Authority, with a Neceſſity of judging and determining Law-Suits according to a Sentence of Law in Affairs of a private nature †: As it accrues to all inferior Judges, it ought to be exercis'd (as the *Civilians* ſay) *officio Judicis Mercenario*. For inferior Judges have only the Cognizances of light and trivial Offences, (by our common Lawyers) called *Treſpaſſes*, and not of ſuch Crimes as Kings and Princes ſit in Judgment on: And ſuch Things as are the Ob-

† Bart. in l. 3. D. 2. 1.

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ject of *ſimple* Juriſdiction, the Judge may diſpatch by his *mercenary* Office, becauſe they only tend to the Good of the Community in a private manner. So that under this *Species* of Juriſdiction conſiſt all civil or pecuniary Cauſes commenc'd in ſecular Courts of Judicature by the means of Actions at Law *, and Spiritual Cauſes of a private Nature, begun in Eccleſiaſtical Courts. Sometimes this kind of Juriſdiction is of a larger extent in point of Territory; extending itſelf to the whole Body of the State; and ſometimes 'tis limited to a certain Province or Place thereof, and after a certain manner; as it happens by Cuſtom and Preſcription in Towns and Villages †, *&c.*

* Bart. & Bald. in l. 3. D. 2. 1.

† Nov. 15. cap. 1.

The *Imperium merum* (according to *Bartolus*) has ſix degrees. The firſt, which is ſtiled *Imperium Maximum*, being that which is employ'd in the general making of Laws for the whole Community; and this Power belongs to the Prince or Legiſlative Authority alone. In *Rome* it formerly belong'd to the Senate, and even to the *Prætorian* Prefect: But by the *Lex Regia*, it was transferr'd on the Emperors. The modern Doctors ſay, that it belongs to this firſt degree of Power to create Notaries, to confiſcate Delinquents Goods and Eſtates, and to convene General Councils: but, according to the Canoniſts, the Emperor cannot do this laſt Act; they aſcribing the ſole Power hereof to the Pope and his Cardinals. But ſome will have it, that all theſe Things are reſerv'd to the Prince alone by way of Prerogative: But I cannot agree with them; becauſe heretofore, general Laws were made by ſuch as had not the Power of the Sword; as by the *Roman* People, when a Law was promulgated at the Interrogation of the Conſul. Thus the Prætors, Ediles and Senators might make general Laws, tho' the Senate had not the Power of Judging. 'Tis now well known that the People make Statutes, tho' they have not the Cognizance of thoſe Statutes in a *judicial* manner, but the Cognizance thereof is lodged with the Judges elected, as it is here in *England*. I ſhall here forbear to diſcourſe of the other five degrees of *mere* Juriſdiction, as they are diſtinguiſh'd into *Majus*, *Magnum*, *Minimum*. *Minus* and *Parvum*: being of little Importance to the Matter in hand, and very tedious to the Reader. Wherefore, I ſhall in the next Place proceed to ſpeak of Juriſdiction as before divided into *ordinary* and *delegated* Juriſdiction in a more particular manner.

Now *ordinary* Juriſdiction, is that which ariſes to any one, either by the means of ſome Written-Law, or Hereditary-Right, or elſe by the way of Cuſtom or Privilege; or, *thirdly*, is that which is conferr'd on any one by the Grace and Favour of the Prince or State whereunto he belongs ||: For I have already obſerv'd, that *ordinary* Juriſdiction accrues to a Perſon three ſeveral ways, *viz.* By Law, Cuſtom and Royal Donation. A Biſhop's Vicar-General, or Principal Official or Chancellor here in *England*, has *ordinary* Juriſdiction; and, holding the ſame Conſiſtory with the Biſhop himſelf, it cannot be appealed from the Chancellor or Vicar-General to the Biſhop: For a Juriſdiction may be in a Perſon without the Exerciſe thereof, as it is here in the Biſhop. In a Cauſe of Hereſy, the Biſhop of the Dioceſs has *ordinary* Juriſdiction over the Perſons of ſuch as are in an exempt or peculiar Juriſdiction; becauſe the Cognizance of Hereſy, and the Puniſhment thereof, belongs tothe Biſhop alone. But the Text in *Linwood* * ſeems to impugn this Opinion of the Doctors, ſaying, That a Biſhop has only a Juriſdiction *delegated* to him by Law, and not an *ordinary* Juriſdiction in a Cauſe of Hereſy againſt Perſons exempt †: which leads me, *ſecondly*, to ſpeak of a *delegated* Juriſdiction.

|| Bart. in L. 5. D. 2. 1. N. 9.

* Lib. 5. Tit. 5. cap. 2. v. *ordinarii.*

† Hoſt. in C. 9. X. 5. 7. v. *Delegatis.*

Now

Now a *delegated* Juriſdiction, is that which a Man has not in his own proper Right, but only in the Right of another ſuperior to him, *viz.* ſuch a Juriſdiction as the Prince or Sovereign Power gives him for a Time only; ſometimes with a full, and ſometimes with a limited Commiſſion; And it expires uſually on the Death of the Perſon, that de-
† D. 2. 1. 6. legates him †. But the Juriſdiction of a *delegated* Judge, before whom Iſſue has been join'd, does not expire by the Death of him who granted ſuch Commiſſion or Delegation to him: yet if the Judge, who delegates another, dies before Iſſue join'd, the Perſon delegated ought not to proceed in virtue of ſuch Delegation or Commiſſion, according to the Doctrine of the *Civil* Law; but (I think) this to be no good Opinion by the *Canon* Law. For if a *delegated* Judge has cited a Perſon to appear in his Court before the Death of the Perſon that delegated him, ſuch
‖ X. 1. 29. 20. a Citation perpetuates the Juriſdiction ‖. A certain Cauſe was committed to a delegated Judge, who thereupon immediately cited the Parties to appear, but Suit was not conteſted till after the Death of the Perſon that delegated him: And the Queſtion was, Whether the delegated Judge might afterwards proceed in the Canſe? And hereunto it was anſwer'd, That a Citation being ſerv'd and executed, the Cauſe or Buſineſs was in ſome meaſure begun, and therefore he might lawfully proceed in the Cauſe; eſpecially, if the *delegated* Judge was not certain of the Death of the Perſon that delegated him: For to perpetuate a Juriſdiction, 'tis not entirely neceſſary that Conteſtation of Suit ſhould be made before the Death of the Perſon that delegates another; nor is it neceſſary to perpetuate a Juriſdiction (I think) that a Citation ſhould be ſerv'd on the Party to be cited; but 'tis enough if it be decreed and emitted by the Judge. And the Juriſdiction of a *delegated* Judge, alſo expires immediately after a definitive Sentence is demanded to Execution, if ſuch Delegation or Commiſſion be only ſpecial to that particular Cauſe: but 'tis otherwiſe, if it has a general Reſpect to all Cauſes and Perſons within his Territory; as in the Caſe of a Biſhop's Chancellor, or an Archdeacon's Official.

A *Delegation* is a Committing of one or more Cauſes to be *judicially* heard and determin'd by him or them to whom ſuch Commiſſion of De-
* X. 1. 29. 3. legacy is granted, either by the Prince, or ſome *ordinary* Judge *: And as the efficient Cauſe thereof is the Will and Conſent of the Prince, or ſuch *ordinary* Judge added to the Conſent of him unto whom ſuch a
† X. 1. 29. 7, & 9. Delegation is made †; ſo the Perſon delegating, and the Perſon delegated, are the Subject of ſuch a Delegation. In reſpect of the Perſon delegated, 'tis neceſſary that he ſhould be a Freedman of good Wit and Judgment, skilful in the Law, and of a legal Age: and in Eccleſiaſtical Cauſes, according to the Papal Law, he ought to be an Eccleſiaſtical Perſon, ſubject to the Juriſdiction of the Perſon delegating; becauſe he that is not of ſuch Juriſdiction, cannot be aſſign'd a *Delegate* againſt his Will. In reſpect of an Eccleſiaſtical Perſon, the *Canon* Law diſtinguiſhes: For it ſays, That a Delegation is made either by the Pope himſelf, or elſe by his Legate, or laſtly, by ſome Biſhop. If it be made by a Biſhop, then a *ſimple* Clerk is enough, provided he be well vers'd and skill'd in the Laws, and qualify'd (as aforeſaid) in reſpect of Age: and in this laſt Caſe, according to the Papal Law, twenty Years of age is deem'd
* X. 1. 29. 41. ſufficient *, tho' King *James*'s Canons ‖ require the Perſon to be twenty
‖ Can. 127. ſix Years of age at leaſt. But if the Parties conſent to a Perſon of eighteen Years of age, or if the Prince ſhall aſſign ſuch a Delegate, the
* X. 1. 29. 41. Delegation is valid *: but if he be delegated by the Pope or his Legate, then 'tis neceſſary for him to be a Perſon veſted with ſome Dignity, or (at

(at leaſt) be a Canon of ſome Cathedral Church. There are ſome Perſons, to whom the Law forbids a Delegation to be made, either in reſpect of Nature, or elſe in reſpect of Manners. In reſpect of Nature, a Man that is Deaf, Dumb, perpetually Mad, and a Perſon under the Age of Puberty; becauſe he wants a good Judgment and Underſtanding *. In reſpect of Manners, Women and Bondmen cannot be Delegates; not that they want Judgment, but becauſe it is a receiv'd Rule in Law, that they ought not to be admitted into Civil Offices and Employments †. And the Law likewiſe forbids Infamous Perſons to be Judges or Delegates, and (among the *Romans*) ſuch as were expell'd the Senate.

* X. 1. 29.
41. 11. Q. 1.
4. 32. Q. 7. 26.
† X. 2. 27.
24. 33. Q. 5. 3.

By the *Civil* Law, an *ordinary* Judge cannot delegate thoſe Things which are matters of *mere* or *mix'd* Juriſdiction ‖; but 'tis otherwiſe by the *Canon* Law; becauſe, as this laſt is practis'd in *Popiſh* Countries, a Biſhop has a temporal Juriſdiction, and the Power *meri & mixti Imperii*, as 'tis ſaid the Biſhop of *Durham* had antiently here in *England*. But even in Popiſh Countries, a Biſhop cannot exerciſe theſe Matters in his own proper Perſon *; and, therefore, he is obliged to delegate the Exerciſe of this Juriſdiction to another †. The Form of the Delegation is the Tenor of the Commiſſion itſelf; which is diverſify'd according to the Condition and Quality of the Cauſes, Clauſes, and Perſons therein concern'd. For either the whole Buſineſs itſelf is delegated, or elſe only ſome Part of the Cauſe in controverſy, as the beginning, middle, or end thereof is committed to one or ſeveral Judges with this additional Clauſe, *viz.* *Quod ſi non omnes*; or elſe unto two only, with a Clauſe of *Quod ſi ambo, &c.* or with a Clauſe of *Appellatione remotâ, &c.* or elſe it is delegated only for a certain Time, or in a certain Place, and the like. But if no certain Form has been preſcrib'd, or no certain Clauſe added in the Letters Commiſſional, then the common Form of Law is to be obſerv'd ‖. A Juriſdiction founded upon former Letters Commiſſional expires, and is gone, *ipſo facto*, by a ſecond Commiſſion granted: And if a Juriſdiction be given to a Judge or other Perſon in reſpect of Quality, ſuch Juriſdiction vaniſhes and diſappears *pro tunc*, if ſuch a Quality be deny'd in the Judge. But whenever the Cauſe or Quality is deny'd, the Judge, to found his Juriſdiction, may take Cognizance of ſuch Cauſe or Quality, in order to ſee whether he has Juriſdiction or not: But the ſole Negation of a Cauſe or Quality, which gives Juriſdiction, does not entirely exclude the Juriſdiction, but only hinders and impeaches the Proceſs on the Principal Matter in ſuch a manner, as that the Defendant is not bound to give an Anſwer to the Plaintiff's Libel, unleſs a ſummary Cognizance be firſt had touching the *incident* Matter, *viz.* touching the Cauſe or Quality, which gives a Juriſdiction, in order to ſee whether the Matter be of a Civil or Eccleſiaſtical Nature, and the like. So that if a Perſon of a foreign Juriſdiction, ſhall on a Citation appear and alledge, That he has made no Contract, or committed any Crime within the Territory where he is cited, it ought in the firſt Place to be diſcuſs'd in a ſummary way, and ſeen whether he has made ſuch Contract, or committed any Crime therein, without any Prejudice to the *principal* Matter in Suit: And if it appears, that he has contracted or offended there, it may be afterwards proceeded in the *principal* Cauſe. *Note*, Particular Juriſdictions are not to be ſupported by Implications and Intendments of Law, but ought to be expreſly founded: And, in proving a Juriſdiction, ſingle Witneſſes are ſufficient to eſtabliſh the ſame by their Evidence. A Juriſdiction is either *ſimply* committed againſt ſome Perſons, and ſuch is a *delegated* Juriſdiction; or elſe 'tis ordain'd in reſpect of ſome Place or Territory, and then 'tis call'd an *ordinary* Juriſdiction.

* X. 3. 50. per tot.
† X. 5. 17. 4.
‖ X. 1. 29. 13 & 27.
‖ D. 1. 21. 1. 2 & 3.

By a *ſimple* Commiſſion or Delegation of a Cauſe, a *delegated* Judge may decree Monitions and Citations, and puniſh the Party cited for his Contumacy, if he does not appear according to the Citation, tho' the Letters Commiſſional do not expreſly give him that Power, and the Cauſe be only *ſimply* delegated to him *: For, the Cauſe being committed to him, he has a plenary Power thereby of doing all things which are known to belong to the Cognizance of that Cauſe †. If a Cauſe be only *ſimply* delegated to two or more Perſons, each of them may make a Sub-delegate, that is to ſay, he may commit his Power to his fellow Judge, or to another Perſon ‖, if he pleaſes, tho' this be not inſerted in the Commiſſion, *viz.* That *one of them may proceed therein without the other*, as I have already remembred. And if a Cauſe be committed to three Delegates or more, with a Clauſe (in the Commiſſion) of *quod ſi non omnes, &c.* that is to ſay, *if all of them cannot be preſent; yet let two of them execute the Commiſſion notwithſtanding* *: I ſay in this Caſe, if the Defendant has been only cited by two of them, he is not of neceſſity bound to appear, becauſe all three of them ought to be mention'd in the Citation, tho' they were not all preſent at the decreeing thereof †. But if a Cauſe be *ſimply* delegated to two Perſons, the Sentence of one of them is not valid withoutthe expreſs Concurrence of the other ‖.

* X. 1. 29. 5.
† X. 1. 29. 39.
‖ X. 1. 29. 6.
* X. 1. 29. 21.
† X. 1. 29. 22.
‖ X. 1. 29. 23.

A delegated Juriſdiction may be prorogued by tacit Conſent of Parties *de Re ad Rem* *, and from Time to Time; but for a *local* Prorogation thereof, the expreſs Conſent of Parties is required: for a Perſon delegated to take Cognizance of Cauſes in one Dioceſs, cannot take Cognizance thereof out of ſuch Dioceſs without the expreſs Conſent of Parties. If a Cauſe be delegated or committed to be decided within a certain Day prefix'd, ſuch Commiſſion or Delegation ceaſes and expires by a Lapſe of the Day prefix'd, unleſs the ſame be prorogued by the common Conſent of all Parties therein concern'd. For a *delegated* Juriſdiction is not extended beyond what is contain'd in the Commiſſion of the Perſon delegating the ſame: And, therefore, if the Judge proceeds on other Matters, he may be contradicted and appeal'd from; but if there be no Appeal, the Judgment or Sentence which is founded on a foreign Plea is valid. Tho' no one ought regularly to be judged out of his own proper Juriſdiction †; yet if a Perſon commits a Crime out of his own proper Juriſdiction, he ſhall be puniſh'd where he commits the Crime ‖: for a Crime committed out of a Man's own Juriſdiction, induces a Juriſdiction over an extraneous Perſon; for the Cauſe ſhall be there heard and try'd, where the Crime was committed *.

* Paul de Caſtr. in l. 74. D. 5. 1.
† 3. Q. 6. 12, 13, 14, & 15.
‖ 3. Q. 6. 18.
* 6. Q. 3. 4, & 5.

A Juriſdiction has a twofold Object, *viz.* the *Agent* and the *Patient*. In reſpect of the *Agent*, the Juriſdiction is placed in the Judge, who acts and adminiſters Juſtice; as a Kingdom is placed in a King, who governs the ſame: But in reſpect of the *Patient*, it reſides in the Perſons, againſt or in favour of whom the Law is given. In the *Roman* Church, Abbots are forbidden to uſurp that Juriſdiction which belongs to *ſimple* Clerks and Biſhops, and which concerns the Cure of Souls †: Nor can Women, according to the *Civil* or *Canon* Law, have the exerciſe of Juriſdiction, unleſs it be in reſpect of ſome Dignity which they have; becauſe they cannot, thro' their great Modeſty and the Imbecillity of their Nature, diſcharge the Office of a Man ‖: Yet if a Dignity, with a Juriſdiction annex'd to it, devolves to a Woman by Law, ſhe may exerciſe the ſame; and diſcharge the Office of a Man. As for Inſtance, in a Woman to whom a Kingdom devolves for want of Male Heirs thereunto: But the *Salick* Law, as receiv'd in *France*, forbids this there. By the

† 16. Q. 1. 10.
‖ X. 2. 27. 24.

the *Canon* Law (I grant) an Abbeſs may have Epiſcopal Juriſdiction *: And tho' ſhe cannot of her ſelf excommunicate, yet ſhe may implore the *Office* of the ſuperior Judge, that he would excommunitate ſuch Perſons as ſhew Diſobedience to her †. For an Inferior having Juriſdiction, in important Caſes, may have Recourſe to the *local* Superior or Ordinary, and implore him to demand his Sentence to Execution, by compelling ſuch as are Subject to ſuch inferior Judge to obey him: And in this Matter, a Biſhop is oblig'd to aſſiſt a Lady Abbeſs ‖.

* X. 1. 33. 12.

† Dd. in c. 12. X. 1. 33.

‖ Dd. ut ſup

According to *Baldus*, all Power and Juriſdiction is derived from the Prince or Emperor; and as it deſcends from him to his inferior Magiſtrates, ſo it returns to him again: Wherefore, a Perſon inferior to a Sovereign Prince, is not preſum'd in Monarchies to have any Juriſdiction or Command over others; becauſe all Juriſdiction is lodged with the Sovereign Power; and if the Office of a Judge be a publick and not a private Office, then no one inferior to the ſovereign Power can aſſume the Rights of Magiſtracy and Juriſdiction to himſelf, but ought to be made a Magiſtrate and a Judge by the Prince himſelf. Therefore, he that avouches a Juriſdiction to be given to him, ought to prove the ſame; becauſe Juriſdiction is a matter of Fact, and Facts themſelves are not preſum'd, but ought to be prov'd. And hence 'tis, that Juriſdiction is a certain Quality, which is not a Man's by Nature, but ſo ariſing to one as it does not accrue to another; and for this Reaſon likewiſe it ought to be prov'd. Therefore, whoever avers himſelf to have a Juriſdiction, whether it be an *ordinary* or a *delegated* Juriſdiction, ought to prove it. Now this is prov'd *firſt* by *Inveſtiture*; whereby the Perſon ſhows, that he has a Mannor or Lordſhip granted him with *Juriſdictional* Authority. *2dly*, 'Tis prov'd from the Letters or Inſtrument of his Commiſſion, which Commiſſional Letters ſuch Magiſtrate ought to preſent and exhibit upon his immediate entrance into any Town, City, Province and the like, where he has Juriſdiction; commanding the ſame to be publiſh'd in the uſual Places for ſo doing, according to the Advice of *Bartolus* *, *Speculator* †, and others. But this is otherwiſe, if the *ordinary* Juriſdiction of ſuch Magiſtrate has been already made publick either by Inveſtitures or open Commiſſions: For then this Juriſdiction is, for the future, preſumed; and, it being once manifeſtly known to the Province, *&c.* 'tis not neceſſary to prove the ſame again. And in this Senſe we ought to underſtand *Baldus* ‖, ſaying, that a Perſon is preſum'd to have *ordinary* Juriſdiction, when he has been already poſſeſs'd of the Adminiſtration thereof in a publick manner. For when a Judge has been once admitted as ſuch, he is preſum'd to be ſuch as long as the Time of his Office laſts. And if ſuch Judge ſhall happen to be in a Place or Province wherein his Juriſdiction is not notorious in this manner, and a Party ſhall upon a *Non-conſtat* deny the ſame, he may (according to *Vantius* *) prove it by common Fame and Opinion. *2dly*, This is otherwiſe when a Sentence has been pronounced by ſuch a Judge againſt a Perſon preſent, and not in Terms oppoſing the ſame. For in ſuch a Caſe a Juriſdiction is preſum'd; and therefore, the *onus probandi* is incumbent on him (according to *Bartolus* ‖, *Innocent*, and others) that avers the contrary: Becauſe the Perſon, againſt whom the Sentence is pronounced, has brought this Miſchief on himſelf by his own Conſent and Silence, and a Preſumption likewiſe lies for the Matter itſelf adjudged. *3dly*, 'Tis otherwiſe, when the Suit has been conteſted by the Parties themſelves: For, according to *Innocentius* *, no Credit is given to a Perſon aſſerting *ex-Poſt-facto*, That ſuch a one is no competent Judge, but

* In l. 5. C. 10. 1.

† Tit. de legat. 8. ſupereſt. verſ. *& pro hoc ſedis.*

‖ In l. 22. C. 1. 3.

* De null. Pr. Tit. Quib. mod. Sent. Null. rep. N. 95.

† In l. 2. D. 4. 5. N. 7.

‖ In c. 44. X. 1. 6. in 31. X. 1. 29. in c. 3. X. 5. 31.

* In c. 3. X. 5. 31.

but he muſt prove the ſame, ſince a Man cannot reprobate and diſallow of what he has once approv'd.

There is one kind of Juriſdiction in Temporals and Spirituals, which is ſtiled *voluntary*, as I have before hinted; and another, which is term'd *contentious* Juriſdiction. *Voluntary* Juriſdiction, is that which does in a great meaſure depend on the meer Will and Pleaſure of the Superior; and, therefore, 'tis not neceſſary, that it ſhould be executed with a ſolemnity
* D. 1. 16. 2. of Judicature *, the Judge ſitting on the Bench, *&c.* ſo that thoſe things are ſaid to be matters of *voluntary* Juriſdiction, which the Parties do of their own Will and Choice, without any Neceſſity and Diſpute at Law. But thoſe Things are ſaid to be the Object of *contentious* Juriſdiction, which are tranſacted in Courts of Judicature, and which are rendred valid by Compulſion.

There is alſo another Diviſion of Juriſdiction, *viz.* into *Civil* and *Eccleſiaſtical:* the laſt of which was originally in the whole Church, till in after Ages, Biſhops got the upper hand of the People, and placed them in the Seat of Power by the Grant of Chriſtian Emperors. For tho' the chief Buſineſs of Biſhops is to inſtruct their Flock in the Word of God, and to give a good example of Life; yet ſince all Men will not be obedient to the Word, nor brought by the Perſuaſion thereof to good Nurture, nor kept in Order; and, the Eminence of the Degree wherein Biſhops are placed, being not ſufficient to keep the People in Obedience without ſome Power and Juriſdiction: Therefore ſuch of
† C. 1. 4. per tot. the *Roman* Emperors as profeſs'd Chriſtianity, aſſign'd † certain peculiar Juriſdictions Eccleſiaſtical unto Biſhops over Perſons and Cauſes Eccleſiaſtical, ſuch as concern'd the Soul of Man, or appertain'd to any charitable Uſe; and over the Laity, as far as the Laity themſelves have been content to ſubmit themſelves to their Government, *viz.* as far as it concerns the Health of their Souls, or the outward Government of the Church in Things decent or comely, or it concerns poor and miſerable Perſons: And in all theſe Things a Biſhop was antiently to perform double Faith and Sanctity; *firſt*, that of an uncorrupt Judge; and, *ſecondly*, that of a holy Biſhop. And as a Biſhop or Metropolitan, was not to intermeddle with the Juriſdiction of another Biſhop without his
* 9. Q. 3. 7. Knowledge and Conſent *: So a Patriarch or Primate, according to the
† 9. Q. 3. 8. *Canon* Law †, has not immediate Juriſdiction over Biſhops, but only over Archbiſhops, as will be remembred under the Title of *Patriarchs, &c.* The Church has Juriſdiction in divers Crimes, as Sacrilege, Uſury, Perjury, Inceſt, Adultery, Fornication, Hereſy, Schiſm, Simony, Drunkenneſs, Blaſphemy, *&c.* as I have and ſhall ſhew under their reſpective Heads. But if the Eccleſiaſtical Court exceeds its Juriſdiction by proceeding in Matters not within its reach, the Proceedings are null and void: for if a Court has not Juriſdiction of the Cauſe, all is void; but other Faults only render the Proceedings voidable: yet if the Juriſdiction of a Court be once admitted by the Defendant's Pleading, as
‖ 9 H. 7. 12. ſurely it is ‖; it is then too late to object againſt the ſame, and to pray a Prohibition; for Eccleſiaſtical Courts here in *England* are to be kept within the Limits of their own Juriſdiction by Prohibitions from the King's Temporal Courts. If a Judge has not Juriſdiction *primâ facie*, 'tis neceſſary in the firſt place (unleſs it be in ſome certain Caſes) for the Perſon commencing the Suit before ſuch a Judge, to ſet forth and prove that the Cauſe begun before him, is of ſuch a Nature of which he has Juriſdiction. For in ſuch Matters as give Juriſdiction to a Judge, the Proof of ſuch Juriſdiction is of neceſſity required *in principio Judicii*, otherwiſe the Proceſs is null and void.

Though

Though an Eccleſiaſtical Juriſdiction cannot be demis'd or let to Farm under a certain yearly Rent; yet if a Perſon having ſuch Juriſdiction ſhould allot a certain Sum of Money to another Perſon for his Salary, in ſuch a manner as that his Deputy or Official ſhould become accountable to him for the whole Profits of the Juriſdiction, ſuch an Allocation is lawful *, becauſe he does not hereby demiſe and let the ſame unto Farm: But if a Perſon having Juriſdiction ſhall delegate the ſame unto another in ſuch a manner as that (the Perſon delegated paying him a certain Rent or Portion of Money out of the ſame) he may retain the reſidue of the Profits to himſelf *pro labore ſuo*; this (I ſay) is not lawful for him to do (tho' too frequently practis'd) becauſe it is a plain letting to Farm, and the Perſon receiving the Rent or Money in ſuch a manner, ſhall, by the *Canon* Law, be depriv'd of his Office, and for ever be remov'd from being a Clerk †; that is to ſay, he ſhall ſuffer Depoſition, ſince ſpiritual Offices by that Law, ought not be purchaſed or ſold for a yearly Rent, it being a kind of Simony. And the Perſon likewiſe who commits or delegates an Eccleſiaſtical Juriſdiction in ſuch an odious manner, ſhall loſe his Office during Life.

* 12. Q. 2. 45. & 66. Bern. in c. 1. X. 5. 4.

† Hoſt. in c. 1. X. 5. 4.

Of Kindred; and the ſeveral Diviſions, Degrees, and Diſtinctions thereof, &c.

SINCE no Student in the Law ought to be ignorant of ſo uſeful a Part of Knowledge as that of *Kindred*, and of the ſeveral Degrees and Diſtinctions thereof *; and this upon many Accounts, as it concerns Matrimony, Guardianſhip, Succeſſion unto Inteſtates Eſtates, and the like: I ſhall, therefore, under this Title treat of *Kindred* according to its ſeveral Degrees, Branches and Diſtinctions. Now thoſe Perſons are in *Latin* uſually ſtiled *Cognati*, or *Kindred* in *Engliſh*, that are by Birth deſcended from one and the ſame common Stock; that is to ſay (according to *Modeſtinus*) *communiter nati* †, or (as *Ulpian* has it) *quaſi ex uno nati*; and having, as it were, but one common Beginning. And tho' the Law of the twelve Tables ſtiles them *Agnati*, yet, by the *Roman* Law, there is this difference between the *Agnati* and *Cognati*: the firſt being ſuch as are of kin by the Father's ſide, and deſcended from the ſame Family; whereas the latter, which by that Law are never called *Agnati*, are ſuch as are ally'd to each other by the Mother's ſide. But waving this Diſtinction, as it is now taken away by the modern Law ||, as well in reſpect of Guardianſhip, as in point of Succeſſion to Inteſtates Eſtates, I ſhall here diſcourſe of Kindred as it is a Proximity of Blood, which renders ſeveral Marriages, that are otherwiſe in their Nature lawful, both impious and diſallowable between certain Perſons; both the Law as well as Nature itſelf abhorring ſuch Conjunctions.

* D. 38. 10. 10.

† D. 38. 10. 4. 1.

|| Nov. 118. cap. 4.

But though, according to the proper Senſe of the Word *Kindred*, it only denotes and includes ſuch Perſons as are deſcended from the ſame common Stock *; yet by Marriage we have divided Kindred into what we call *Conſanguinity* and *Affinity*; and make Kindred to ſignify a certain Body of Perſons, that are ally'd unto each other either by Blood or by Marriage. The firſt we ſtile in *Latin Conſanguinei*, as being of the ſame Blood; and the latter we term *Affines*. So that as *Conſanguinity* is the

* D. ut ſupr.

joining together of ſeveral Perſons by Blood; ſo *Affinity* is a Civil Bond of Perſons, that are ally'd unto each by Marriage or Eſpouſals, according to the *Canon* Law. That which I here call a *civil Bond*, *Azo* and *Clariſius* do both of them term *Proximity*. I call it a *civil* Bond, becauſe lawful Marriage cannot be contracted between Perſons forbidden by the Law to marry each other; and I call it a *Bond*, becauſe Perſons are join'd together in one Body by Affinity. And laſtly, I have added the Word *Eſpouſals*; becauſe, by the *Civil* and *Canon* Law, there is and may be a good Affinity between Perſons betrothed only. Now all the Kindred of the Husband and Wife (in reſpect of Marriage) being thus join'd together, they are in *Latin* ſtiled *Affines*, becauſe theſe two Relations, which are diſtinct in regard of each other, are by Marriage united together, and approach each other *ad finem cognationis*, on the Verge of Kindred. And though it is often ſaid, that there is no room for Affinity without a Marriage-Contract, yet both *Accurſius* and *Panormitan* on the *Civil* and *Canon* Law, do each of them hold, that Affinity may be contracted in Bar to Matrimony without ſuch a Contract, tho' not in reſpect of other matters.

In propriety of Speech, only Brothers and Siſters are ſaid to be of the Conſanguinity, when they are deſcended from the ſame Father; and further, thoſe of the Conſanguinity are not reckon'd, according to *Alexander* †: But, according to *Baldus* ||, *Barbatia* *, and the reſt of the Doctors, the Conſanguinity, in ſtrictneſs of Speech, not only extends it ſelf to Brothers and Siſters, but to all in the collateral Line. And *Alexander* himſelf confeſſes; that the Word *Conſanguineus*, in the common uſage of Speech, is ſtretch'd to every one ally'd by Blood even beyond the ſecond Degree †, as the *Canoniſts* ſay; that is, beyond Brothers and Siſters. But (I think) that Perſons of kin by Blood on the Mother's ſide, as well as thoſe on the Father's, may very well be call'd *Conſanguinei*, and the Law ſufficiently juſtifies the ſame ||, as well as the common way of Speech, which ought always to be regarded *. Conſanguinity has many Privileges and Operations in Law, which are too numerous to be here ſpecify'd; as a Kinſman, by Blood, may converſe with an excommunicated Perſon of the ſame Relation without incurring Excommunication, which no other Perſon but ſuch a Kinſman can do †: And by the *Civil* Law, ſuch a Kinſman may be an Advocate for his Kindred by Blood, even againſt the State, which no other Perſon can, according to *Speculator*, touching Advocates ||; and ſuch a Perſon receiving his baniſh'd Kindred is puniſh'd in a more gentle manner, than if he had entertain'd a baniſh'd Stranger †, *&c.* The Proof of Conſanguinity, as it ariſes from the Procreation or Propagation of Mankind, which we in other Terms call *Filiation*, is a matter of equal Difficulty with *Filiation* itſelf, becauſe this is an Act of Secrecy, and does not (as the Doctors obſerve *) fall under our corporeal Senſes: And, therefore, it may be prov'd by Fame, Conjectures, and Preſumptions †; eſpecially, if ſuch Conſanguinity be antient and immemorial. According to *Alexander*, the Term of fifty ſix Years may in this reſpect be ſaid to be *Tempus antiquum* ||; becauſe, thro' the ſhortneſs of human Life, an Act done before ſuch a number of Years, cannot eaſily be prov'd by Men ſurviving ſuch a term of Years, which in ſome Countries ſeldom happens. But if Conſanguinity or Affinity, which admits of the ſame Proof with the former, has been ſo lately contracted, as that it does not exceed the Memory of Man, then publick Voice and Fame is not ſufficient to prove the ſame, but ſome Overt-act ought to be prov'd together with ſuch Fame; as the calling a Man by the Name of *Father*, *Son*, *Brother*, *Couſin*, and the like.

† Conſ. 228.
|| In c. 1. vi. 3. 11.
* In l. 30. C. 6. 42.

† Conſ. 82. lib. 1. N. 1.

|| D. 29. 2. 30. 3.
* D. 33. 10. 7.

† 11. Q. 3. 103. X. 5. 39. 31.

|| §. 1. verſ. ſed nunquid.
† D. 47. 16. 2.

* In l. 83. D. 35. 1. Dec. Conſ. 195. Anch. Conſ. 52. † Socin. Conſ. 89. vol. 1. Jaſ. Conſ. 114. v. 1.
|| Alex. Conſ. 90. vol. 6. Jaſ. ut ſup.

like *. And Inſtruments and Deeds are alſo a concurrent Evidence, together with a publick Fame, to prove Conſanguinity or Affinity, tho' ſuch Conſanguinity or Affinity be only mention'd therein by way of Enunciation.

* Bart. in L. 9. D. 1. 6. Bald. in L. 9. C. 9. 1.

The Kindred is diſtinguiſh'd by Lines or Limits, *viz.* either by the *Right* Line or the *Collateral* †. The *Right* Line is of Parents and their Children, computing by Aſcendants and Deſcendants. The *Collateral* Line is between Brothers and Siſters, and the reſt of the Kindred among themſelves. For when the Queſtion is ask'd, How ſuch Perſons are of kin? you muſt aſcend to the Stock from whence both Parties ſprang, and deſcend *Collaterally* and Obliquely, to find out the Degrees. Now a *Line* is nothing elſe but a Collection of Perſons deſcending from the ſame Stock, containing the Degrees, and diſtinguiſhing the ſeveral Relations of Kindred. And as Degrees are diſtinguiſh'd by Lines in order to number the ſame, ſo are Lines diſtinguiſh'd by Degrees. Therefore I ſhall in the next Place conſider, after what manner the Degrees of Kindred ought to be reckon'd. And to do this, we muſt firſt obſerve, that there is one kind of Kindred reckon'd upwards, and another reckon'd downwards in the *Right* Line; and a third kind, which is reckon'd Collaterally, or (as we ſay) *ex Tranſverſo*. The ſuperior Kindred in the Right Line, is that of Parents, and this is reckon'd upwards: And the inferior Kindred in the ſame Line is that of Children, which is always reckon'd downwards. And that which is reckon'd Collaterally or Tranſverſly, is that of Brothers and Siſters, as aforeſaid, and of ſuch as are born from them; and likewiſe Uncles and Aunts by the Father's ſide, and the ſame by the Mother's. Both the upper and lower Kindred begins from the firſt Degree; but that which is reckon'd *ex Tranſverſo*, or the *Collateral* Kindred, begins from the ſecond Degree. In the firſt Degree upwards we may reckon the Father and Mother, and downwards the Son and Daughter ‖. In the ſecond Degree upwards are the Grandfather and Grandmother, and downwards the Grandſon and Grandaughter: But in the *Collateral* Line, are the Brother and Siſter †. In the third Degree upwards are the Great Grandfather and Great Grandmother, and downwards is the Great Grandſon and Great Grandaughter: And in the Collateral Line, the Brother and Siſters Children; and likewiſe the Uncle and Aunt both by the Father and Mother's ſide *. The Uncle by the Father's ſide, is the Father's Brother, and is in *Greek* ſtiled Πατρώος; and the Uncle by the Mother, is the Mother's Brother, and in the ſame Language is properly term'd Μητρῶος; and each of theſe is, in that Tongue, promiſcuouſly call'd Θεῖος, but in the *Latin*, *Patruus* and *Avunculus*. The *Amita*, is the Aunt by the Father's ſide, or the Father's Siſter; and the *Matertera* is the Aunt by the Mother's ſide, or the Mother's Siſter. The firſt Degree only contains four Perſons, *viz.* the Father, Mother, Son and Daughter. But the ſecond Degree comprehends Twelve; the third Degree Thirty two; the fourth Degree includes Eighty Perſons; the fifth Degree takes in one Hundred and eighty four; the ſixth Degree four Hundred and forty eight; and the ſeventh Degree contains one Thouſand and twenty four Perſons †. It is not to be expected, that I ſhould here give the Reader a *Nomenclature*, or the diſtinct Names of theſe Relations within the compaſs of my preſent Deſign: But 'tis enough for me to refer him to the Text in the Law, and to his own Conſideration. By the *Civil* Law there are no Degrees in reſpect of *Affinity* ‖: But by the *Canon* Law, they are computed after the ſame manner as the Degrees of *Conſanguinity* are *. Touching the way and manner of computing theſe, ſee before the Title of *Degrees* in this Work †. But I muſt

† D. 38. 10. 1.

‖ D. 38. 10. 1. 12.

† Sect. 13. d. l.

* Sect. 14. d. l.

† D. 38. 10. 10. §. 12. 13, 14, 15, 16, 17 & 18.

‖ D. 38. 10. 4. 5.

* X. 4. 14. 8 & 9.

† Pag. 209.

*35. Q. 5. 2. must (notwithſtanding) here take notice, that the *Canon* Law * agrees with the *Civil* Law, in reckoning Degrees in Reſpect of the *Right* Line, tho' there is a Diſagreement between theſe two Laws in reſpect of the *Collateral* Lines, in that the *Canon* Law ſtops in its Computation at the common Stock: for which ſee *Page* 209, and the *Title* above quoted. The Common Law of *England* computes the Degrees of Kindred according to the *Canon* Law †.

† Cok. 1. Inſt. 24. a.

Of the Knights Templars, Hoſpitallers, &c.

THERE were heretofore ſeveral Perſons, who, according to the Farce of thoſe Times, were ſtiled *ſacred* Knights; and, theſe aſſembling themſelves together into divers Bodies, upon a pretended account of Religion, were incorporated for this End, tho' they never deſign'd the Means to come at it. Some of which Corporations or Colleges are now taken away, and others of them are ſtill extant and ſubſiſting. And tho' the Inſtitution and Foundation of theſe Knights was at firſt from very ſmall Beginnings, yet it afterwards, in proceſs of time, arrived to great Wealth and Riches in the World. For about the Year of our Lord 1099, when the Chriſtians re-poſſeſs'd themſelves of *Jeruſalem*, there were then at *Jeruſalem* ſeveral Chriſtians called the *Latins*, who obtain'd a Grant from the *Saracens*, having the Government thereof, that they might have Houſes near our Lord's Sepulcher: and, in purſuance of this Grant, they built a Religious Houſe in Honour of the Virgin *Mary*, call'd the *Latin* Abbey. And the Duty and Office of the Abbot, was to receive and entertain all ſuch Strangers as came thither on the Score of Religion; provided, they were of the *Latin* Church: A noble Stratagem of the Biſhop of *Rome*, to get Footing in the *Eaſtern* Countries! Hereunto there was aftetwards added the Abbey of St. *Mary Magdalene*, being alſo another Religious Houſe, which was for the Reception of Women, that Chriſtians might come together there and propagate their *Species*. But the Number of Pilgrims increas'd ſo faſt hereupon, that theſe Religious Houſes were not ſufficieent for their Reception, and, therefore, they built another Hoſpital or Houſe of Entertainment, which they dedicated to God by the Name and Title of St. *John the Baptiſt*'s Hoſpital: And over this Houſe they ſet one Prefect or Governor for the Rule thereof, according to *Polyd. Virgil, de rerum Inventoribus* ||. And out of theſe ſeveral Houſes, have ſince proceeded divers Families or Orders of Knighthood bearing the Croſs: For from their Example, ſeveral other ſuperſtitious Perſons have mark'd themſelves with the Croſs, in order to perform the ſame Military Service in the Cauſe of Religion.

|| Lib. 7. c. 5.

Guil. Tyrius in the ſecond Book of his Hiſtory of the Holy War (as it is called) writes; That the Chriſtians alſo built a Temple at *Jeruſalem* on the Permiſſion of the *Arabians*, after the Ruin of the Temple by *Coſdroas* King of *Perſia*, which (he ſays) was extant even in his Time: For this *Coſdroas*, about the Year 610, in the Time of the Emperor *Heraclius*, took *Jeruſalem* and a great Part of *Aſia*, and laid the ſame waſte to the ground. After this the *Arabian* Power diſplay'd itſelf apace and

and got ground in the Eaſt, under the Command of *Homar* the Son of *Chorab*, and the Author of the *Mahometan* Religion; who, having again depopulated all *Paleſtine*, *Syria*, and *Damaſcus*, now left *Jeruſalem* in its Ruins to be govern'd by his own Laws, and tributary to him; giving the Chriſtians a Power to rebuild their Temple in the Place where it ſtood, when it was deſtroy'd by *Titus Veſpaſian*, and to enjoy their own Religion. To this Temple, Revenues were aſſign'd; and ſuch Knights as came thither as Pilgrims to viſit the Holy Sepulcher, were to have the Government and Conſervation thereof, according to *Paul Æmilius*, in the fifth Book of his Hiſtory. But the Order of the Knights *Templars* was not then founded, (as ſome will have it) but by *Baldwin* the fourth King of *Jeruſalem*, about the Beginning of the twelfth Century *; and were appointed for the Defence of that City, and the ſafe Convoy of all ſuch as went thither. At which Time ſeveral Perſons of Quality, and of the Order of Knighthood, devoting themſelves to the Service of the Church, and to live after the manner of Canons Regular, in Chaſtity and Obedience towards their Superior, and without any ſuch Thing as Property, profeſs'd themſelves of a Religious Order. And whereas they had no Habitation, *Baldwin* granted them that part of his Palace, which was near the aforeſaid Temple, and likewiſe Proviſion and temporal Eſtates in perpetuity to live on. The *Templar* Canons alſo granted them a certain Piece of Ground near the Temple and Palace to build on. Afterwards by the Pious Bounty of Princes, as Piety went in thoſe Days, they were diſpers'd into all Parts of *Chriſtendom*, and richly endow'd with large Poſſeſſions, which made them degenerate very much from their firſt Inſtitution, and become execrably vicious: For which reaſon all Chriſtian Princes did combine together to ſeize and apprehend them, and to turn them out of their Order and Eſtates, the *French* King being the foremoſt in this Deſign, becauſe (as is pretended) he had Thoughts of making one of his Sons King of *Jeruſalem*, and getting their Revenues for him. Their Accuſation was brought to the Council at *Vienna*, and they were condemn'd to be rooted out and aboliſh'd, as is evident from the condemnatory Sentence againſt them in the Bull of Pope *Clement* the Vth. wherein we meet with theſe Words, *viz.* *Quanquam de Jure poſſumus, tamen ad Plenitudinem poteſtatis dictum ordinem reprobamus* †. And then their Eſtates were given to the *Hoſpitallers*; of which by and by. King *Richard* II. ſoon after his Coronation, did at once Arreſt all the Knights *Templars* throughout *England*, committing them to Priſon, according to the Example given him by the *French* King. For the firſt nine Years after their Inſtitution they were modeſt and humble, wearing a Secular Habit, and cloathed in a Charity Dreſs. But, in the ninth Year, at the Council of *Creſſy* in *France*, they had a Rule and a white Garment or Robes aſſign'd them; and by the Order of Pope *Honorius*, and *Stephen* Patriarch of *Jeruſalem*, their number was greatly increas'd. And in the Papacy of *Eugene*, not only the Knights, but alſo the inferior Friars, which were called their Servants or Eſquires, began to wear Croſſes of red Cloth on their white Mantles or Gowns. See *Tyrius* his Hiſtory of the Holy War ||, which was written under *Baldwin* the Vth. about the Year 1180. Pope *Alexander* the Third, in a *Decretal* of his, ſtiles theſe *Templars* by the Name of Religious and Hoſpitaller Friars, ſaying, they had ſome Churches ſubject to them *pleno Jure*, and others for Inſtitution wherein-to they were to pray the Biſhop's Authority *. This Order of *Templars* was approv'd of in *Italy* by Pope *Innocent* † III. who was elected to the Papacy *Anno Dom.* 1198. *Platina* in the Life of Pope *Clement* V. ſays,

* A.D. 1118.

† A.D. 1312.

|| Lib. 12. cap. 7.

* X. 5. 33. 3. 3.

† X. 2. 1. 16.

ſays, That the Order of theſe fighting Friars was demoliſh'd on the account of conſpiring and joining with the *Saracens* againſt Chriſtianity: And the Abbot of *Urſpergh* will have it, that their Deſtruction was owing to their Treachery in betraying the Emperor *Frederick* the Second; tho' *Gaguinus* affirms ‖, That it was for betraying *Lewis* King of *France*, being ill-affected to the *French* Nation. But whatever the Occaſion was, *Albericus de Roſate* ſays, That *Pope Clement* was reſolv'd to extirpate the Race of them; and, therefore, though he could not deſtroy the Order *viâ Juſtitiæ*; yet he wou'd do it *viâ Expedientiæ*, leſt his dear Son the *French* King ſhould be offended. Yet *Hermannus* will have it, that they were falſly accus'd of Hereſy by the ſaid Pope, in order to oblige the *French* King *.

‖ Lib. 7. de vit. Philip.

* Herman. Chron.

But the Number of Pilgrims to the Holy Sepulcher increaſing ſo faſt in thoſe Times of Darkneſs, a Hoſpital was built near the Temple of *Jeruſalem* (as I have already obſerv'd) ſtiled by the Name and Title of St. *John*'s Hoſpital, which was for the Reception of all ſuch Pilgrims the Abbeys could not contain. Wherefore for the Miniſtry of this Houſe, divers Noblemen on a ſuppos'd Principle of Piety devoted themſelves hereunto; and were as a Guard to the Pilgrims, to defend them from the Incurſions of the *Saracens* and other Robbers. Theſe Knights or Champions for the Church, renouncing and laying aſide all manner of Property, as the *Templars* did in the Beginning, profeſſed a ſolemn Vow of Poverty, Chaſtity and Obedience. Therefore, on the ſcore of their firſt Vow, they could have no ſuch Thing as Property, but were to receive a certain Maintenance during Life from the Revenues of the Hoſpital, whereunto they did belong. On the Account of their Vow of Chaſtity, they were nearly related to Eccleſiaſticks; and, therefore, they could not take a Wife, according to the Statutes of the ſaid Hoſpital: And Pope *Alexander* III. when he did forbid them Marriage, ſtiled them by the Title of the Friars of St. *John of Jeruſalem*; and their Head he term'd a *Prior* †. And Pope *Innocent* III. gave them the ſame Style or Title ‖. But yet they were not Eccleſiaſtical Perſons, ſince they might freely, and by Profeſſion, bear Arms in defence of the Chriſtian Faith againſt the *Saracens*, after the Example of the *Maccabees*; which Clergymen are not allow'd by the *Canon* Law to do. And tho' theſe *Hoſpitaller* Knights ought not to become Prieſts according to their Order; yet we find in a Letter wrote to them by Pope *Honorius* the Third, That he ſays he had heard their *Prior* ought to be a Presbyter. Pope *Alexander*, in a Conſtitution made by him during his Papacy, ſtiles the *Templars* by the Name of *Hoſpitaller* Friars (as aforeſaid) but ſurely theſe were two diſtinct Orders. The chief Reaſon why I have here troubled the Reader with an account of theſe Religious Knights, is, becauſe we have frequent mention made of them in our Books of the *Common* as well as the *Canon* Law; and that both the Knights *Templars* and *Hoſpitallers* were diſcharged from the Payment of Tithes in reſpect of their Eſtates which they held in their own Hands: which they could not have been, if they had not been deem'd Eccleſiaſtical Perſons. The Corporation and Order of *Hoſpitallers* here in *England* was diſſolved by a ſpecial Act made in the thirty ſecond of *Henry* VIII. Chap. 24. by which their Poſſeſſions were given to the King, with all the Privileges and Immunities thereunto belonging. And thus I have done with them, till I come to diſcourſe of Tithes hereafter, under the Title of Tithes.

† X. 3. 32. 8.

‖ X. 5. 33. 11. Gloſs. ibi. X. 3. 30. 31.

Of

Of a Lapſe or Devolution, and how it accrues.

A *Lapſe*, by the *Canon* Law ſtiled a *Devolution*, is a transferring (by Forfeiture) of that Right and Power, which a Perſon has to preſent or collate to a vacant Benefice, from one Perſon to another, by Reaſon of ſome Act or Negligence in the Perſon that is veſted with ſuch Right and Power *: for if the Perſon, to whom ſuch Right of Preſentation or Collation belongs, does not preſent or collate thereunto within the Space of half a Year, the Power of preſenting or collating thereunto devolves to the next immediate Superior by way of Lapſe or Forfeiture, and ſhall not return to the inferior Perſon again for that Turn; becauſe the Nature of a Lapſe or Devolution, is, that an Eccleſiaſtical Benefice being thus devolv'd by the Neglect or Omiſſion of the Patron to preſent to a Church within ſix Months after Voidance, it ſhall not revert again to him for that Turn †. By the *Canon* Law, a Lapſe or Devolution may happen two ſeveral ways, and on a twofold Account. As *firſt*, when the Perſon that is thus depriv'd of his Right of electing, preſenting, or collating to a Benefice, has elected, preſented, or collated ſome very unfit and diſqualify'd Perſon ‖. And *ſecondly*, When he has not diſcharged the Duty of his Truſt within a certain time preſcrib'd by the Law for that end and purpoſe*: for, he that abuſes the Truſt and Power granted him, ought to loſe the ſame †. A Lapſe happens not only by the Patron's being privy unto ſuch Voidance, but alſo by his Ignorance thereof; except only where ſuch Voidance is made by Reſignation or Deprivation of the former Incumbent: In which two Caſes the Biſhop ought to give Notice or Intimation thereof to the Patron, that he may preſent another Clerk, before ſuch Lapſe or Devolution can happen. And thus a Lapſe is alſo an Act and Office of Truſt repos'd by Law in the Ordinary, Metropolitan, and (with us here in *England*) in the laſt Place reſerv'd unto the King; and the Title by a Lapſe is rather an Act of Adminiſtration than of Intereſt: But the Patron's Title continues againſt the Ordinary, and even againſt the King himſelf, till the Lapſe is executed by Plenarty. If the Ordinary dies after a Lapſe happens, his Executor ſhall not have it; but the King ſhall preſent in virtue of his Prerogative, though it has been a Queſtion among ſome, whether the King or Metropolitan ſhall have it. But if the Patron preſents, and his Clerk be inſtituted, and remains without Induction for eighteen Months, the King ſhall not preſent upon him by virtue of a Lapſe, as he may do upon a direct Patronage accruing to him, by having the Guardianſhip of the Temporalties, or by the Ward of his Tenants Heirs after Inſtitution, and before Induction. For the King cannot have a Lapſe, but where the Ordinary might have had it before him.

Now, according to *Hobart*, the Ordinary, or he that is to beſtow the Benefice by way of Lapſe, is as it were a *Negotiorum Geſtor*, or a kind of an Attorney made ſo by the Law to do that for the Patron, which he would himſelf (perhaps) have done, as ſuppos'd, if there had not been ſome Lett or Impediment that prevented him: And a Collation thus, is in Right of the Patron and for his Turn ‖. In *Albany*, and the Biſhop of

* X. 1. 6. 7. 4.

† vi. 3. 2. 5. C. 6. 7. 2.

‖ X. 1. 6. 7. 4.

* X. 1. 6. 41.

† C. 19. 11. D. 3. 5. 38. 74. Diſt. 7.

‖ Hob. Rep. p. 154.

of St. *Aſaph*'s Caſe, it was reſolv'd and agreed unto by the whole Court; That, in the Computation of the ſix Months, in reſpect of a Lapſe on notice given, the Reckoning ought not to be according to the Calendar, as *January*, *February*, and ſo on; but according to the Number of particular Days, by allowing twenty eight Days to every Month: which I take to be a wrong Judgment, becauſe the Law ſays *tempus ſemeſtre* †. But in *Catesbie*'s Caſe, the Time of Lapſe was adjudg'd according to the Computation of Calendar Months, and not according to the Computation of twenty eight Days to the Month. And it was adjudg'd in the Caſe of *Molineux*, that if the Patron preſents, and the Ordinary refuſes, he ought to give notice to the Perſon of the Patron thereof, if he be reſident within the County; and if not, then at the Church itſelf, which is become void: for ſufficient notice ought to be given after ſuch a Refuſal, and not as in the Caſe of the ſaid *Albany*, when the Church became void the 14th of *March*, and *Albany* preſented the 13th of *Auguſt*, and the 29th of *Auguſt* the ſix Months expir'd: yet the Biſhop did not give Notice to the Patron till the 4th of *September* of his Refuſal, and the 14th of *September* he collated. And it was adjudg'd not to be Notice, by reaſon of the great Delay of twenty two Days between the time of the Preſentation tendred, and Notice given. All the Doctors do agree, that a Lapſe or Devolution was introduced as a Puniſhment for Negligence ‖, as a Judge may be depriv'd of his Office for Negligence, and another ſubſtituted.

† vi. 3. 19. 1. 2.

‖ Gloſs in c. 14. vi. 1. 3. & in c. 17. vi. 1. 6.

By a Canon of the fourth Council of *Lateran*, it was decreed, That Eccleſiaſtical Prebends, and all other Offices in any Church, ſhould not continue long vacant, but the ſame ſhould be filled up within ſix Months, and conferr'd on ſuch Perſons as are fitly qualify'd for the Adminiſtration thereof *. But yet this Council decreed nothing in derogation of any ſhorter term of Time, in reſpect of filling up ſuch Eccleſiaſtical Livings as were to be diſpos'd of, and filled by ſome ſpecial Law within a leſſer Time; but leaves them to remain in their antient State. And by this Council, a Layman was to make his Preſentation to a vacant Church within four Months †, and a Clerk that had the Right of Patronage or Election, was to do the ſame within ſix Months ‖, otherwiſe the Right of collating thereunto did devolve to the Biſhop, or the next immediate Superior *. But in reſpect of the greater Benefices and Dignities in the Church, as Biſhopricks, Archbiſhopricks, and the like †, they ought to be full of a Paſtor within three Months after every Vacancy, under pain of a Devolution ‖, as aforeſaid: And thus, upon the Lapſe of every three or ſix Months, according to the Natute of the Benefice, a Devolution was made from one Superior to another till the Church was full, and the Right of Devolution commenc'd immediately from the Lapſe of ſuch Term. But tho' no other Reaſon can be given why this Council limited the term of ſix Months unto ordinary Collators, than that it ſo pleas'd the Law-makers; yet ſome will have it, that it was founded upon a Law in Pope *Gregory*'s Decretals, whereby Archbiſhops and Biſhops are bound to viſit their Provinces and Dioceſſes, (at leaſt) once a Year *: And, therefore, as they may in their ſemeſtral Viſitations inform themſelves touching ſuch Churches as are become void, this Council thought this a ſufficient time to convict any Perſon of Negligence in point of preſenting to Livings, eſpecially ſince a Benefice becomes void by ſix Months Non-Reſidence thereon †. And this term of ſix Months, and every other given to elect, preſent or collate to a Benefice, ſhall begin to be reckon'd from the Time of a true Preſumption of ſuch Vacancy, and ſhall have its proper Effect, if no legal Impediment happens to hinder the Perſon from diſ-

* X. 3. 8. 2.

† X. 3. 38. 27.

‖ X. 3. 8. 6.

* vi. 3. 19. c. un.

† X. 3. 8. 12.

‖ X. 1. 6. 41. 50. Diſt. 11. vi. 1. 6. 6. Dd. ibi.

* X. 3. 39. 21. X. 5. 7. 13.

† X. 3. 4. 11.

diſcharging the Duty of his Truſt ‖: For as negligent Perſons have no Relief in Law, ſo it is fit that Perſons who are hindred by a Neceſſity of their Affairs ſhould have aid in ſuch a Caſe *. But (I think) this Diſtinction of four and ſix Months, in reſpect of Lay and Eccleſiaſtical Patrons, was never receiv'd in *England* †.

‖ X. 3. 8. 2 & 5. X. 1. 11. 3.
* D. 4. 6. 16.
† Dr. and Stud. 116. b.

I have before obſerv'd, that, according to *Bernard de Compoſtella* and others ‖, when a Patron preſents a very unfit and unworthy Perſon for Inſtitution to a Living, a Devolution is thereby made to the Biſhop: But the *Canoniſts* ſay, That this has a reſpect only to Eccleſiaſtical Patrons, and does not happen when a Lay Patron preſents ſuch an unfit Perſon, though he ſhould do it knowingly. And herein *Hoſtienſis* * ſeems *primâ facie* to agree with *Compoſtella*, ſaying, that when the firſt Perſon preſented is unworthy, a Lay Patron preſenting ſuch a Clerk, may (perhaps) repent thereof †; yet he afterwards appears to contradict himſelf by adding, that the Dioceſan in admitting of a ſecond Preſentation is ſaid to gratify the Patron, becauſe he may repel the ſecond Preſentee, ſince the Patron has preſented a Clerk that is *minus idoneus*. But *Joh. Andreas* ‖ ſays, that if a Lay Patron preſents an unfit Perſon, he has till the end of four Months to preſent a fit one; and thus he may vary his Preſentation: But *Hen. de Bowick** will have it, that a Lay Patron cannot, even within four Months vary his Preſentation, unleſs the Biſhop admits of ſuch Variation. And thus the Doctors are divided in their Opinions about this Matter. But (I think) that, even in the Senſe of the *Canon* Law, a Lay Patron may vary his Preſentation within four Months, even without the Biſhop's Conſent; and whether he preſents an unfit Perſon knowing or ignorantly, ſuch a Preſentation ſhall not hinder a ſecond to be made, eſpecially before ſuch a Preſentation is tendred to the Biſhop. With us here in *England*, no Devolution happens on the Account of the unfitneſs of the Preſentee, but the Biſhop ought to give notice to the Patron of the unfitneſs of his Clerk; and then if the Patron ſhall not preſent another within the ſix Months, a Lapſe enſues thereupon. If the firſt Perſon preſented to the Biſhop by a Lay Patron be a Perſon well qualify'd in every reſpect, he ought not to ſet him aſide, but to give Inſtitution with all convenient ſpeed, not only under a Canonical Puniſhment which the Biſhop incurs by any unneceſſary delay †, but alſo *in pœnam animæ*, according to *Hoſtienſis* ‖ and others.

‖ In c. 4. X. 1. 31.
* In c. 24. X. 3. 38.
† D. 37. 6. 8.
‖ In c. 4. X. 1. 31.
* In c. 5. X. 3. 38.
† X. 3. 38. 29. in fin.
‖ In c. 24. X. 3. 38.

Every Lapſe or Devolution ought to be made *gradatim*, and not *per ſaltum*; as from the Patron to the Biſhop, from the Biſhop to the Archbiſhop, and from the Archbiſhop to the King; but, by the *Canon* Law, to the Pope finally, as every Devolution is from Patrons having Churches exempt from Epiſcopal Juriſdiction *. But in *regular* Churches, that are exempt from Epiſcopal Juriſdiction, the Biſhop of the Dioceſs, where ſuch Benefice lies, collates thereunto by the Pope's Authority †. During the Vacancy of the Biſhop's See, the Chapter may collate unto ſuch Benefices as are lapſed unto the Biſhop by way of Devolution, thro' the Neglect or Fault of an inferior Perſon ‖: But if Prebends become void *ſede vacante*, the Chapter ſhall not collate thereunto by way of Devolution *, becauſe a Collation unto Benefices is *in Fructu Epiſcopi*; and, therefore, they ſhall be reſerv'd to his future Succeſſor to diſpoſe thereof †.

* X. 1. 10. 2 & 3.
† vi. 3. 4. 32. Cl. 1. 5. 1.
‖ X. 1. 33. 14. Joh. Andr. in c. 17. vi. 1. 6.
* X. 3. 9. 2.
† vi. 1. 6. 40.

A Biſhop may collate by Lapſe, where two Patrons pretend a Right of Preſentation, and one ſues the other without naming the Biſhop, and recovers, and the ſix Months paſs, pending the Action: For in ſuch a Caſe the Biſhop was in no Fault ‖: And 'tis the ſame Thing, if after a Recovery the Defendant brings a Writ of Error upon the Judgment, and

‖ Rolls Abr. pt. 2d. 265.

the six Months expire before the Errors are determin'd. So likewise if a *Quare Impedit* be brought against the Bishop and Patron, who never presented any Clerk to him, if the six Months expire, the Bishop may collate, tho' his Title accru'd to him by Lapse pending the Writ: For he was no Disturber; and 'tis unreasonable he should lose his Title by any fraudulent Action brought against him *. So if the Bishop collates, and before his Clerk is inducted, the Patron presents, the Bishop may in this Case refuse him †. If the Bishop's Title should accrue by Lapse in the Archbishop's Visitation, and whilst the Ordinary is under an Inhibition, whereby all Acts of Jurisdiction are for a while suspended, tho' he cannot institute a Clerk himself; yet he may present him to the Archbishop, who is bound to do it. In the 18th of *Eliz.* it became a Question, that if the King's Presentee upon a Lapse should die after Institution, and before Induction, whether he should present again or not? And it was adjudg'd he should, because he had not the Effect of his first Presentation *: For the Incumbent dying, before Induction, that was a Revocation of his Presentation in Law.

* Rolls. ut sup. 266. Hob. Rep. 270.

† Dyer. Rep. p. 277.

* Rolls. ut sup. pr. 353. 9. Rep. 132.

There are several Matters which according to the Common Law of *England*, do prevent a Lapse; as when the Bishop delays the Examination of a Clerk presented to him for a Living till the six Months are expired, for the Bishop shall not receive an Advantage from his own Negligence ||: nor shall the Bishop collate by Lapse, where a *Quare Incumbravit* is brought against him *; but touching this, some have made a Query. Nor does a Lapse incur, when the Bishop refuses to award a *Jus-Patronatus* to try the Right of Presentation to a Benefice; because this would be to deprive the Patron of his just Right by a denial of Justice in the Bishop, which ought not to be suffer'd: But a Lapse may happen (pending a *Jus-Patronatus*) if it be not through the Bishop's default, that such *Jus-Patronatus* remains undetermin'd. And so likewise it shall, if the Patron's Clerk for whom it is certify'd, does not make a new Request to the Ordinary to be admitted †, which may be done upon the first Presentation, without any new Request of the Patron's. Nor, lastly, shall any Lapse incur, where the Right of Presentation is in the King; because the Words of the Statute of *Westminster* 2. are not particular enough: For though that Statute ordains, That Plenarty by six Months shall bar the Party that has a Right, yet it shall not bar the King, because he is not expresly named in the Statute, and the King's Prerogative *Quod nullum tempus occurrit Regi*, says *Jones*, shall not be taken away by a general Statute ||. And in Case the King does not present, all that the Ordinary can do, is to sequester the Profits of the Church, and appoint a Clerk to serve the Cure *. The King is Patron *Paramount* of all the Benefices within the Realm †; that is to say, That the King, in right of his Crown, is to see that all Places be duly supply'd with Persons fit for them: And if all others entrusted by Law neglect their Duties, then by the natural order and course of Government, it falls to the supreme Power, which is to supply the Defects, and reform Abuses; and thus the King comes to his Right after the Metropolitan's neglect.. This last resort for filling up of vacant Benefices by the Papal Law is vested in the Pope by virtue of his Supremacy: But as his Supremacy herein was never acknowledg'd by our Kings of *England*, it remain'd upon the Reformation of Religion with us, where it was before, *viz.* in the King. But where the King has a Title by Lapse, and does not present, but the Patron presents, and after the Church becomes void by Death, the King shall not present as it has been adjudg'd: But *Quære*, Whether this will make a diversity when it becomes by Deprivation? I think not, for the Reason already given ||.

|| 2. Rolls. Ab. 356.

* 17 E. 3. 75.

† 34 H. 6. 12.

|| Jon. Rep. 21.

* 18 E. 3. 21. 14 H. 7. 21.

† Plowd. C. 12. 498. b.

|| Pag. 331.

Of

Of Legacies, and the ſeveral Diſtinctions thereof, &c.

THE *Latin* Word *Legatum*, which we in *Engliſh* call a *Legacy*, is a generical Term, which from one particular Signification has a Relation to ſeveral Things: For the Word *Legare* in the Books of the *Civil* Law, ſeems to import the ſame as *Eligere*, *Mandare*, *Decernere*, and the like *. And hence by a Law of the twelve Tables, a Legacy was ſaid to be *voluntatis Electio*, of what Kind or Nature ſoever it was, whether it were of a general or particular Inſtitution and Appointment: For under the Name of a *Legacy*, the *Romans* included a *Fidei-commiſſum*, and a Donation *mortis cauſâ*; tho' the Word for the moſt part now, has only a reſpect to particular Legacies left by a laſt Will and Teſtament; for ſuch as ſucceed to the whole Eſtate or Inheritance are not now called *Legataries* or *Fidei-Commiſſarii*, but only ſuch as ſucceed to the particular parts of an Eſtate or Inheritance. And a *Fidei-Commiſſum* is a Legacy in Truſt, committed to the Honeſty of the Heir or Executor to be reſtor'd to another Perſon; as in this manner, *viz. I deſire he would give*; or, *I believe he will give ſuch a Thing to ſuch a Perſon:* Whereas Legacies are made by direct and *imperative* Terms.

* Alciat. in L. 120. D. 50. 16. N. 1.

Now a Legacy is a certain kind of Gift or Donation which a Perſon deceas'd has left by his laſt Will and Teſtament to be perform'd and made good by his Heir, or (as we call him in *England*) by his Executor, out of the Eſtate which belongs to him as Heir or Executor †. Whence we may infer, that a *Legacy* and an *Inheritance* (as the *Civilians* ſtile it) are not the ſame Thing, nor is a *Legatary* and an *Executor* the ſelf-ſame Perſon: And, conſequently, the impoſition or granting of a Legacy, is not the making and conſtituting of an Executor, tho' the Verb *Lego* or (in *Engliſh*) *I bequeath*, be ſometimes added and uſed to ſignify any or every laſt Will and Teſtament. Yea, if this Word *Lego* be added to an univerſality of Goods without expreſly naming an Executor, (for ſo I ſhall call an *Heir* in this Title) it denotes an Inſtitution or an Appointment of an Executor (at leaſt) by the preſumptive Will of the Teſtator ‖: as if the Teſtator ſhould ſay, *Lego omnia Bona mea Petro*, or, *I bequeath* all my Goods unto *Peter*, it is the ſelf-ſame Thing as if he had appointed him his Heir or Executor to all his Eſtate *. So that, according to this, a Legacy is twofold, *viz. Univerſal* and *Particular*.

† D. 31. 2. 36. D. 30. 1, 116.

‖ Bart. & Pd. in l. 15. D. 28. 6.

* Mant. lib. 4. De conj. ult. vol.

An *univerſal* Legacy happens, when the Teſtator onerates his Executor by obliging him to reſtore all his Goods and Eſtate unto ſuch a Perſon, as to *Peter* or *John*, *&c.* and this is the ſame as an univerſal *Fidei-Commiſſum*, or Legacy in Truſt. A particular Legacy happens, when the Executor is charged with an Incumbrance of paying ſomething certain, out of the Teſtator's Eſtate, to a third Perſon, which does not amount to the whole of his Subſtance. Now a Legacy is given ſeveral Ways; Firſt, *Purely* and *Simply*, that is to ſay, without any condition or determination of a Day certain; and ſuch a Legacy is immediately due to the Legatary after the Teſtator's Death. *Secondly*, A Legacy is limited

limited under a Condition, as when the Teſtator ſays, *I leave to* Titius *one Hundred Pounds, if he has a Son born within ſuch a time:* In which Caſe the Legacy is not due or payable, unleſs the Condition happens and comes to paſs. Moreover, a Condition is either expreſs'd, it being made in expreſs Terms; or elſe it is tacit, it being ſuch either by a Diſpoſition of Law, or elſe from the Will and Intention of the Teſtator. As when 'tis ſaid, *I leave to* Titius *one Hundred Pounds per annum.* For this Condition is thereby underſtood, *viz.* If *Titius* lives: For if *Titius* dies before the Teſtator, the Legacy does not deſcend to his Heirs or Executors *. Again, the Condition is either touching ſomething paſt, preſent or to come hereafter. And, laſtly, a Condition is either Neceſſary or Contingent, Poſſible or Impoſſible, Honeſt or Diſhoneſt, *&c.* It has been a Queſtion, whether a Legacy of Dowry be a *pure* Legacy, being left in theſe Words, *viz. I bequeath unto* Sempronia *a Thouſand Pounds if ſhe marries*; or whether it be only a *conditional* or *modal* Legacy? And herein the Doctors diſagree in their Opinions. Some will have it to be a *pure* Legacy (at leaſt) when 'tis not left by an extraneous Perſon, but by her Parents: and, conſequently, a Siſter, to whom the Father leaves a *Paragium* or Dowry (for *Paragium* is a Woman's Dowry or Marriage Portion) may compel the Brother to pay the ſame even before ſhe be of Age fit for Marriage †. *2dly*, Some think it to be a *modal* Legacy; eſpecially, if it be made and left to enable her to marry: and, conſequently, a Legacy of this Kind ought to be paid before the *Mode* is fulfilled, as other Legacies left *ſub modo* are paid ‖. But this ſecond Opinion does not differ from the firſt. The third Opinion is, that a Legacy of this nature is a conditional Legacy; and, therefore, cannot be demanded before the Woman is marriageable *: yet the Brother, whom the Father has enjoin'd to pay this Legacy or Dowry to his Daughter, is in the mean while bound to maintain his Siſter, as he ſucceeds in his Father's Place, and is in Poſſeſſion of the paternal Eſtate †. From this third Opinion it follows, according to ſeveral of the Doctors, that a Legacy of Dowry left in the aforeſaid manner, does not paſs to the Executors of ſuch a Perſon dying a Maiden, or before the Celebration of Matrimony; becauſe the Condition, under which the Legacy was to be paid, was not then fulfill'd; unleſs (perchance) the Girl becoming marriageable, ſhould then have demanded the Payment of ſuch Legacy from the Executor, and the Executor delay'd the ſame, or was in default of paying thereof. But others think, that this *Paragium* or Legacy deſcends to her Executors like other Legacies bequeath'd *purely* and *ſub modo*. But I am of an Opinion, that a Legacy of this kind is a *conditional* Legacy, when 'tis ſaid, *I bequeath to* Berta *one Hundred Pounds, if ſhe marries:* And, conſequently, ſuch Legacy is not due to *Berta* before her Marriage; and, therefore, the Legacy does not deſcend to her Executors, ſince a conditional Legacy is not acquired before the Event of the Condition*. But if it be ſaid, that *I bequeath to* Berta *one Hundred Pounds that ſhe may marry*, or the like, it ſeems to me very probable, that ſuch a kind of Legacy is a *modal* Legacy, and is due before the event of the Condition; and, conſequently, paſſes to her Executors, unleſs the Teſtator's Mind appears to be otherwiſe, or may be thus inferr'd: for the Nature of a *modal* Diſpoſition, whereby a Legacy is given to any one with a Charge or *Onus* of performing ſomething, ſeems thus to require it. And 'tis the ſame Thing, if a Legacy be left to *Berta*, that ſhe may marry *Titius:* But *Titius* dying before Marriage, ſhe intends to marry another Man, and wants the *Paragium* or Dowry to that end: For it was not her Fault, ſhe did not marry *Titius*; and, therefore, the Legacy

* D. 33. 1. 4.

† Bald. in l. 27. C. 6. 23. N. 1.

‖ Tuſch. Concl. 102. v. Legatum.

* Bart. in l. 71. D. 35. 1. 3. N. 7.

† D. 34. 1. 10. 2.

* J. 2. 20. 31.

gacy ſhall deſcend to her Executors. And, by a Parity of Reaſon, the *Canoniſts* think that a Legacy left to a Church under a Condition of being bury'd therein is valid, and due to ſuch Church, tho' ſuch Burial ſhould not enſue thro' ſome Impediment of the Teſtator himſelf, as becauſe he was excommunicated, burnt for a Heretick or became a Suicide: And the Reaſon is, becauſe the Condition is rendred impoſſible thro' the Teſtator's own Act, and 'tis not through the Means of the Church that he was not bury'd therein *.

* Vaſquez. de Teſtam. c. 8. Dub. 6.

All Things may be bequeath'd and left as Legacies, to which the Teſtator has any juſt Right and Title of diſpoſing; for as he may ſell or anywiſe alienate the ſame, ſo he may alſo leave them as Legacies: But 'tis otherwiſe of ſuch Things as he has no right to diſpoſe of, becauſe no one can transfer more Right to another, than he has in himſelf †. And thus if a Teſtator ſhould bequeath a Thing, which belongs to another Perſon, the Legacy is void, even though it ſhould be given to Pious Uſes. But if he bequeaths a Thing which is in common to him with another, the Legacy is valid as to that part which belongs to himſelf, becauſe the Teſtator might bequeath his own Right therein ‖. By the *Feudal* Law, a Legacy is not valid, whereby the Teſtator bequeaths a *Feudal* Eſtate without a lawful Faculty obtain'd from the Lord: And ſo likewiſe it is of all publick Things bequeath'd; becauſe the Alienation of all ſuch Things is prohibited, theſe Things being not in *noſtro commercio*. And the Doctors doubt, whether a Teſtator can leave a Legacy to be paid out of the Profits of a *Feudal* Eſtate? For if a *Fief* be antient, and not Hereditary, a Legacy of this kind cannot be bequeath'd; becauſe no Charge or Incumbrance can be laid on ſuch a *Fief*: But if the *Fief* be Hereditary, then, according to the receiv'd Opinion of the Doctors, a Legacy may be charg'd thereon; becauſe though a *Real* or *Hypothecarious* Action does not lie againſt a *Feudal* Eſtate, yet a *Perſonal* Action lies to compel the Heir to ſatisfy and diſcharge all ſuch Incumbrances as the Teſtator ſhall lay on ſuch Hereditary *Fief*. But, *thirdly*, A Legacy is valid, where the Teſtator bequeaths unto another his Eſtate, or any Part of his Goods, which are mortgaged or pawn'd unto a Creditor; becauſe the Teſtator had ſtill ſome Right therein, which he might transfer to another *. Yea, if the Teſtator knew the Thing to be mortgaged or pawn'd, the Executor ought to redeem it, and deliver it to the Legatary †, unleſs the Teſtator has declar'd his Intention to be, That the Legatee ſhall redeem it himſelf, and not the Executor. *Fourthly*, A Legacy is valid, whereby the Teſtator has bequeath'd to another a Thing belonging to his Executor ‖; becauſe as the Teſtator might impoſe other Obligations on his Executor, ſo may he likewiſe add this *Onus* to the Executorſhip; and the Executor by taking the Executorſhip on himſelf, ſeems to accept of all Incumbrances left on him, and is bound to ratify the Act of the Perſon deceas'd. But there is this Difference between a Legacy of the Teſtator's own proper Goods, and a Legacy of the Goods belonging to the Executor, *viz.* That the Dominion and Property of the Teſtator's own proper Goods bequeath'd, paſſes to the Legatary after the Teſtator's Death (as we ſay) *rectâ viâ*, that is to ſay, without Delivery *; but the Property of a Thing, bequeath'd by the Teſtator, and belonging to his Executor, does not paſs to the Legatary without the Executor himſelf delivers the ſame to the Legatee after the Teſtator's Death, ſince the Teſtator was not Lord and Proprietor of the Thing belonging to his Executor: And, therefore, he could not transfer the Dominion and Property thereof to the Legatee (as we ſay) *rectâ viâ*, according to the vulgar Rule, *nemo plus Juris*, &c. †. For as to the Thing bequeath'd,

† D. 50. 17. 54.

‖ D. 30. 1. 5. 2. D. 30. 1. 24. 2.

* D. 30. 1. 57.

† L. 57. ut ſupr.

‖ D. 31. 2. 67. 8.

* D. 41. 2. 64. in fin.

† D. 50. 17. 54.

bequeath'd, the Legatee is in the Place of the Executor *; and as the deceas'd had no Property in his Executor's Eſtate, ſo conſequently the Legatee can have none without a wilful delivery from the Executor himſelf. But a Legacy is not valid, whereby the Teſtator bequeaths any Thing proper to the Legatee himſelf †; for a Teſtator cannot bequeath that to another, to which he has no Right himſelf (as aforeſaid): And becauſe that which is already of a Man's own Property, cannot be made more ſo by any additional Right whatever ‖. But if, at the Time of the Legacy given, the Thing bequeath'd did belong to another, and afterwards in the Teſtator's Life the Thing bequeath'd came to the Legatee, the Executor in ſuch a Caſe is bound, according to the common Opinion of the Doctors, to pay to the Legatee the value of that Thing, if the Thing came to the Legatee by an *Onerous* Contract, as on the account of Dowry, Purchaſe, Permutation or other Contract of the like nature. But 'tis otherwiſe, if it came to him by virtue of a *Lucrative* Title: For two *Lucrative* Titles, generally ſpeaking, cannot concur to the ſame Thing, and happen to the ſame Perſons †; nor by the Civil Law, regularly ſpeaking, is that a valid Legacy, whereby a Man bequeaths a Dower to his Wife, becauſe a Dower by that Law, is not a Matter of the Husband's Property; but it belongs to the Wife; and (as before hinted) no one can bequeath a Thing which is the Property of the Legatary. Yet a Legacy of this kind is valid as to the Anticipation of Payment; becauſe a Legacy ought to be paid immediately; but a Dower or Dowry may be reſtor'd even after a Year from the Husband's Death, and the Heir or Executor is not bound to pay or reſtore it ſooner, unleſs it be thus bequeath'd.

* D. 41. 1. 14. in fin.

† C. 6. 37. 13.

‖ J. 2. 20. 10.

† J. 2. 20. 6.

If a Perſon bequeaths unto another the Bed, the Ornaments belonging to ſuch Bed are likewiſe deem'd to be given with it; becauſe *Legato Principali cenſentur etiam Legata Acceſſoria illius:* For that properly ſpeaking, the Principal trails the Acceſſory along with it. Thus if I bequeath my Veſtments or wearing Apparel, the Gold and Silver Ornaments thereunto belonging do go with the Legacy. And, again, if I bequeath all my Eſtate or Goods, all Rights and Actions are thereby underſtood to be given by Will; becauſe theſe Things come under the Name of *Goods* or Chattels. By a Legacy of *Alimony* we underſtand Meat, Drink, and all ſuch Things as appertain to a Man's Habitation, and likewiſe Medicine, Phyſick, and other Things of this kind: For theſe Things are not only Accidents to Alimony; but are all comprehended under the ſame *. By a Legacy of Houſholdgoods or Furniture, all moveable Goods are underſtood to be given, which belong to frequent and daily Uſe; Gold, Silver, and living Creatures excepted. And, by a Legacy of *Victuals* under the *Latin* Word *Penus*, we reckon ſuch Things to be bequeath'd, which relate to Meat and Drink, as Corn, Oil, Wine, Cheeſe, Honey, and the like: For the Word *Penus* includes both Eatables and Drinkables, in *Latin* called *Eſculenta & Poculenta* †. And 'tis the ſame Thing, if any one ſhall bequeath a Legacy by the *Latin* Word *Victus* unto *Titius*; for he ſhall be deem'd to have bequeath'd him all Things, that are neceſſary to him for Life: And, therefore, Bed and Board, as well as Cloaths and the like are due to him. But if a Legacy be left to any one by the Words *Diaria* or *Cibaria*, 'tis otherwiſe ‖; For by the Word *Diarium*, we only mean one Day's Meat or Proviſion, which the *Greeks* cali Διαῖτα. But Alimony and Education may be bequeath'd to a Perſon by the Words *Alimenta* and *Educatio*; becauſe theſe are ſynonymous Terms, and Words of equal Signification.

* D. 34. 1.

† D. 33. 9.

‖ D. 34. 1. 21.

But what if a Thing be left as a Legacy with its Acceſſories and Ornaments, which has no Acceſſories and Ornaments? *Ex. gra.* If a Horſe be

be left as a Legacy with its Furniture, which in Truth has no Furniture, in this Caſe a Legacy of the Horſe is due, becauſe the Furniture (as we ſay) is not put *Taxatively* and by way of Limitation, but *Augmentatively* and by way of Acceſſory. But if theſe Ornaments or Furniture had been put *Taxatively* and by way of Limitation, ſuch a Thing bequeath'd as a Legacy ſhall not be paid, if it wants Ornaments or Furniture: as when 'tis ſaid, *I leave you the Horſes having ſuch a Mark, or ſuch kind of Furniture*, &c. Hence we ſee what ought to be done, when a Teſtator leaves a Legacy to be paid to a Perſon with a pointing out of ſuch a Place, called a *local* Demonſtration: As when a Man leaves ten Buſhels of Wheat as a Legacy to a Church to be paid out of ſuch a Field of Corn, according to Deſignation and Appointment, or out of the Rent or Penſion of ſuch a Houſe, and by ſome ſubſequent Loſs or Damage there ſhould not be ſo much Wheat gathered, or ſuch a Rent or Penſion recover'd, as may equal the Penſion expreſs'd in the Legacy: for if ſuch a Demonſtration be put *Taxatively* and by way of Limitation, a greater Penſion ought not to be paid than what is receiv'd *ex re deſignata*: But 'tis otherwiſe, if it put *Demonſtratively*, *viz.* with an Intent only of pointing out the Field or Houſe. Now to know whether this Demonſtration be put *Taxatively* or *Demonſtratively*, this Rule is aſſign'd, *viz.* That Demonſtration is often adjudg'd to be put *Demonſtratively* only, when the Legacy is given *duplici oratione*: as when it is ſaid, *I bequeath ten Pounds to* Titius, *which I would have paid out of the Rents of ſuch a Farm or Eſtate.* In which Caſe, ten Pounds ought to be paid when the Farm or Eſtate is put *Demonſtratively*, tho' ſo much ſhould not be recover'd or receiv'd from thence *. But if the Legacy be conceiv'd and expreſs'd in one Sentence, the Demonſtration then ſeems to be put *Taxatively*: as thus. *My Will is, that* Sempronius *ſhould have ten Pounds given him out of the Profits of ſuch a Farm or Eſtate.* And in this Caſe if ten Pounds be not receiv'd from the Profits of that Farm or Eſtate, the Executor ſhall not be oblig'd to compenſate and make it good by any other means †.

* D. 30. 1. 96. in prin.

† D. 32. 1. 34. 2.

The Profits of any thing bequeath'd are due from the Time of the Teſtator's Death to the Legatary, if the Legacy conſiſts in a particular Thing, tho' the Executor ſhould delay to take on himſelf the Executorſhip; becauſe the undertaking of the Executorſhip has a Retroſpect as to this Effect, and reſpects the Obligation incumbent on the Executor at the Time of the Teſtator's Death ‖. Yea, if the Teſtator has bequeath'd a Thing, *together with its Profits and Emoluments*, not only the Profits and Emoluments, which have been growing and receiv'd ſince the Teſtator's Death, are due to the Legatary, but even thoſe likewiſe, which became due in the Teſtator's Life-time, and have been receiv'd ſince his Death *. I have ſaid, *If a Legacy conſiſts in a particular Thing*: becauſe if it has its Exiſtence in, and conſiſts of a generical Thing, the Profits are not due, unleſs it be from the Time of the Delay †; for then *res Domino fructificat*, that is to ſay, the Profits of the Thing do accrue to the Owner and Proprietor thereof: But the Legatary is not the Owner and Proprietor of the Thing bequeath'd in general; and, therefore, he ſhall not have the Profits thereof.

‖ D. 30. 1. 86. 2.

* D. 31. 2. 22.

† C. 6. 47. 6.

A Legacy may be left and given to all Perſons, that are capable of receiving Goods and Eſtates; provided they be not Perſons altogether Uncertain: Becauſe the Validity of the Legacy depends on the Will of the Perſon diſpoſing thereof, and on the Capacity of the Perſon accepting of it: As in a Donation, which is like unto a Legacy, a Legacy being a *Species* or kind of Donation ‖, to be perform'd by the Executor, according to the Teſta-

‖ J. 2. 20. 1.

Teſtator's Order after his Death. Hence it follows, *Firſt*, That according to the *Civil* Law, a Legacy may be left to a Minor, Madman, Prodigal, *&c.* and (according to the *Canon* Law) to a Perſon profeſſing Religious Orders, if he be *Capax Bonorum:* For all ſuch Perſons are capable of taking Goods and Eſtates, tho' they cannot make a Laſt Will and Teſtament, as I ſhall hereafter obſerve under that Title. *Secondly*, A Legacy may be left and given to a ſpurious Iſſue (at leaſt) in reſpect of Alimony or Maintenance, and a ſuitable Dowry may be bequeath'd to a *ſpurious* Daughter in reſpect of Marriage, and ſuch Dowry ſhall ſupply the Place of *Alimony*. For tho' by the *Civil* Law a Father cannot appoint an illegitimate Child to be his Heir; yet he is bound by the Law of Nature to allow him Maintenance or Alimony. *Thirdly*, A Legacy may (according to the *Canon* Law) be left to a Pilgrim, going to *Rome*, or viſiting the Shrines of *Popiſh* Saints; for as a Pilgrim may be appointed and made an Heir, ſo he may alſo be a Legatary: 'Tis otherwiſe by that Law in reſpect of ſuch as deny the Pope's Supremacy, and apoſtatize from the Faith. *Fourthly*, A Legacy may be left to a Wife, that ſhall marry within the Year of mourning, as being *Capax Bonorum:* For though a Legacy cannot otherwiſe be given to her; yet this muſt be underſtood to be by the *Civil* Law. For the *Canon* Law in favour of Matrimony, has taken away all Penalties on ſuch as marry *infra annum Luctûs*, except that Penalty which reſpects the Children had by a former
* X. 4. 21. 5. Husband or Marriage*. *Fifthly*, A Debtor may leave a Legacy to his Creditor: But the difficulty in this Caſe, is, whether a Legacy left by a Debtor to his Creditor may not in a doubtful Caſe be deem'd to be left him *animo compenſandi*, with an intent of Compenſation? To which I anſwer *Negatively*, unleſs he be Debtor by a diſpoſition and appointment of Law; or unleſs it may be otherwiſe inferr'd from the Mind of ſuch Debtor, that he did it with a deſign of quitting Scores with his Creditor; a Legacy being nothing elſe but a kind of Donation, (as juſt now remembred.) But that which is left by way of Compenſation is not a Gift or Donation. And therefore, it cannot be a Legacy, but muſt be the Reſtitution of a Debt. I have ſaid, *unleſs he be a Debtor by Diſpoſition of Law:* For then a Legacy ſeems to be a Compenſation for a legal Debt, ſince 'tis to be preſum'd, that the Law wou'd not inflict a greater Grievance on the Teſtator, and yet be willing that the Teſtator ſhould ſatisfy the Law in this Point. For when a Father bequeaths a Legacy, or gives any thing to a Son or Daughter, which does not come up to a legal and ſuitable Portion or Dowry, ſuch Legacy is in Compenſation of ſuch Portion or
† C. 3. 28. 26. 1. Dowry †. For this is a legal and neceſſary Debt, according to the *Civil* Law: And, in matters of neceſſity and compulſion, no one can be ſaid to be liberal, nor is he preſum'd prodigally to throw away his Eſtate:
‖ Dd. in L. 22. D. 24. 3. And, conſequently, 'tis preſum'd to be a Legacy *animo compenſandi* ‖. And I have alſo ſaid, unleſs it may otherwiſe be infer'd from the Will of the Debtor: For if it does appear from Circumſtances, that the Teſtator bequeath'd ſuch Legacy by way of Compenſation or quitting of Scores;
* Mant. de conject. ult. vol. lib. 10. tit. 2. as when he ſays, I leave 100*l.* to *Caius* for all that I owe him: I ſay in ſuch a caſe Compenſation ought to be made; for the Diſpoſition is confirm'd from the Teſtator's Intention, according to *Menoch. Lib.* 4. *Præſumpt.* 109. A Legacy may be left to a Biſhop, or the Canon of a Cathedral Church; as being capable of receiving a Legacy: And if it becomes a Queſtion, whether ſuch Legacy be given in reſpect of the Perſon, or in reſpect of the Dignity, or in regard to *pious Uſes*; and, conſequently, whether it ſhall go to the Biſhop's Perſon or Dignity? I anſwer, that it is deem'd to be given in reſpect of his Perſon, if it appears that

that the Teſtator was his Friend or Kinſman *. Again, a Legacy may be left to a baniſh'd Perſon: for as a Perſon that ſuffers *Relegation* or Baniſhment does not preciſely loſe his Goods and Eſtate †, ſo neither does he loſe his Capacity of taking by Legacy, *&c.* But ſome of the *Civilians* are of another Opinion; becauſe Perſons condemn'd to the Gallies are incapable of inheriting a Legacy or a *Fidei-Commiſſum*: for a Condemnation to the Gallies ſucceeded in the Place of a Condemnation to dig in the Mines; and a Perſon condemn'd to dig in the Mines cou'd neither be a Legatary, nor an Executor in Truſt ||.

* Bart. in l. 2. D. 34. 5. N. 2.
† D. 48. 22. 7.
|| D. 34. 8. 3.

I have before obſerv'd, that the Perſon to whom a Legacy is given ought not to be an uncertain Perſon: for a Legacy cannot be left to Perſons altogether uncertain; but the ſame becomes *Legatum inutile*, if the Legatee be unknown *. But 'tis otherwiſe, if the Perſons are not altogether uncertain, but may be known and aſcertain'd by ſome Means or other; for then the Legacy ought to be paid †. Wherefore a Legacy is valid, if it be ſaid, *I bequeath a Hundred Pounds to him, who ſhall marry my Daughter*: For the Perſon of the Legatee becomes known by a Celebration of Marriage. And 'tis the ſame Thing, if the Name of the Legatary has not been expreſs'd, and 'tis doubtful whom the Teſtator meant, there being ſeveral Perſons of the ſame Name: For tho' the Legacy is valid, yet it becomes *inutile* on the Account of the uncertainty of the Perſon, unleſs the Legatary proves, that the Teſtator deſign'd to give the Legacy to him ||.

* J. 2. 20. 25.
† J. 2. 20. 25.
|| D. 31. 1. 8. 3.

A Legacy may be left to a College or Corporation that is well eſtabliſh'd in Law †; but it cannot, by the *Civil* Law, be left to an unlawful College or Corporation, ſince ſuch is no otherwiſe than a Conventicle *: yet, by the *Canon* Law, it may be well enough bequeath'd to the particular Members of ſuch College or Corporation, if the ſame be not reprobated and diſallow'd of on the account of ſome Sect or Hereſy therein, but only not approv'd in Law †. For if it be reprobated on the the ſcore of any Sect or Hereſy therein, as being a College of Hereticks, a Legacy then to the particular Members thereof ſhall not be valid according to the *Canoniſts* *. And in the ſame manner, if a Legacy be left to a College of *Jews*, it is not valid by that Law: But yet becauſe it is not reprobated on the account of any Hereſy, it is good to the particular Members of it †. If a Legacy be left to the Citizens of ſuch a Place, as *London*, and the like, it is the ſame as if it were left to the City itſelf, when nothing reſults from ſuch a Legacy that is contrary to Law. If a Legacy be left unto God, it is deem'd to be left unto the Church (ſay the Novels ||) which ought to take Care of the Poor *: And if the Teſtator has not mention'd the Place of his Abode in his Will, ſo that it may be known to what Pariſh he did belong, it ſhall be adjudg'd to be given to that Cathedral Church, in which Place the Teſtator liv'd at the Time of his Death, unleſs it may be known, where he dwelt at the Time of making his Will †. And in the *Romiſh* Church, 'tis the ſame Thing if a Legacy be left to ſome Saint, or Houſe dedicated to a Saint: And if there be ſeveral Houſes dedicated to the Name of that Saint, and the Teſtator has not expreſs'd to which of thoſe Houſes he has given it, it ſhall be intended to be left to the Church of that City, in which the Teſtator had his Dwelling, and to the pooreſt of thoſe Churches too. At this Day, by an Edict of the Emperor *Charles* the Vth, and by the Cuſtom of *France*, Churches and other Religious Houſes cannot acquire *real* Eſtates by way of Legacy, or come into Poſſeſſion of them without the Prince's Placart or Licence firſt had

† D. 34. 5. 20.
* C. 6. 24. 8.
† Mant. de conject. ultim. vol. lib. 8. Tit. 6. N. 23.
* Abb. in c. 5. X. 5. 7. N. 1 & 2.
† Abb. in c. 5. X. 5. 6. & Gloſs ib.
|| Nov. 131. * Cap. 9.
† Tuſch. Conc. 46. v. *Legatum*.

had and obtain'd, which we in *England* ſtile a Charter of *Mortmain* of which hereafter under the Title of *Mortmain*.

By the *Civil* Law, a Teſtator cannot enjoin his Heir or Executor to pay Intereſt for the Non-Payment of a Legacy: And though Intereſt or Uſury be only forbidden by the *Civil* Law beyond ſuch a Sum, yet it being entirely prohibited by the *Canon* Law, it follows *à fortiori*, that he cannot do it by that Law. A Legacy given to a Perſon condemn'd to die, or to perpetual Impriſonment, is no Legacy at all, unleſs it be left for Alimony *. A Legacy left in this manner, *viz.* *If* Titius *ſhall pleaſe to pay the ſame*, is a conditional Legacy in reſpect of the Payment thereof; but in reſpect of *Titius*'s Will and Pleaſure herein, it is deem'd a pure and *abſolute* Legacy †: And ſuch a Condition as is above mention'd in the Beginning of this Title is ſaid to be a *Poteſtative* Condition in reſpect of a third Perſon, but a *Caſual* Condition in regard to the Perſon, to whom ſuch Legacy is given; and whenever Words infer a Condition, a Judge ought not to depart from them in giving Sentence for a Legacy. A Legatary in Alternatives has his Choice and Election from the Law it ſelf.

* D. 34. 1. 11.

† Dd. in l. 1. C. 6. 51. 7.

But though a Variation be permitted and allow'd of in ſome particular Caſes, as in Contracts, and likewiſe judicial Proceedings before Conteſtation of Suit; yet after a Legatary has once made his Choice of a Legacy, wherein he has his Election, a Variation is prohibited to him, provided ſuch Election be rightly made ‖: Nor does it much import, whether ſuch Election does accrue to the Legatary by a Diſpoſition of Man, or a Diſpoſition of the Law. For in laſt Wills, wherein Property has no ſuch thing as Pendency, the Property of the Legacy does immediately paſs unto the Legatary, as ſoon as he has made his Election *. And 'tis a general Rule in Law, that whenever any Election carries its own Execution along with it, a Variation is never legally admitted: But 'tis otherwiſe, if ſuch Election does not carry its Execution with it. Heretofore, if the Legatary did not make his Election in alternative Legacies in his own Life-time, ſuch Legacy did not deſcend to his Executors †: but now this Law is alter'd in favour of Laſt Wills ‖, and the Legatee's Executor may have his Option: But if a Teſtator gives a Legacy by way of Option, either under an expreſs Condition, or by aſſigning a Day that carries ſome uncertain future Event with it, ſuch Legacy is extinct, and ſhall not paſs to the Executors of the Legatee, if he did not in his Life-time make his Choice and Election.

‖ D. 33. 5. 20.

* D. 33. 5. 19.

† D. 35. 1. 99.

‖ C. 6. 51. 1. 7.

A Legatary is, in ſome meaſure, ſaid to be the Heir of the Thing bequeath'd to him †: And 'tis an Obſervation in Law, that the firſt Legatary nam'd in a laſt Will, is more belov'd by the Teſtator than his Subſtitute. If a Legatary be made an Executor in a Laſt Will and Teſtament, he may receive or retain the Thing bequeath'd to himſelf: But a Legatary poſſeſſing himſelf of a Legacy bequeath'd to him, if he does it *cum vitio*, ſhall loſe his Legacy: and ſo he ſhall, if he poſſeſſes himſelf of the Teſtator's Will with a malicious and fraudulent Intention, or endeavours to conceal and hide the ſame. If a Legatary does by his own Money, or otherwiſe, redeem a Legacy bequeath'd to him from the Hands of a Creditor, or the Power of an Enemy, the Executor is bound to pay him the Price of ſuch Redemption; for the Executor muſt otherwiſe have done it *: But if a Legacy be made of a Debt, it is ſufficient for the Heir or Executor to aſſign over the Action itſelf to the Legatary †. And as an Executor may be damnify'd by the Act of the Legatary, the Legatary may therefore be compell'd togive Caution or Security to indem-

† Paul. de Caſtr. in l. 14. D. 41. 1. N. 2.

* J. 2. 20. 5.

† J. 2. 20. 21.

demnify the Executor: For a Legatee ſhall be oblig'd to refund againſt Creditors (if there be not Aſſets) and likewiſe againſt Legatees, if there be not Subſtance enough to diſcharge all the Legacies †; for all the Legatees are to have their Proportions, where the Aſſets fall ſhort: But an Executor himſelf, if he aſſents to ſuch Legacy without taking Caution, ſhall never bring back the Legacy again after ſuch Aſſent given. But if an Executor has been ſued, and paid the Legacy by a Decree of the Court of *Chancery*, the Legatee muſt refund in proportion, if the Aſſets fall ſhort of the Legacies bequeath'd. And, according to *Ventris* *, if they give Sentence in the Eccleſiaſtical Court for the Payment of a Legacy, a Prohibition will lie, unleſs they take Security to refund in caſe of Inſufficiency of Goods, to diſcharge Debts, *&c.* For a Diminution of Legacies is made *pro Ratâ*, even by our Law, as well as by that of the *Romans* ||, if the Teſtator's Eſtate will not extend to pay them all.

† Paul. de Caſtr. ut infr.

* Rep. pt. 2. p. 358.

|| Paul. de Caſtr. in l. 79. D. 30. 1. N. 2.

But no Action lies at the Common Law to recover a Legacy not paid or ſatisfy'd, a Legacy being a Teſtamentary Thing: And as the Spiritual Court has the Juriſdiction of the original Cauſe thereof, the Temporal Court ought not to extend its Reach or Arm hereunto, but keep itſelf within its own Bounds. It has been urged, indeed, that the Non-payment of a Legacy is a breach of Truſt in the Executor; and therefore an Action on the Caſe lies for the Recovery of it: But this was urg'd without any Effect, becauſe the Executor for a breach of Truſt herein, is ſubject to the Eccleſiaſtical Court; for *Principale ſequitur Acceſſorium*; and as a Teſtament is of their Cognizance, ſo likewiſe is a Legacy and the Non-Payment thereof: But Legacies out of Lands are properly ſuable in *Chancery*. And the Reaſon why Actions at Law for Legacies were countenanced in the Times of the late Civil Wars, was, becauſe there were no Biſhops in Fact, tho' there were in Law; and, therefore, a want of Juſtice happen'd †.

† Kebl. Rep. vol. 1. p. 116.

Only ſuch Perſons are capable of receiving Legacies, to whom it was permitted to make a Laſt Will and Teſtament ||; and this Capacity is required to be in a *pure* Legacy at the time of the Teſtator's Death: For if the Legatary be at this Time incapable, he ſhall be barr'd and excluded from the Legacy thus left him by the *Lex Catoniana*, though he afterwards becomes capable of receiving the ſame; ſince in conditional Matters we ought to regard the Time when the Condition is to be fulfill'd, if there be a Capacity in Hand. And herein a Legatary or a particular *Fidei-Commiſſarius* differs from an extraneous Heir according to the *Civil* Law: For to capacitate ſuch a Perſon, 'tis neceſſary that he ſhould be capable at three ſeveral Times or Seaſons, *viz.* at the Time of making the Will, at the Time of the Teſtator's Death, and at the Time of taking the Executorſhip on himſelf.

|| J. 2. 20. 24.

A Legatary is properly ſaid to be him whoſe principal Intereſt it is that Legacies ſhould be paid and fulfill'd, tho' the Words of the Legacy be not directed to him: For Legacies are ſaid to be thoſe Gifts which are made by *diſpoſitive* Words *, and are commonly (indeed) directed to the Perſon thus honour'd, that is to ſay, to the Legatary. Nor is it of any Import, by what Words Legacies are given, whether by Words introduced by Law or by Cuſtom, provided they are ſuch as do ſubſtantiate a Gift: But Legacies left by Words *diffamatory* of the Legatary are not valid, ſince Legacies are generally left on the account of the Man's Merits †. 'Tis true there were heretofore, among the *Romans*, four ſeveral ways of bequeathing Legacies in Form ||. For ſometimes the Teſtator ſaid, *Do you claim unto yourſelf after my Death this Thing, which I have bequeath'd to you*; and this was ſtiled a Legacy

* D. 31. 2. 88. in prin. & Bart. ibi.

† D. 30. 1. 54. in prin.

|| J. 2. 20. 2.

per

per vendicationem. 2*dly*, He ſometimes ſaid, *Let my Heir ſuffer* Titius *to have this Thing or Eſtate*, and this was term'd a Legacy *Sinendi modo.* 3*dly*, The Teſtator ſaid, *Hæres, damnas eſto*; which is as much as to ſay *Damnatus eſto*; and this way of bequeathing was called *per Damnationem.* And the fourth way of bequeathing was by common Words as now in Uſe; the other three ways being now aboliſh'd*. Legataries may convene all the Heirs or Executors on the account of the Hereditary Portion; or that Executor only, which is made ſuch *in Solidum:* And by the *Civil* Law, a Legatary, to whom one Moiety of the Teſtator's Eſtate is bequeath'd, is bound to diſcharge Debts and Legacies according to his Part of the Inheritance.

* C. 6. 37. 21.

Legacies left in a Will, cannot ſubſiſt without the Will, becauſe if the Will be annull'd, all Things fall to the ground with the Will it ſelf: And, therefore, Legataries regularly ſpeaking, cannot be Witneſſes to ſupport a Will in favour of themſelves; and conſequently, if they will be Witneſſes, they muſt renounce their Legacies, otherwiſe they are not what the Lawyers call *Teſtes integri.* But tho' a Legatary cannot be a Witneſs *principally* in a Teſtamentary Cauſe, yet he may be ſo *incidently:* For Legataries may be Witneſſes in a Will, when the Cauſe does not principally relate to themſelves, or when the Will may be otherwiſe proved by a ſufficient number of Witneſſes †. He that avers a Legacy to be left him, ought to ſhew from the Will, that the Teſtator ſo intended it ‖. When a Legacy is made of Wine or any thing elſe in general, the Heir or Executor is well diſcharg'd *præſtando minimum*; yet this is no Diſcharge or Releaſe from the Payment of a Legacy, if he delivers that which is corrupt, putrid, and the like.

† Abb. in c. 6. X. 2. 20.

‖ D. 31. 2. 34. 3.

If Alimony or Maintenance be bequeath'd unto any one by way of Legacy during Life, the Gloſs * holds, that ſuch a Legacy is a *pure* and *abſolute* Legacy for the firſt Year, but 'tis only a Conditional Legacy for all the Years enſuing †: And upon a Conditional Legacy, or a Legacy *in diem*, Witneſſes may be admitted, examin'd, and publiſh'd *ad perpetuam rei memoriam.* If a Legacy of Alimony be bequeath'd to any one to be had *in Domo*, the Legatary may demand and ſue for the ſame *extra Domum*; becauſe, in a doubtful Caſe, where ſuch a Legacy is given and bequeath'd *in Domo*, it is always preſum'd to be ſo left in favour of the Legatary ‖; and ſince it is put in favour of him, ſurely he ſhall not be obliged to the ſtrict obſervation of ſuch a Clauſe in the Legacy *. But 'tis ſaid on the other hand, that this Addition of (*in his Houſe*) is put in favour of the Executor, who can maintain the Legatary with leſs Charge and Inconvenience in his Houſe than out of it, as daily Experience and Evidence of Fact plainly ſhews: And, therefore, by way of Concluſion, I ſay, That ſuch a Legatary cannot ſue for Alimony out of the Houſe, if he may with any Convenience or Safety live with the Executor in the Houſe; but 'tis otherwiſe, if he be hindred by any Act of Cruelty, and the like from the Executor to live with him †.

* In L. 4. D. 33. 1.

† D. 36. 2. 20. D. 33. 1. 5.

‖ C. 6. 37. 1. Dyn. de reg. jur. c. impr.

* D. 35. 1. 71. in prin.

† D. 32. 1. 29. D. 33. 1. 13. in prin.

When a Teſtator bequeaths a certain Quantity of Corn to be yearly paid to a Legatary, the ſaid Corn is not immediately due; but it ought to be paid at the Time, when ſuch Corn is reap'd and gather'd into the Barn ‖: And 'tis the ſame thing in reſpect of other Matters of the like nature. If a Teſtator ſhould bequeath a Way or Road unto *Titius* through his Land or Ground, and the Executor is charg'd with ſuch Legacies, that he is willing to have the Benefit of the *Falcidian* Law, the Legatary ſhall yield up a fourth Part of ſuch Way for ſo much Money paid him upon a Valuation or Appraiſement thereof; becauſe a Road or Way is an individual Thing. If a Debt be bequeath'd to a Debtor

‖ D. 36. 2. 26.

Debtor under a Condition, the Executor (pending ſuch Condition) may, notwithſtanding ſuch Legacy, demand and ſue for the ſame, and ſhall not be ſet aſide by an exception of *Deceit*; becauſe ſuch a Condition may become defective: yet ſuch Demand or Suit ought to be made with this *Proviſo*, that the Executor do give ſecurity to the Debtor himſelf, by a *Legatary* Stipulation, That if the Condition exiſts, he will reſtore ſo much to him as he himſelf has demanded, ſued for, and recover'd. If a Legacy left to Pious Uſes cannot be fulfill'd and perform'd as it is bequeath'd, it ought to be apply'd to ſome other Uſe, and not be converted to the Executor's Advantage *: For whenever a Legacy cannot be fulfill'd after the manner the Teſtator order'd it, it ought, according to *Ancharanus* †, to be converted to ſome other pious Uſe and Purpoſe. If a Man leaves a Legacy, or *Fidei-Commiſſum*, to Perſons by the Name of his *Deſcendants*, all his Deſcendants are included, how far ſoever diſtant they are in Degree from the common Stock, and of what Sex ſoever they be, either Male or Female ‖: And 'tis the ſame thing if a Man bequeaths a Legacy to Perſons by the Name of his *Children*, his Grandchildren, and Great Grandchildren are therein comprehended.

* D. 33. 2. 16.

† Conſ. 197. in fin.

‖ D. 50. 16. 56. C. 6. 55. 12.

I ſhall here in the laſt Place ſay ſomething of the Revocation of a Legacy, in the Books of the *Civil* Law, called *Ademptio Legati*: And this may be made either by contrary Words, as when a Perſon bequeaths any thing in this manner, *viz. I give, bequeath, &c.* and then ſays, *I do not give, bequeath*, and the like. Or elſe by Words not contrary to the former, but by any Words whatever *: As when the Teſtator ſays, *I do revoke* or *repent of that which I have bequeath'd*, and the like. Yea, Legacies may be taken away, even by a naked preſumptive Will of the Teſtator: As when the Legatee afterwards becomes the Teſtator's Enemy by any ſignal or capital Act of Hatred. And a Revocation of Legacies is firm and valid *ipſo Jure*, whether ſuch Legacies be revoked by the ſame Will or by Codicils annex'd thereunto. *Accurſius* indeed diſſents hereunto in reſpect of Codicils; and will not have Legacies to be revoked *ipſo Jure* by Codicils, and that they are only revoked by the aid of an Exception: But *Bartolus* refutes this Doctrine, and plainly ſhews that ſuch a Revocation is valid, whether the Codicils are confirm'd by the Will or not, unleſs they are made by a Perſon Inteſtate. And in a Will, it matters not whether the Words do precede the Legacy, or are ſubſequent thereunto; for the Will of the Perſon deſirous to revoke the ſame, *facit utramq; paginam*: ſo that it is ſufficient, if his Will does appear by the Evidence of two good Witneſſes, if it be declared by naked Words without any Writing at all.

* J. 2. 21. in prin.

Of Libels, and the Doctrine thereof.

THE Word (*Libel*) bears ſeveral Senſes in our Law-Books. For, *Firſt*, 'Tis ſaid to be a private Writing made uſe of to the Defamation of any one †. *2dly*, 'Tis ſaid to be that Writing, which the Inferior Judge gives to the Party *Appellant*; and this is called a *Dimiſſory* Libel *, or *Letters Dimiſſory*; and, in other Terms, by the Name of *Apoſtles*. *3dly*, 'Tis ſometimes taken for the Commiſſion or Delegation

† 5 Q. 1. 1 & 2.

* D. 49. 6. 1.

of a Judge; and ſometimes for the Delegation of a Cauſe *. 4*thly*, 'Tis often uſed to denote a ſupplicatory Addreſs or Petition, and in this Senſe 'tis term'd a *ſupplicatory* Libel. 5*thly*, 'Tis taken for the Plaintiff's Petition or Allegation made and exhibited in a *Judicial* Proceſs with ſome Solemnity of Law †; and, in this Acceptation, 'tis called a *Conventional* Libel ‖. A little Book is alſo in *Latin* ſtiled *Libellus*, to diſtinguiſh it from a greater Volume. And, according to this Senſe of the Word, a Libel here to be treated of is a ſhort and well-order'd Writing, ſetting forth in a clear manner, as well to the Judge as the Defendant, the Plaintiff or Accuſer's Intention in Judgment *: ſo that a Libel ought to be firſt ſhort, and not verboſe; becauſe the Law abhors a Prolixity of Words †. 2*dly*, It ought to be clear, and ſuch as the Defendant may well deliberate on, and from thence certainly know, whether it be moſt adviſeable for him to ſubmit or contend with the Plaintiff in the Suit. And, laſtly, I call it in this Definition a *well-order'd* Writing; becauſe the Order of the Petition ought not to be inverted; as when a Perſon deſires Execution before Sentence pronounced in the Cauſe: nor ought the Concluſion of the Libel to go before the Narration of the Fact ‖. But if any one ſhould *formally* ſay thus in his Libel, *viz. Peto talem condemnari, &c.* Yet ſuch an Inverſion of Order would not vitiate the Libel, becauſe ſuch a Sentence may, by Interpretation, be reduced to a proper Order and Method of Words *; the Mind of the Perſon thus expreſſing himſelf being more to be regarded than the Form of Words in Writing †.

*D. 1. 16. 1. 9

† X. 2. 3. 1 & 2.

‖ 3 Q. 3. 4. 3.

* Cyn. in cap. 3. Nov. 53. & in l. 1. C. 3. 9.

† C. 7. 62. 39. 1.

‖ C. 6. 26. 8.

* Bart. in l. 58. D. 42. 1.

† D. 28. 5. 51.

In reſpect of Libels they are all form'd from Actions: And as Poſitions and Articles are form'd from Libels, ſo are Exceptions form'd from Poſitions and Articles. Moreover, 'tis to be noted in reſpect of Libels, that every ſolemn Libel ought to contain five Things. *Firſt*, The Name of the Plaintiff, who makes a demand by bringing his Action. 2*dly*, The Thing itſelf which is in Demand or Controverſy ‖. 3*dly*, The Name of the Defendant, from whom the Demand is made. 4*thly*, The Action, whereby the Demand is made, and the Defendant ſued. And, 5*thly*, It ought to mention the Judge or Perſon, by whom Judgment is given, with a Deſcription of his Power and Commiſſion. All which Things are thus ſumm'd up in *Latin*, *viz. Quis*, *Quid*, *à Quo*, *Qualiter*, *& coram quo petatur*. And again, touching this matter of Libels, 'tis to be obſerv'd, that a Libel ought not only to contain the five foregoing Things, but it ought to be free from the five following Things, *viz. Generality* *, *Obſcurity*, *Duplicity*, *Conditionality*, and *Diſjunity*. For great Care ought to be taken, that a Libel be not too general and obſcure, and that there be no Word of a double ſignification inſerted therein, nor a conditional Term, nor any disjunctive Clauſe: of all which hereafter.

‖ X. 2. 3. 3.

* X. 2. 3. 2.

Tho' Writing be regularly of the Subſtance of a Libel †; yet 'tis otherwiſe in ſeveral Caſes, as Cuſtom, and the Stile of Court prevails over a written Law in point of Practice: and then a Libel may be made in the Vulgar Tongue, and without Writing. In Criminal Caſes, both by the ancient and modern *Civil* Law, a Libel or Articles ought to be preferr'd in Writing with an Inſcription and Subſcription of Retaliation (as already remembred ‖) whether the Crime be of a publick or private Nature: But as every Rule has its Exception, this Rule of the *Civil* Law is otherwiſe in the following Caſes, *viz. Firſt*, In a notorious Crime. 2*dly*, In a Crime of *Bawdry*, in *Latin* called *Lenocinium*. 3*dly*, In a Crime of *Falſhood* or *Forgery*. 4*thly*, In a Caſe wherein a Feme-covert is admitted to an Accuſation. 5*thly*, In a Crime of a ſuſpected Tutor, *&c.* for

† X. 2. 3. 1.

‖ Vide Pag. 24.

for in theſe Caſes, a Libel need not be made in Writing with an Inſcription and Subſcription of Retaliation. As to the Clauſes of Libels I muſt obſerve, that there are four neceſſary Clauſes which are uſually placed at the end of the Libel, and ſometimes at the beginning, *viz.* The firſt is, that it ought to be ſaid, *ſuper quibus omnibus & ſingulis peto mihi jus & juſtitiam miniſtrari, &c.* The ſecond is, *omni meliori viâ, modo & Juris formâ, &c.* The third is, *non reſtringens ſe, &c.* And the fourth is, *Proteſtans ſe de expenſis.* The firſt Clauſe ſaves a Libel from all Ineptitude. The Operation of the ſecond is, that in a doubtful Caſe, a Libel ought to be interpreted in ſuch a manner as is moſt favourable to the Plaintiff *Libellant:* The Effect of the third Clauſe is, that the Plaintiff is not oblig'd to the Quantity and Quality deduced in the Libel. And the fourth Clauſe is there put, becauſe the Judge is deem'd to be requeſted to condemn the Perſon caſt in the Suit in the Expences thereof to the Victor *.

As every thing contain'd in a Libel ought to be expreſs'd in the briefeſt manner, ſo it ought (notwithſtanding) to be very clear; becauſe Clearneſs is as great a Friend to the Law, as Obſcurity is an Enemy thereunto †. Now a Libel is ſaid to be obſcure, *firſt*, in reſpect of Equivocation, *viz.* when the ſame Word or Sentence may be underſtood ſeveral Ways, and in different Senſes. 2*dly*, In reſpect of its Generality; as when one Perſon brings an Action of Slander againſt another, and does not in his Libel expreſs any particular Injury done him. 3*dly*, In reſpect of Alternation; as when the Name of an Injury is thus deſcrib'd, *viz. Illud vel Illud:* the Injury not being ſpecially deduced and ſet forth. 4*thly*, A Libel may be obſcure in point of Diction or Locution, not ſufficiently coarcted and reſtrain'd. And 5*thly*, in reſpect of the Indefiniteneſs thereof. The Uncertainty of a Libel appears ſeveral ways. *Firſt*, If it be an *Alternative*, becauſe Alternation produces Obſcurity ||, as aforeſaid. But here I muſt obſerve, that there are ſometimes ſeveral Alternatives in an Obligation, Diſpoſition of Law, or a Covenant of the Parties, *&c.* And then either both the Parts remain true; in which Caſe, an *alternative* Libel is admitted; yea, it ought of Neceſſity to be deduced *alternatively*. Or elſe only one of the Alternatives remains good: And then only that Alternative is ſued and pray'd in that Libel; and an *alternative* Libel is not admitted. Sometimes there is one Alternative in an Obligation, or in a Petition, *viz.* either by Authority of Law, or by the Agreement of the Parties: and then either the Plaintiff is certain of his Right, in which Caſe only that Right is demanded and ſued for; for if it be otherwiſe ſued for under an Alternative, the Libel is vitiated. But if the Plaintiff be uncertain of his Right, then an uncertain Libel is admitted touching his Right, if ſuch uncertainty happens thro' the Act and Fault of the Defendant convened *: but if it be occaſion'd thro' the Plaintiff's Act, 'tis otherwiſe.

Again, the Reader ought to know, that Generality alſo produces Obſcurity: and when the Defendant moves to have a general and obſcure Libel explain'd, a Sentence cannot be pronounced thereon, without ſuch an Explanation or Declaration firſt had and obtain'd. But this Generality and Obſcurity the Plaintiff may explain and declare at any Time whatever, whether call'd upon to do it or not. But a Libel that is general and obſcure, is valid, if it be not oppos'd and objected to by the Defendant †, tho' 'tis not otherwiſe good ||. Tho' general Words in a Libel may be interpreted by the Plaintiff to his own Advantage *, or where clear and ſpecifick Proof follows, it ought to be adapted to the Libel for the Plaintiff's Benefit: yet where a Libel is general, and hinders the

* Gail. lib. 1. obſ. 61.

† D. 49. 14. 40.

|| D. 45. 1. 15. 4 & 8.

* D. 43. 3. 1. 4. Bart. ib. N. 1.

† Gloſs. in c. 25. X. 5. 40. || C. 7. 40. 3. * Socin. Reg. 237.

the Defendant from any certain determination and deliberation thereon, the Defendant is not ſo much as oblig'd to deliberate or underſtand the Libel to the Plaintiff's Behoof; yea, he may cauſe the Plaintiff to be compell'd to declare the Meaning thereof. For the Defendant is not bound to divine the Plaintiff's Meaning; nor ought the Plaintiff to ramble and wander in his Libel to another's Diſadvantage. But if the Plaintiff's Intention be ambiguous, and the Defendant's Anſwer be likewiſe ſo; tho' the Plaintiff may explain his own Intention to his own Advantage, yet his Intention is not underſtood to be confeſs'd according to his own Interpretation; but, according to the Senſe and Underſtanding which the Defendant has of his Libel. And tho' the Plaintiff be allow'd *judicially* to explain his obſcure and ambiguous Libel, yet his Executor may not do the ſame, as not knowing the Plaintiff's Meaning. And laſtly, 'Tis to be remark'd, that when a Libel is general and obſcure, the Defendant is not oblig'd to anſwer thereunto, as I have already obſerv'd under the Title of *Perſonal* Anſwers.

A Libel is, in *Latin*, ſaid to be *Ineptus*, when we cannot from thence infer, that the Plaintiff has any Right of Action; and if the Ineptitude therein contain'd be notorious, the Judge may, on a Motion made, cancel and tear the ſame †; but he ought not to cancel, reject, or tear it (*ex officio*) without ſome Motion made: But a Libel, whoſe Ineptitude conſiſts in ſomething, that is intrinſecal, ought not to be cancell'd and rejected by the Judge. In ſuch a Libel the Judge may (*ex officio*) rectify the Flaws and Faults therein contain'd, and ſupply any Thing relating to the Concluſion of the Libel, as it belongs to his Office to put an end to Law-Suits; and herein he is not ſaid to proceed *de Facto*, but *de Jure*. But tho' the Judge may *ex officio* (as aforeſaid) ſupply a Libel, which is *Ineptus*; yet he ought not to admit a Libel, wherein the Cauſe of Action is not expreſs'd: But a Libel is valid, when the Intention of the Libellant is apt and congruous, though the Action it ſelf be *inept*. When 'tis evident, that a Libel contains ſome notorious piece of Injuſtice, ſuch Libel may, on mature Deliberation and Information had touching the Nature and Matter thereof, be rejected as *inept*; tho' the ſame does not appear from the *Series* and Frame thereof, but the ſame is extrinſecal to the Libel itſelf: And the Plaintiff is not only barr'd from bringing his Action again, when the Libel does from the Frame and Scope of it contain an Ineptitude; but even when it is notorious, that the Petition thereof is unjuſt. A Sentence pronounced *ſuper inepto Libello*, is null and void *ipſo Jure* ‖, tho' the Party ſhould not oppoſe the ſame, becauſe a Sentence ought to be conformable to the Libel *: Therefore if the Libel be *inept*, the Sentence pronounc'd thereon will likewiſe be of no Moment at all. And this is ſo far true, that the judge of an Appeal cannot reform ſuch a Sentence pronounc'd *ſuper Libello inepto*, but ought of Neceſſity to pronounce touching the Nullity thereof, by condemning the Plaintiff in Expences. But though a Sentence founded on ſuch Libel be null and void, where a Libel is required; yet 'tis otherwiſe, where a Libel is not neceſſary, as we ſee hereafter under the Title of *Sentences*. What I have already related ought to be underſtood of an *apparent* Ineptitude in a Libel, and not of ſuch an Ineptitude as is only tacitly inferr'd and apprehended by Implications and Subtleties of Law †: for a Sentence is valid, if the Libel be only *tacitly*, and not *expreſly* inept. If a Libel be inept, the Defendant ought to ſay, *I will not anſwer thereunto, for that the Cauſe of Suit or Action is not therein expreſs'd* ‖: and accordingly, the Judge ought to pronounce thereon. For in a *perſonal* Action, the Libel ought to

† Abb. in. c. 3. X. 2. 3. N. 10.

‖ X. 3. 17. 3. Dd. ibi.

* Gloſ. in c. 31. X. 5. 3. v. *Formam.*

† Vant de null. ſent. tit. Quis poſs. dic. N. 22.

‖ X. 2. 3. 3. Abb. ibi. N.

to contain the Cauſe of Action, otherwiſe the Defendant is not bound to anſwer thereunto: But if the Defendant makes no exception thereunto, the *judicial* Proceſs goes on. A Cauſe which ought to be expreſs'd in a Libel, ought to be ſuch as induces a juſt Suit or Demand in Law: As when a Creditor being Plaintiff, does by way of Allegation ſay, *I demand of thee one Thouſand Marks*, &c. But 'tis not neceſſary to ſay, *that* the Defendant converted the ſaid Sum to his own Uſe, becauſe the Law preſumes it. If a Libel contains an *inept* Cauſe, it cannot be declar'd and explain'd after Conteſtation of Suit: But 'tis otherwiſe, if it contains a Cauſe that is null.

A Libel ought not ſo much to be conſider'd in *modo narrandi*, as in reſpect of the Subſtance and Effect of it; as in reſpect of its Generality in the way of concluding *: for things ſuperfluous, or narrated in too general a manner, ought not to alter the Concluſion of a Libel, and the Nature thereof; ſince 'tis well enough, if the Libel be clear in reſpect of the manner and mode of narrating the Fact, but it ought to be very proper in its way of concluding; for Things ſuperfluouſly declared and ſet forth therein, are not the proper Objects of Proof. A Libel ought to be judg'd of by its Concluſion, and not by its Narration, nor from its *medium* of concluding only: for the Judge ought, from its Concluſion, to collect and infer what kind of Action it is, that is commenc'd and entred againſt the Defendant. But the Concluſion of a Libel does not interpret and reſtrain the ſame: And 'tis enough, if a Libel has but a *preſumptive* Concluſion, or concludes *preſumptively* †. But in criminal Matters, a Narration of the Fact alone, without any Concluſion or Petition, is allow'd as ſufficient ‖; becauſe in ſuch Cauſes as theſe, the Law concludes, and nothing is pray'd to be given or done for the Party himſelf: for either the Puniſhment is corporal, and then 'tis apply'd to the Body; or elſe 'tis pecuniary, and then 'tis due to the Exchequer. And hence 'tis, that a legal Puniſhment ſucceeds according to the Narration of the Fact, without any Concluſion or Petition at all: And if no Law or Statute preſcribes a Puniſhment, 'tis then left to the Diſcretion of the Judge, and becomes Arbitrary. Thus in criminal Caſes the Law concludes the Judge, and not the Accuſer. And, therefore, 'tis not the Judge's Buſineſs or Duty herein to conſider the Mode and Method, wherein a Libel is conceiv d and drawn in point of its Concluſion; but he ought to conſider, how the Law concludes according to the Nature and Quality of the Offence.

* Gail. l. 1. Obſ. 61. N. 15. Abb. in c. 3. X. 2. 8. N. 2.

† Felin. in c. 3. X. 2. 3.

‖ Bart. in l. 3. D. 48. 2. N. 19.

But as no one can except againſt, or reject a Libel, which has not been *judicially* exhibited, I will firſt ſay ſomething touching the exhibiting of a Libel, before I proceed to ſpeak of the Exceptions, which may be made thereunto. Now a Libel, or (which is the ſame Thing) the Plaintiff's Petition, is wont to be offer'd in Judgment on three Accounts *. *Firſt*, For the Plaintiff's ſake, who exhibits it to this End, *viz.* That he may thereby declare and demand his Right in Form. *2dly*, 'Tis exhibited on the Defendant's Account; That he may, on Sight and good Advice thereof, by due Deliberation debate with himſelf what Anſwer he ought to make thereunto; or, whether it be adviſeable for him to ſubmit to the Plaintiff's Demand, or to oppoſe the ſame †. And, *3dly*, 'Tis exhibited on the ſcore of the Judge, that he may, from the Form and Quality thereof, the better know, how he ought to form his Sentence, and pronounce it with Juſtice; which ought always to be given according to the Form of the Plaintiff's Libel, or Petition in ſuch Libel. By the *Canon* Law, the Rector of a Pariſh, in bringing an Action for the Right of the Church,

* Abb. Tom. 8. cap. 36. N. 4.

† Bart in l. 17. D. 48. 5. 2. N. 1.

ought to form his Libel in the Name of the Church; becauſe ſuch Rector has not a *direct* or *profitable* Action in his own Name.

I come next to conſider after what manner an Exception may be made againſt the Plaintiff's Libel, and how ſuch Libel may be rejected on the Defendant's Motion. Now *firſt*, the Defendant may impugn ſuch Libel by way of Exception, if the Petition or Demand therein be inſufficiently ſet forth and declared, *viz.* When he ſays by way of Objection to the Plaintiff, That the Libel exhibited by him is fram'd *indeterminately*: For a Libel is not valid, if the Demand or Petition therein contain'd be deduced and ſet forth *indeterminately*. And a Libel is firſt ſaid to be ſo drawn, when ſuch Libel or Petition does not expreſly mention the Plaintiff's Name, Addition, and Place of Abode; which ought of neceſſity to be therein contain'd, that there may be a full *Conſtat* of the Plaintiff's Perſon. 2*dly*, When the Defendant's Name, Addition, and Place of Abode are not therein ſpecify'd; and this for the like Reaſon. 3*dly*, When the Judge's Name and Authority are not therein deſcribed. 4*thly*, When the Name of the Action is not therein ſet forth. But this laſt is only an Exception, according to ſome of the Doctors, it not being now every where in Practice. But though it be not neceſſary (eſpecially by the *Canon* Law) to expreſs the Name of the Action in the Libel by a conceiv'd Form of Words; yet the Cauſe of Suit*, or Mode of Concluding, ought to be expreſs'd. 5*thly*, When the Libel does not declare and ſet forth the Matters in Controverſy in *Latin* call'd *Res petitas*: for theſe Things, doubtleſs, ought to be expreſs'd in a Libel †. 6*thly*, When it does not name where the Thing was done or tranſacted; tho' this is not much in uſe at this day. 7*thly*, When it does not mention the Day on which the Libel or Petition was exhibited; for if a certain Day be not expreſs'd, we cannot know whether twenty Days (more or leſs) have paſs'd ſince that Time, as the Law requires. 8*thly*, When it does not contain the Day, Year, and Name of the Prince, to whom that Province or Dioceſs is ſubject, when and where the Suit is commenc'd. In all theſe Caſes, according to the *Civil* Law, a Libel is deduced *indeterminately*; and as ſuch, may be objected to. But all theſe Things are not ſtrictly purſued and obſerved with us here in *England*: for we do not obſerve the laſt; nor have we any regard to the twenty Days, *&c.* When a criminal Proceſs is made *per viam querelæ*, which is wont to be deſcribed according to common Practice, the Place where, and the Time when a Crime is committed, ought of neceſſity to be inſerted in the Libel or Articles in a ſolemn Form or Manner, unleſs the Denunciation be made touching a Crime committed againſt the divine Majeſty, as Blaſphemy, and the like; becauſe ſuch Solemnities as theſe are not then required. But in a Complaint of Injury, the Time and Place, when and where ſuch Injury was done, ought to be ſolemnly inſerted in the Libel, tho' 'tis otherwiſe when the Injury appears by the Parties own Confeſſion.

* X. 2. 3. 3.

† X. 2. 3. 2.

In reſpect of the Amendment and Alteration of a Libel, it is not allow'd of more than once in the Courſe and Pleadings of a Cauſe; but if the Libel ſhall in any part of the Proceedings appear to have an Ineptitude therein contain'd, the Defendant ſhall be diſmiſs'd from the *Inſtance* of the Suit. In ſingular or particular Action, a Libel may be amended in four Caſes by adding thereunto. For, *firſt*, it may be thus amended in the Matter of the Petition, *viz.* in reſpect of the Thing demanded or ſued for, as when leſs is demanded than is due: And in ſuch a Caſe, an Amendment is allow'd both after and before Conteſtation of Suit, even to the Time of a Sentence pronounced ||. 2*dly*, An Amend-

|| Bart. in l. 3. C. 2. 1. N. 6.

ment

ment may be made to a Libel in reſpect of the Subſtantials thereof. 3*dly*, A Libel is frequently amended in regard to the principal Qualities of ſuch Libel*. And, 4*thly*, It may be amended in reſpect of its adventitious Qualities. According to *Bartolus*, and the reſt of the Doctors, when any Libel is amended before Conteſtation of Suit, the Plaintiff may then amend the ſame by adding a greater Sum without a new Proceſs on the ſcore of the former Libel amended; but, after Conteſtation of Suit, the Plaintiff may not do this: But this Opinion (I think) is not true, ſince a greater Sum may be demanded even after Conteſtation of Suit without a new Proceſs or Citation. For an Error in a Libel may be corrected after Conteſtation of Suit on due Proof made to the Judge of ſuch Error: and this alſo holds good in Law, tho' there be a Term aſſign'd *ad deliberandum*; becauſe any one may err in Deliberation itſelf. And, therefore, in reſpect of an Error, any one may amend his Libel, even after Conteſtation of Suit, if he proves his Error. But before Conteſtation of Suit, an Error may be corrected in a Libel without ſetting forth and proving the ſame; becauſe a Perſon may then revoke his own Libel at pleaſure. But this Concluſion impugns the receiv'd Opinion of the Doctors, ſaying, That every one is ſo bound by a Conteſtation of Suit to that *Inſtance*, as that he cannot again recede from it: Becauſe Conteſtation of Suit cannot include and comprehend ſuch Things as are afterwards deduced and brought into Judgment: and ſo far the Opinion of the Doctors, that a Libel cannot be corrected on the Score of any juſt Error; but there ought to be a new Libel, and a freſh Inſtance. 'Tis to be noted, that in a Caſe wherein Amendment or Change of the Libel is ſuffer'd, a Perſon thus amending his Libel, or changing the Nature of his Action, is oblig'd to a Refuſion of ſuch Expences as the Defendant has been at thro' the Plaintiff's temerity in his former Proceeding, for that he did not in the Beginning ſufficiently conſider the Matter with himſelf, nor weigh the Action as he ought to have done: For he ought to have come prepared and well inſtructed to act. But this refuſion of Expences ought to be taxed by the Judge.

* Bart. ut ſupr. N. 7.

Judicial Pleadings are either made *vivâ voce*, or elſe in Writing; and ſuch on the Plaintiff's Side as are made *vivâ voce*, are properly ſtiled Petitions *groſſo modo*; but ſuch as are exhibited in Writing, are uſually term'd *Libels*: And ſuch a Writing may contain ſeveral diſtinct Petitions againſt the ſelf-ſame Perſon being the Defendant. A Libel is not requir'd, where the Proceſs is *ſine figurâ Judicii* †: But then ſome Petition or other *Qualis Qualis* ought of natural Right to be exhibited, and in no wiſe omitted. For tho' the Solemnity of a Libel be taken away, yet there is required *talis qualis Petitio* in the way of a ſimple Petition, containing only a clear Narration of the Fact without any Concluſion, whereby the Defendant may deliberate whether he will ſubmit or contend in Law: And afterwards the Notary or Regiſter ought to reduce the ſame into Writing or the Acts of Court; for ſuch a Petition may be made *ore tenus*.

† Abb. in c. 2. Clem. 5. 11. N. 6.

A Citation ought to be previous to a Libel, though in ſome Places 'tis otherwiſe: And, therefore, the *judicial* Proceſs begins from the Citation ||, and not from the Libel. But ſome will have it to be the beſt Practice for a Judge to ſee the Libel, before he decrees a Citation; becauſe if the Libel contains any Thing which is unjuſt, he ought not to decree a Citation. But a Libel may be given to a Perſon that has not been cited, if he be found in the Conſiſtory, or in open Court, on the Account of any other Cauſe *. A Libel has not the Force of a Demand or Interpellation †; and, therefore, ſuch Demand ought to be made before the Libel be exhibited.

|| Bart. in l. 1. C. 2. 1. N. 1.

* Paul. de Caſtr. in l. 21. D. 28. 1. N. 19.

† Alciat. in l. 22. D. 12. 1. N. 51.

hibited. But ſuppoſe that more is demanded in the Libel than is due; as for Inſtance, I owe you ten, and you demand twenty Pounds; or I owe you part of a Thing, and you demand the whole thereof: *Quære*, Whether I may, in this Caſe, *ſimply* deny the whole Demand? And it ſeems, that I may: for if the Poſition of a Libel be falſe in any Part thereof, I may in my Anſwer deny the whole Poſition, in regard to that Part which is falſe *. But the Party *Libellant* ſeems to confeſs whatever is contain'd within the Compaſs and Words of his Libel †, according to a Maxim in Law, *viz.* *Qui ponit, fatetur*. Wherefore, if the *Libellant* propounds any Thing in his Libel which makes againſt himſelf, he muſt abide by it, tho' to his own prejudice*. A Libel is juſtify'd by the Acts of Court; and 'tis ſufficient, that the Quality for which the Action is given be found in thoſe Acts, tho' not found in the Libel itſelf. Where a Power is given to a Perſon in reſpect of ſome certain Quality, the Party *Libellant*, in the firſt place, ought to verify and make good that Quality: For a Libel founded on a certain Quality, falls to the ground, if that Quality be not prov'd.

* Abb. in c. 1. X. 2. 11. N. 15.
† Abb. in c. 15. X. 2. 1. N. 4.
* Paul. de Caſtr. in l. 2. C. 6. 25. N. 4.

In a doubtful Caſe, a Libel ought to be ſo interpreted, that it may ſuit and agree with the Perſon of the Judge, and the Right of the Plaintiff; and the Thing itſelf, in Demand, may have ſome validity ‖: for the Words of a Libel ought not only to be underſtood in favour of the *Libellant*, but ought even to be ſo expounded, as to ſupport and include his Intention, as much as poſſible. For, ſays the *Abbot*, the Words of a Libel ought to be taken in a large and wide Signification, that they may include the Plaintiff's Intention. But this Rule, which ſays, That the Interpretation of a Libel ought to be made in the favour of the *Libellant* only, proceeds and takes place when the Ambiguity thereof conſiſts in ſome Points of Law alone; and not in a Matter of Fact. But in a criminal Cauſe, according to *Socinus*, a Libel or Articles ought to be expounded in favour of the Defendant. By the *Canon* Law, the Plaintiff ought to deliver unto the Defendant a Copy of the Libel at his own Expence, and hereunto he may be compell'd: But by Practice in our Courts, the Defendant takes out this Copy at his own Charge, if he will have it. And, by the Common Law of *England*, when a Man cannot procure the Copy of a Libel at the hand of an Eccleſiaſtical Court, there lies a Writ *Copia Libelli deliberandi* *: And by a Statute of the Second of *H.* 5. Cap. 3. If the Judge of the Spiritual Court denies the Copy of a Libel to any Perſon impleaded there, and demanding the ſame, a Prohibition ſhall be awarded *Quouſq*; And 'tis the ſame Thing, if the Copy of a Preſentment be refuſed or denied him: For reading of a Preſentment to the Party is not ſufficient, ſince a Copy ought to be deliver'd as well on the Articles of a Preſentment as on other Libels; to the end, that on a Surmiſe or Suggeſtion, it may appear whether a Writ of Prohibition ought to be awarded thereupon to the Spiritual Court †.

‖ Abb. in c. 5. X. 2. 2. N. 10.
* Reg. Orig. F. N. B. 51.
† Kebl. Rep. vol. 3. p. 597.

A diſcreet Judge and Advocate ought, in the firſt place, principally to conſider the Form of the Libel, and the Quality of the Action propounded, becauſe a Judge ought to form his Sentence according to the Manner and Petition of the Libel as aforeſaid; for if he ſhall pronounce Sentence in any other manner, *viz.* either contrary to, or beſides the Form of the Libel, he ſhall be cenſured as a weak and ignorant Perſon, and his Sentence may be appealed from. I have already hinted, that 'tis enough for the Plaintiff to propound the Fact without expreſſing the Name of the Action in his Libel: But then he ought to do it in ſo clear a manner, that the Right of bringing his Action may be inferr'd from thence. A recuſatory Libel or Allegation ought to be offer'd before the Judge recus'd ‖, if

‖ Paul. de Caſtr. in l. 18. C. 3. 1. N. 1.

if he be preſent in Court; elſe it ought to be exhibited before the Judge of that Place where the Party dwells, and this Judge ought to compel the Parties to chuſe Arbitrators, as I ſhall hereafter obſerve under the Title of *Recuſation*.

Of a Licence, and the Power thereof.

A Licence, in *Latin* called *Licentia*, is derived from the Verb *Liceo, Lices, Licui*; and is a Power by Grace and Favour granted unto a Perſon for the doing ſome Thing, which it was not lawful for him to do before ſuch Grant made *. It is ſometimes in our Books term'd a *Grace*, and ſometimes a *Faculty*; and is equivalent unto a Diſpenſation in many Reſpects: But ſtrictly ſpeaking, a Diſpenſation has only Place in caſe of Neceſſity; but a Licence obtains without any Cauſe of Neceſſity whatſoever. If a Licence be a *Grace*, it has a perpetual Duration and Continuance after it is once granted †, unleſs ſuch Grant be limited to a certain Time or Uſe ‖: And, moreover, it follows from hence, that a Licence ought to be conſtrued and taken in an extended Senſe, becauſe it is a Matter of Grace and Favour *. Upon which account *Innocentius* obſerves, that if a Licence or Faculty be granted to any one, of going to the Schools, or for any other Reaſons whatſoever, ſuch Licence does not expire on the Death of the Perſon that granted it †, tho' the Gloſs on the Law, quoted in the Margin, intimates the contrary. But I make no doubt, but that a Succeſſor may always, upon a good Account, and for juſt Reaſons, revoke a Licence granted by his Predeceſſor ‖. *Croke* in his Reports affirms, That a Licence of its own Nature cannot be without Writing *: And, I think, his Opinion, generally ſpeaking, is well warranted from the Books of the *Canon* Law, eſpecially where a Licence is granted *ex proviſione Hominis*, and not *ex inſtitutione Legis*.

A Licence which is extorted or obtain'd by undue Means, is not properly called a Licence, according to the Archdeacon †: And as a Mandate or Commiſſion is of neceſſity previous unto the receiving of any Office or Truſt; ſo likewiſe in all Caſes where a Licence is granted, which is but another kind of Commiſſion, it ought to be previous unto the Act itſelf ‖; as in the Caſe of a Curate, Schoolmaſter, and the like. But where an Authority is required, the ſame ought to be apply'd in the Act itſelf incontinently, either before or after it *. But when a Man's Conſent is only required, then it is well enough if it be either previous or ſubſequent unto ſuch Act: But if a Man's Advice or Counſel be neceſſary, then it ought to be previous to the Act †. We read of ſeveral kinds of Licences in our Law-Books ‖, as a Licence to preach, a Licence to marry without publiſhing the Banns of Matrimony, a Licence to purchaſe in Mortmain, a Licence of Appropriation, a Licence to teach School, and the like; ſome of which are founded upon Diſpenſation, others upon Permiſſion, a third ſort upon Approbation, a fourth ſort are only Occaſional, and a fifth ſort are entirely founded upon an Abuſe of Power, as being rather deſign'd to get Money from the Perſon, than to do any Service to Religion, or Good to the State. No one can grant a Licence unto himſelf, or for his own Advantage, becauſe ſuch a Licence has

* Lindw. in c. 2. lib. 1. Tit. 9. v. *Licentia.*

† vi. 1. 14. 6. vi. 3. 4. 36.

‖ X. 3. 15. c. unic.

* X. 5. 41. 2.

† X. 3. 4. 16.

‖ X. 1. 6. 20.

* Crok. 2. Rep. p. 103.

† In c. 24. vi. 1. 6.

‖ vi. 3. 11. 2.

* J. 1. 21. 2.

† D. 26. 7. 47. vi. 2. 8. c. un.

‖ Bald. conſ. 288. N. 6. v. *Auctoritas.* lib. 3.

not *terminos habiles* *; for the Perſon that grants a Thing, and the Perſon that receives it, muſt be different Perſons, ſince no one can give to himſelf. In Things prohibited, and which cannot be done without a Licence obtain'd, the tacit Conſent of the Perſon who ſhould grant it is not ſufficient †, becauſe in all ſuch Caſes, an expreſs Conſent is required: And the Perſon who affirms himſelf to have a Licence for the doing of a Thing, ought to prove the ſame by exhibiting the Licence. A Clerk in Orders, cannot adminiſter the Sacrament of the Euchariſt unto the Pariſhioner of another Church, without a Licence obtain'd from the Biſhop of the Dioceſs, or the Parſon of the Pariſh ||, where he adminiſters the ſame: nor ſhall any Credit be given to a Perſon that affirms himſelf to have ſuch a Licence, nor to the Pariſhioner averring the Truth thereof; but he ought to ſhew his Licence in Writing, or prove from the Parſon of ſuch Pariſh that he had Leave ſo to do. And a Curate, who is not Parſon of ſuch Pariſh, may grant ſuch a Licence, though he be not in Prieſts Orders. Nay, ſo ſevere is the *Canon* Law in this reſpect of the Sacraments, that it will not ſuffer a Pariſhioner to receive the Sacraments of the Church from another Pariſh-Prieſt, or any Clergyman whatſoever, without the ſpecial Leave of his own Parſon; and if he ſhall act contrary hereunto, he ſhall be excommunicated *ipſo facto* *: And hence it is, that no one ought to ſolemnize Matrimony without the particular Licence or Leave of the Pariſh-Prieſt firſt had and obtain'd thereupon, becauſe Matrimony is a Sacrament in the *Romiſh* Church.

* Bald. ut ſupr. N. 5. v. *præterea.*

† Lap. alleg. 87. N. 3.

|| Lindw. lib. 3. Tit. 15. cap. 2.

* Cl. 5. 7. 1.

Though a Prieſt by his Ordination receives Authority to preach the Word of God, and to adminiſter the Holy Sacraments in the Congregation, where he ſhall be lawfully appointed thereunto; yet, notwithſtanding this, he may not preach without the Licence either of the King, or his reſpective Archbiſhop, Biſhop, or other lawful Ordinary, or of one of the Univerſities of *Oxford* or *Cambridge* †. But a Licence by the Biſhop of any Dioceſs is ſufficient, though it be only to preach within his Dioceſs, the Statute not requiring any Licence by the Biſhop of the Dioceſs where the Church is ||. Heretofore, the Neceſſity of Baptiſm to newborn Infants was ſo rigorouſly taught, that for this Reaſon, they allow'd Lay People, and even Women to baptize a declining Child, where a Prieſt could not be immediately found: And this Office of baptizing in ſuch Caſes of Neceſſity was commonly perform'd by Midwives, which very probably firſt introduced the Licenſing of Midwives by the Biſhop; becauſe they were firſt to be examin'd by him or ſome deputed Officer, whether they could repeat the Form of Baptiſm, which they were in haſte to adminiſter on ſuch extraordinary Occaſions.

† Stat. 1. Mar. cap. 3. 14. Car. 2. cap. 4. 13 Eliz. cap. 12.

|| 1. Kebl. Rep. 503.

In antient Times, the Cathedral Church, according to the Council of *Lateran*, was to provide a Maſter, and to maintain one out of the Eſtate of the ſaid Church, who was to inſtruct the Clergy belonging to the ſaid Church, and other poor Scholars *gratis*; (for he was not to demand any Money and the like, under any pretended Cuſtom whatever) and hence it came to paſs, that the Biſhop had the Licenſing of ſuch Maſter, as being provided by the Church, who was to have no Fee upon ſuch Account, under pain of Deprivation. Nor could a Biſhop interdict or reſtrain any Perſon that was fitly qualify'd to teach School, from ſuch Employment, on ſuing out a Licence. In the *Decretals* *, we read of ſeveral Laws touching this Matter, after the Church ſet up for the Care and Inſpection of Learning, which weaken'd the Power of the Laity very much; and I am inclin'd to think, that this Licenſing of Schools by the Clergy, has done no great Service to Religion itſelf, however it was at firſt intended.

* X. 5. 5. 1. 2. 3. & 4.

Of

Of Liturgies, otherwiſe called Common Forms of Prayer.

THE Word *Liturgy*, in the general Acceptation of it, ſignifies the performing of ſome publick Office or Work; being deriv'd from the *Greek* Verb λειτουργεῖν, which is to perform ſome Service for the Publick: And from hence, according to the Uſe of the Church, this common Term is by a Metaphor apply'd to Things of a divine Nature; and, having oftentimes a larger Signification, it denotes every Office of Piety whatſoever, as in St. *Paul*'s Epiſtle to the *Romans* *, where 'tis ſaid, *Their Duty is to miniſter to them in carnal Things*, that is to ſay, to adminiſter Supplies to the Poor. And in his ſecond Epiſtle to the *Corinthians* †, 'tis likewiſe ſaid, "The Miniſtration of this Service, not "only ſupplieth the want of the *Saints*," &c. But in a more confin'd Senſe of the Word, 'tis generally taken to denote ſome Office or Function in the Church, as in his Epiſtle to the *Hebrews* ‖. "Every Prieſt ſtandeth "daily miniſtring and offering ſometimes the ſame Sacrifices, which can "never take away Sin:" ſpeaking thereof the Prieſts of the *Old* Teſtament, who are ſaid λειτουργεῖν. And thus Chriſt is ſaid to be λειτουργὸς τῶν ἁγίων, the Miniſter of the Sanctuary *: And in this Senſe, St. *Paul* likewiſe ſtiles the Preaching of the Goſpel by the Word λειτουργία †. And thus the Word *Liturgy*, in the antient Church, ſignify'd all Holy Offices perform'd by Biſhops, Prieſts, and Deacons; and (perhaps) it denoted the Books themſelves, containing ſuch Offices, and the Forms of publick Adminiſtrations, as now with us: For by a Liturgy of Prayers, we can underſtand nothing elſe but the publick Forms then in common Uſe.

* Cap. 15. v. 27.

† Cap. 9. v. 12.

‖ Cap. 10. v. 11.

* Heb. c. 8. v. 2.

† Rom. cap. 15. v. 16.

We have very early Proofs of ſome common Forms of Prayer, which were generally uſed in Chriſtian Churches, and were the Foundation of thoſe antient Liturgies, which were, by degrees, much enlarged, as I ſhall obſerve by and by. And the Interpretations of latter Times, do no more overthrow the antient Ground-work, than the large Additions to a Building, do prove there was no Houſe before. But though it ſhould be ſaid, that ſuch Liturgies were, or could not be the Liturgies of St. *James* or St. *Mark*, becauſe of ſuch Errors, Miſtakes, and Interpretations of Things, and from the Phraſes of later Times; yet this is not an Argument againſt the ancient Uſe of Liturgies in the Churches of *Jeruſalem* and *Alexandria*, ſince we find, even in *Origen*'s Time, an entire Collect produced by him out of the *Alexandrian* Liturgy ‖. And the like may be ſhewn as to other Churches, which, by degrees, came to have their Liturgies, or ſet Forms of Prayers, for general Uſe among them, which were ſometimes ſtiled the *publick Offices* of the Church. In the old *Saxon* Canons, the Presbyters are required to uſe and read theſe publick Offices conſtantly at Prayers in their Churches *: And ſo it was decreed in the Council of *Cloveſhoe*, and by the Canons of *Egbert* †, and King *Edgar* ‖. Indeed, ſome Perſons have ſince thought it unlawful to pray to God in ſet Forms of Words; but thoſe that are of this Opinion, do not pretend to any Inſpiration, but only to ſome inward Help from a frantick

‖ Biblioth. Patr.

* Conc. Angl. vol. 1. 247.

† Can. 2.

‖ Can. 45.

tick Devotion of Mind in their preſent and ſudden Conceptions of Prayer, whereby they are more earneſtly excited to implore the divine Bleſſings, and the Forgiveneſs of their Sins. I will not here enter into any Diſpute with them concerning this Matter, having never yet met with any ſolid or convincing Argument to determine, why the Holy Spirit ſhould be leſs aſſiſting to us when we pray for a Thing in a ſet Form of Words, than when we pray for it in a looſe and rambling Manner, according to our own Fancies and Emotions. In the *Roman* Church there were always Forms of Prayer, as may be ſeen in their *Miſſals*, *Breviaries*, *Rituals*, *Pontificals*, *Manuals*, *Roſaries*, *&c.* For tho' that Communion has deviated much from the Purity of the antient Church of Chriſt; yet, in reſpect of publick Liturgies and common Forms of Prayer, it has follow'd the Primitive way of divine Worſhip in every Thing, but in Idolatry and Superſtition, which have been ſince introduced for the Grandeur of the *Romiſh* Clergy. But thoſe Offices beforemention'd, and which were uſed in the *Romiſh* Church, being ſo many; and every Religious Order having likewiſe ſome peculiar Rites and Services adapted to themſelves, and to be perform'd on the Saint's Day which belonged to their reſpective Orders, it was formerly a very difficult thing to underſtand in what manner to officiate. In the *South* Part of *England*, the Offices were generally received after the Uſe of *Sarum*; and in the *North* after the Uſe of *York*; in *South Wales*, after the Uſe of *Hereford*; and in *North Wales*, after the Uſe of *Bangor*; and in *Lincoln*, and other Places, there were proper Offices to be uſed: And when any Prelate was made a Saint, there were Collects and particular Forms uſed in honour of him in his Dioceſs. And thus ſtood the publick Forms of Prayer till *Edward* the VIth's Time here in *England*.

* 2 E. 6. cap. 1.

For upon the Reformation of Religion, or ſoon after *, theſe Forms being found full of Superſtition and Idolatry, the Protector, and the reſt of that King's Council, thought it expedient to have one uniform Order of publick Worſhip throughout the Kingdom, and to prepare and compoſe ſuch a Form, a Committee of particular Divines was appointed, *viz.* the two Archbiſhops, ſixteen other Provincial Biſhops, and ſix Doctors of Divinity, to examine and reform all the old Offices of the Church. And upon the Examination thereof they found them ſo Superſtitious, that they rather reſembled the Rites of Heathens than Chriſtians: and, therefore, they rejected every thing which was not warranted by Scripture; and reduced other Matters to their Primitive Purity. In the compiling this Book, the Reformers began with the Morning and Evening Prayers, which they put almoſt in the ſame Form we now have them, only the general Confeſſion of Sins, and Abſolution to Penitents were omitted. The Communion Service was likewiſe the ſame as it is now, only the Ten Commandments were not read in that Service. And becauſe Religion was clouded and encumbred with many Ceremonies, they therefore rejected all ſuch as had been abuſed by Superſtition, retaining ſuch as were decent, and which tended to move our Affections by ſome apt and good Significations; and they prefix'd a *Preface* concerning ſuch Ceremonies, which is the ſame as now printed before the Book. But theſe Alterations in the publick Offices of Worſhip, occaſion'd great Heats among the People, which were excited chiefly from the Pulpit, the Clergy being very unwilling to part with thoſe Methods whereby they govern'd the Laity: And, therefore, Preaching was prohibited for a Time to any Perſon not licenſed by the King or his Council, or by Archbiſhop *Cranmer*. Afterwards the major part of the Committee framed a Bill which they brought into the Houſe of Peers on the ninth Day o

December *, and which lay before them for a long while; for eight of the ſixteen Biſhops, who were of the Committee, and three Temporal Lords, proteſted againſt it; whereby they ſhew'd their unwillingneſs to make any Alterations, tho' they were reſolv'd to obey when it was enacted into a Law; which ſee at large with the Preamble thereunto. But becauſe ſome things were contain'd in that Liturgy, which ſhew'd a Compliance to the Superſtition of thoſe Times, and ſome Exceptions taken to it by ſome Men at Home, and by *Calvin* abroad, therefore it was review'd two Years afterwards, in which *Martin Bucer* was conſulted, and ſome Alterations were made in it, which conſiſted in adding ſome Things, and leaving out others. The Additions were, *viz.* a general Confeſſion of Sins, a general Abſolution to the Penitent, and the Communion to begin with Reading the Ten Commandments, and a Rubrick concerning the Poſture of Kneeling, which was afterwards order'd to be left out, but is now again explain'd, as it was in K. *Edward*'s Time. The uſe of Oil in Confirmation, and Extreme Unction, were left out, and ſo were Prayers for Souls departed, and what tended to a Belief of the *real* Preſence of Chriſt in the *Euchariſt*. Afterwards a Bill was brought into the Houſe of Peers † to enjoin a Conformity to this Book, with thoſe Additions and Alterations; which Bill then paſt into a Law. But on the King's Death, which happen'd ſoon after, this Liturgy was laid aſide; and ſome of thoſe Divines, who had been the chief Promoters of it, fled beyond Sea, where at *Frankfort* there happen'd a Contention amongſt them: for ſome thought they ought to accommodate the Worſhip of God in conformity to the uſage of the People there, and nearer to the *Geneva* Form, that all might be united in one way of Worſhip. But on Queen *Mary*'s Death it was again appointed ‖ to be uſed by every Miniſter, tho' not as before; for upon a Review of ſeveral Divines, ſome Additions were made to it, *viz.* There were added certain Leſſons for every *Sunday* in the Year, two Sentences added on the delivery of the *Euchariſt*, intimating to the Communicants, that Chriſt's Body is not preſent in the Elements, *&c.* The Form of making Biſhops, Prieſts, and Deacons, was likewiſe added. There were ſome Alterations made in the Reign of King *James* I. but thoſe were in the Rubrick only. As for the Additions of Thankſgivings at the end of the Litany, and the Prayer for the King and Royal Family, which were not in the laſt Book, they were added by the Authority of the King's Commiſſion; and are ſtill in force by virtue of his Proclamation; and ſo are the Prayers for the Inauguration of our Kings and Queens, *&c.*

* Burn. Hiſt. of the Ref. vol. 2. p. 93.

† 5 & 6. E. 6. cap. 1.

‖ 1 Eliz. c. 2.

Anthems were anciently added to the Liturgy by Pope *Damaſus*, who order'd them to be ſung in Churches: about ten Years after the firſt Council of *Nice*, *Marcus*, Biſhop of *Rome*, appointed the *Nicene* Creed to be ſung after the reading of the Goſpel: And Pope *Anaſtaſius* decreed, that Men ſhould hear the Goſpel read in a ſtanding Poſture. Pope *Sabinius* the Firſt introduced the Diſtinction of Canonical Hours for Prayers: And Pope *Zepherinus* order'd, that the Wine in the *Euchariſt* ſhould be conſecrated either in Cups of Gold, Silver, or Pewter, and not in wooden Cups or Glaſs, as had been done before; and that all Chriſtians above fourteen Years of Age ſhould receive the Communion upon Eaſter-day. The *Sanctus* or Hymn beginning, *Holy, Holy, Holy, Lord God, &c.* was inſtituted by Pope *Sixtus* to be ſung at the Celebration of the *Euchariſt*; whereas, before this Pope's Time, the Communion was perform'd without the mixture of any human Inſtitution whatever. As it was a receiv'd Cuſtom in the *Hebrew* or *Jewiſh* Synagogue to read ſome Portion of Scripture out of the Law of *Moſes* on every Sabbath-day

throughout the whole Year, and ſome other Portion of Scripture out of the Prophets; ſo 'tis particularly enjoin'd by the Holy Liturgy in the Chriſtian Church to read ſome Leſſons out of the *Old* and *New* Teſtament every Day, ſo that the whole may be read thorough in the Year; and likewiſe decreed, that the *Doxology* or *Gloria Patri, &c.* ſhould be repeated at the end of every Pſalm, and gave Authority to *Jerom*'s Tranſlation of the Bible, according to *Platina*.

Of a Mandatory Writ, in Latin *ſtiled a* Mandamus.

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tion of Mankind ; ſo it is now likewiſe made uſe of as a Remedy for Man's Weakneſs and Infirmity, after Sin entred among us, in order to reſtrain a vagous Concupiſcence. And ſurely ſince it was firſt introduced by the Divine Will and Command, it muſt be a good Thing, and may be practis'd without Sin ; however the Paſſions of Men may have abuſed this Holy State. Among the *Papiſts* there is a threefold matrimonial Good, *viz.* what they in *Latin* call *Fides*, *Proles* and *Sacramentum* : And this threefold Good, they ſay, was in *Chriſt*'s Parents. There was a *Fides*, becauſe there was no Adultery. *Chriſt* himſelf was the *Proles* or Offſpring. And there was a Sacrament, in their Notion of it, becauſe there was no Divorce. And as the firſt Cauſe and Reaſon of Matrimony ought to be the Deſign of having an Offſpring ; ſo the ſecond ought to be the avoiding Fornication : And, therefore, in the Beginning of the World, the Precept of the Law of Nature, or rather right Reaſon itſelf oblig'd every one to a Contract of Matrimony for the Neceſſity of human Propagation ; for if ever there was a Neceſſity of propagating an Offſpring, it was ſurely in the early Ages of Mankind, when the Race of Men was thin, and the Earth was unpeopled. And in reſpect of the ſecond Reaſon, certainly the *Romiſh* Church does very ill in forbidding Marriage to the Clergy, ſince ſo few of its Clergy avoid Fornication and Adultery, which that Church thinks a far leſs Sin in a Prieſt than Matrimony it ſelf ; as *Cloſter*, and others heretofore maintain'd, tho' they are ſomewhat aſham'd to own this Doctrine at preſent. *Sylvius Æneas*, *Panormitan*, and other Writers of the *Romiſh* Church, were all againſt the Marriage of Biſhops and Prieſts : But *Caſſandra*, who was a better Chriſtan, affirms, That that Law which enjoins a ſingle Life unto Biſhops and Prieſts, ought to be aboliſh'd, though it were an Apoſtolical Canon. So that this Prohibition of Marriage to the Clergy is condemn'd by one of their own Communion. For to forbear Marriage is not a neceſſary Means to preſerve Chaſtity, as we may learn from the lewd and ſcandalous Practices of the *Romiſh* Clergy, who commit ſuch frequent Acts of Whoredom and Adultery ; and juſtify the ſame too, from their Books of the *Canon* Law, *viz.* *Si non caſtè*, *tamen cautè*, and the like. Therefore, this Prohibition does no good, nor does it tend to Gods Service (as they vainly boaſt) ſince Virginity is not in Scripture deem'd more holy than a chaſte Marriage. But the true Reaſon why the *Papiſts* will have the Clergy always to abſtain from the uſe of Wedlock, is not ſo much on a Religious as a Political Account, as thinking not only to recommend themſelves to the Laity by a greater ſhew of Sanctity, that they may procure a larger Authority to themſelves thereby, but likewiſe to put themſelves under a greater Subjection to the Pope, and the better to eſtabliſh the Hierarchy of the Church.

By the Papal *Canon* Law, Matrimony is twofold, *viz.* *Spiritual* and *Carnal*. Spiritual Matrimony is that, which is contracted between a Prelate elected and the Church, unto which he is choſen by means of the Perſons electing : And it may be divided into three Parts. The firſt conſiſts in the Conſent of the Perſons electing, and the Perſon elected ; and this is called the *Beginning* of ſpiritual Matrimony. The ſecond Part conſiſts in Confirmation, whereby this Kind of Matrimony is ratify'd and confirm'd. And the third Part conſiſts in Conſecration, whereby the ſame is conſummated, as carnal Matrimony is by Copulation. Note, That ſpiritual Matrimony is only ſaid to be contracted between a Biſhop and his Church, and not between an inferior Prelate and his Church. But here I ſhall only treat of *Carnal* Matrimony, as it is a Conjunction of Man and Woman in an individual State and Converſation of Life : And herein we ought to conſider ſeveral Things. For, *Firſt*,

First, We ought to conſider the Parties themſelves that are thus join'd together. *Secondly*, At what Age of the Parties this Conjunction may be made. And, *Thirdly*, By what, and whoſe Conſent it is to be made. And *Firſt*, in reſpect of the Woman which marries according to Law, it is ſaid that ſhe ought to be a chaſte Virgin, and a Perſon betroth'd in her Virginity. *Secondly*, She ought to be legally endow'd, and given by her Parents in Wedlock. And, *Thirdly*, She ought to be ſuch a Perſon as is acceptable to the Bridegroom. I ſay, ſhe ought to be endow'd, becauſe Matrimony ought not to be without a Dowry, if it may be had; yet if ſuch Marriage be contracted, it is not therefore void; becauſe, though a Dowry be an Expedient, yet it is not an eſſential Part of Matrimony. The Dowry, according to *Bartolus* †, is that Eſtate which is given by the Woman, or elſe in her Name, to the Husband, in order to ſupport the Charges of a marry'd Life; and it had its riſe from the Law of Nations, as well as from the Conſent of the Giver: And, according to the *Civil* Law, a reſcinding of Wedlock, either by Divorce or by the Death of one of the marry'd Couple, induces a Reſtitution or Loſs of Dower, if ſuch Divorce be grounded on any Fault of the Perſon divorced.

† In Rub. D. 24. 3.

As to the Age of the Perſons contracting Eſpouſals *de præſenti*, commonly called Marriage, it ought to be fourteen in the Man, and twelve Years of Age in the Woman ‖: yet a Marriage Contract before ſuch Time is not void, but only voidable, if it be not ratify'd by the Conſent of the Parties in Wedlock, when they come to theſe reſpective Ages. This is the Age of Perſons, which the Law has deem'd capable of Advice and Underſtanding, which ought to be principally regarded in the Buſineſs of Matrimony, becauſe ſo many Inconveniences may flow from an indiſcreet Marriage: And, therefore, though a Perſon under Puberty may contract Eſpouſals *de futuro*; yet he cannot contract Matrimony or Eſpouſals *de præſenti*. But if this ſhall happen, the Perſon under the Age of Puberty ought, as ſoon as he or ſhe ſhall arrive at ſuch Age, to appear before the Biſhop, his Official, or any other competent Judge, if he deſires to have ſuch Marriage declared null and void *ab initio*, and pray an Abſolution thereof for want of a proper Conſent *; otherwiſe the Marriage ſhall remain firm and valid; eſpecially, if Carnal Copulation has enſu'd thereupon.

‖ Nov. 100. cap. 2.

* Hoſtienſ. in c. 1. X. 4. 15.

Thirdly, Matrimony ought to be contracted with the utmoſt Freedom and Liberty of Conſent imaginable, without fear of any Perſon whatſoever †: For Matrimony contracted through any Menace or Impreſſion of Fear, is null and void *ipſo Jure*; ſo that it is not neceſſary to reſcind the ſame by an Action, in the Civil and *Canon* Law called, *Quod metûs cauſâ*, becauſe all Marriages ought to be free. For Marriages contracted againſt the Will of either of the Parties are uſually attended with very bad and diſmal Conſequences ‖: And, therefore, all Statutes and Decrees made againſt this Liberty of the Parties are null and void in their own Nature. But tho' Matrimony contracted thro' ſuch a Fear as may happen to a Man of Courage, Conſtancy, and Reſolution, be null and void *ipſo Jure*; yet this Fear may be purged and done away by a ſpontaneous Cohabitation for ſo long a Time, as that the Cauſe of ſuch Fear may be preſum'd to ceaſe and be deſtroy'd thereby; and a ſpontaneous Conſent added in its room*. For, according to *Oldradus*, Cohabitation baniſhes and caſts out Fear, whenever ſuch Cohabitation happens, and eſpecially after the Removal of ſuch Cauſe of Fear: For Fear only remains during the Time, that the Cauſe of ſuch Fear continues. Thus a Wife is preſum'd to have contracted Wedlock thro' Fear, if the Husband beats her, becauſe ſhe would

† C. 5. 4. 12.

‖ D. 23. 2. 22.

* X. 4. 1. 2.

not give her Conſent to ſuch a Contract. But 'tis otherwiſe, if the Man has beat the Woman on another Account. Now from this freedom of Conſent, which is ſo neceſſary in Matrimony, it is inferr'd, that if a Judge has a Jealouſy, or any well-grounded Suſpicion, that this Liberty of Conſent will be hindred by ſome Fear or Force induced on a Woman, he ought to ſee that ſuch Woman be kept in ſome ſafe and proper Place, where ſhe may expreſs her Conſent, and be without Reſtraint. By Fear, here we ought to underſtand ſuch a Fear as may happen to a Man or Woman of good Courage and Reſolution, and ſuch as either includes ſome danger of Death, or elſe ſome bodily Torment and Diſtreſs: otherwiſe it can have no Operation in Law to reſcind a matrimonial Contract.

In reſpect to the Conſent of Parents; 'tis ſaid in our Canons, that Children may not marry without their Conſent †: for *Iſaac* did not marry without his Father's leave, tho' God himſelf deſign'd and appointed the Marriage. And Marriages, that are made contrary to the Conſent of Parents, are pronounced to be invalid both by the *Canon* ‖ and *Civil* Law; and the Church did ſometimes Anathematize ſuch as marry'd without the Conſent of Parents. But yet when Sons and Daughters arrive at a competent Age, and are endued with the uſe of ſtrong Reaſon, they may of themſelves contract Marriage without this Conſent: for 'tis reaſonable, that Children ſhould be left at liberty in nothing more than in Marriage; becauſe their future Happineſs in this Life depends hereon. By the *Civil* Law, indeed, an emancipated Son might have contracted Marriage without his Father's Conſent *: But a Son under the Power of the Father, could not do it without his Approbation. And thus it appears, that this Conſent (according to the *Civil* Law) did not depend on that particular Power which the Father was veſted with, and which was peculiar to the *Roman* Citizens †. But as Children owe a reverential Obedience to their Parents, Sons at this day under Twenty-five Years of Age, and Daughters under Twenty, are, in *Holland* ‖, and other Countries, govern'd by the *Civil* Law, forbidden to marry without their Parents Conſent: But if they exceed the ſaid reſpective Ages, the Diſſent of Parents, which is only naked and *ſimple*, without a ſufficient Cauſe, is not a legal Impediment to hinder them from contracting Marriage. But Marriages contracted in any other manner, are there look'd upon to be as null and void *ipſo Jure*; inſomuch, as that they can not be confirm'd even by a ſubſequent carnal Copulation. The Law only makes ſuch Marriages as are contracted without Conſent of Parents *civilly* null and void, and not *naturally* ſo: But a Father cannot force his Children to marry whom and when he pleaſes.

† Can. 100.

‖ 27 Q. 2. 2.

* D. 23. 2. 25.

† J. 1. 9. 2.

‖ Orden. van Polit. binnen Holl. Art. 3 & 13.

I have juſt now obſerv'd, that the principal Thing required to a legal Marriage, is the Conſent of the Parties contracting; which is ſufficient alone to eſtabliſh ſuch a Marriage †: And, tho' there is nothing more contrary to Conſent than Error; yet every Error does not exclude Conſent. Wherefore, I ſhall here conſider what kind of Error it is, according to the *Canon* Law, that hinders or impeaches a matrimonial Conſent; and renders it null and void *ab initio*. Now there are four *Species* of Error, which are hereunto referr'd. The firſt is ſtiled *Error Perſonæ:* as when I have Thoughts of marrying *Urſula*; yet by my Miſtake of the Perſon I have marry'd *Iſabella*. For an Error of this kind, is not only an Impediment to a Marriage Contract, but it even diſſolves the Contract it ſelf, through a defect of Conſent in the Perſon contracting ‖. For Deceit is oftentimes wont to intervene in this Caſe; which ought not to be of any Advantage to the Perſon deceiving another *. A ſecond

† D. 50. 17. 30.

‖ X. 4. 1. 25.

* D. 24. 4. 1.

Species

Species is ſtiled an Error of Condition; as when I think to marry a Free-Woman, and through a Miſtake I have contracted Wedlock with a Bond-Woman, and ſo *vice verſâ*: for by the *Canon* Law, ſuch an Error is an Impediment to a matrimonal Contract †. But as there is now no ſuch Thing among Chriſtians as Perſons that are truly Bondmen or Bond-women, (this kind of Bondage or Servitude being now aboliſh'd among us by the Advantage of the Chriſtian Religion) I ſhall not long inſiſt on this Head. But if a Freedman marry'd a Bondwoman, knowing her to be ſuch, the Church did not diſſolve ſuch a Marriage. And thus we read, that the Marriage between *Abraham* and *Agar* the Hand-maid, was a true and valid Marriage. The third *Species* is what we call *Error Fortunæ*; and is, when I think to marry a rich Wife, and in truth, have contracted Matrimony with a poor one. But this Error does not, even by the *Canon* Law, diſſolve a Marriage-Contract made *Simply*, and without any Condition ſubſiſting ‖: But 'tis otherwiſe by that Law, if I have contracted with a Perſon to marry her upon Condition that ſhe is worth ſo many thouſands Pounds, and the Condition is not made good. The laſt *Species* is ſtiled an Error of *Quality*, *viz.* when a Perſon is miſtaken in reſpect of the other's Quality, with whom he or ſhe contracts: As when a Man marries *Berta*, believing her to be a chaſte Virgin, or of a noble Family and the like, and afterwards finds her to be a Perſon deflower'd, or of a mean Parentage*. But according to the common Opinion of the Doctors, this does not render the Marriage invalid; becauſe Matrimony celebrated under ſuch kind of Error, in point of Conſent, is deem'd to be *ſimply* voluntary as to the Nature and Subſtance of it, though in reſpect of the Accidents 'tis not voluntary. Nay, the *Canoniſts* are ſo far from reſcinding a Marriage contracted with a Strumpet, that their Law makes it a matter of Merit for a Man to take an Harlot out of the Stews and marry her; becauſe it is not the leaſt Act of Charity (ſays the *Canon* Law) to recall a Perſon going aſtray from the Error of her ways: But the true Reaſon is, becauſe that Law allows of publick Stews.

† X. 4. 9. 2.

‖ X. 4. 1. 26.

* 39 Q. 1. 1.

Among unlawful Marriages, there are ſome which are ſtiled *inceſtuous* Marriages, from the *Latin* Word *Cæſtus*, as not being initiated *juſtâ venere*: For *Venus*'s Girdle, or *Cæſtus*, as made uſe of at all honeſt and decent Nuptials, was by the ancient *Civil* Law in *Latin*, ſtiled *Legitimorum annorum initium*, as *Politian* obſerves in his Miſcellanies; that is to ſay, the Initiation of a lawful Marriage; for all ſuch Marriages as are *inceſtuous* are unlawful, though all unlawful Marriages are not *inceſtuous*. Now *Inceſt* is from hence ſaid to be a Carnal Copulation had between two Perſons of Conſanguinity or Affinity unto each other; and who, by a Prohibition of Law, cannot contract Matrimony: For that Marriages, contracted by ſuch Perſons within a certain Degree of Kindred, are condemn'd as *inceſtuous* Marriages both by the *Civil* and *Canon* Law. The *Perſian Magi* were indeed begotten of the Mother and the Son; but the Marriage of Parents with their Children is not only forbidden by the *Jewiſh* and *Roman* Law, but even by the Goſpel Diſpenſation. And ſo are all Marriages prohibited to Perſons any wiſe ally'd to each in any Degree of the aſcending or deſcending right Line, by reaſon of ſuch Kindred or Conſanguinity: as between Father and Daughter, Mother and Son, Grandfather and Grandaughter; Grandſon and Grandmother; and ſo on *in infinitum* †. But God has not entirely forbidden us to marry our Kindred, but only the neareſt of our Fleſh, *Propinquos non Cognatos*, ſays the Law: for as to ſuch as are ally'd to us in a *collateral* Manner, this Prohibition only extends to ſome certain limited Degrees. Such Marriages as are contracted and enter'd into between

† D. 23. 2. 53 & 68. C. 5. 2. 17.

Aſcendants

Aſcendants and *Deſcendants*, are, by the *Civil* Law, ſtiled by the Title of Nefarious as well as *Inceſtuous*, to ſhew the Abhorrence that Law has of ſuch kind of Marriages: Nay, the Laws of God do forbid us not only carnal Knowledge of a Mother, but even of a Step-mother alſo. Inceſt committed between *Aſcendants* and *Deſcendants*, was, by the *Jewiſh* Law, puniſh'd with Death‖; it being a more heinous Crime with them than Adultery itſelf. The Interdicts of Marriage and carnal Copulation in the *Levitical* Law, were directed to the Men, and not to the Women, who are only interdicted by a Conſequence and Implication of Law: for the Woman being interdicted to the Man, the Man muſt be alſo interdicted to the Woman; ſince a Man cannot marry a Woman, and ſhe not marry him. But for a Man to marry his Wife's Siſter, tho' ſhe be not in the right Line aſcending or deſcending, is a Marriage expreſly forbidden by the *Levitical* Law. A Man marry'd his Grandfather's Brother's Wife by the Mother's ſide, and it was held here in *England* not to be an unlawful Marriage. A Man married his firſt Wife's Siſter's Daughter, and it was held to be an unlawful Marriage; and after a Prohibition was pray'd, a Conſultation was granted. See *Man*'s Caſe in *More*'s* and *Croke*'s † Reports. By the *Civil* Law, Matrimony is not prohibited with a Siſter's Son or Daughter, in *Engliſh* commonly called a *Couſin German*, and in *Latin* ſtiled *Conſobrinus*, and *Conſobrina*: But 'tis otherwiſe by the *Canon* Law, in reſpect of Intermarriages between Couſin Germans, for the ſake of Gain to the Church, by a Papal Diſpenſation. It was a Law among the *Jews* or *Hebrews*, that Freedmen ſhould not marry their Handmaids; nor ſhould any Perſons be hereunto compell'd by Love, as we may read in the fourth Book of *Joſephus*'s *Jewiſh* Antiquities‖: But theſe were only unlawful, and not inceſtuous Marriages. And this too was an ancient *Salick* Law among the *Franks*. See the Book of the *Salick* Law *: *Qui ingenuas mulieres rapiunt.*

‖ Lev. cap. 18. v. 29.

* Pag. 907.

† 33 Eliz.

‖ Cap. 6.

* Tit. de ingen. Hom.

Pope *Evariſtus* writing to the *African* Biſhops, ſays, That Marriages ought not to be contracted in a clandeſtine manner; for Marriage (ſays he) is no otherwiſe Lawful, but when the Wife is demanded of ſuch Perſons as ſeem to have the Government and Dominion over the Woman's Perſon, and who have the Care and Guardianſhip of her: And unleſs ſhe be eſpouſed by the Conſent of her Parents and neareſt Relations, and be endow'd according to Law, and likewiſe at the time of her Nuptials, receives the Sacerdotal Benediction according to Cuſtom, by the means of Prayer and Oblations, and be alſo given in Marriage by her *Paranymphi* (as uſual) ſuch Marriage is deem'd unlawful by the *Canon* Law. And this was the ancient way of celebrating legal Marriages in the Church: For otherwiſe they were only ſtiled *Conjugia præſumpta*, and not lawful Marriages; and by that Law are rather term'd *Adulteria*, *Stupra* and *Contubernia*, than lawful Marriages‖. "Let no Believer or Chriſtian of "what Condition ſoever he be, preſume to celebrate Wedlock in private, but "let him publickly marry in the Lord, receiving the Benediction of the "Prieſt," ſays the Text of that Law. The Council of *Trent* declares all clandeſtine Marriages to be null and void: But this is not Law in *England*; our Law only puniſhing ſuch Marriages with the Cenſure of the Church.

‖ 30 Q. 2. 5. 1. 2 & 3.

The ſolemn and uſual Times of ſolemnizing Marriage, according to the *Canon* Law, ceaſe at certain Seaſons of the Year, *viz.* from the firſt *Sunday* of our Lord's *Advent*, to the *Octave* of *Epiphany*, *incluſively*; and from the Beginning of *Lent*, to the *Octave* of *Eaſter*, *incluſively*; and from the firſt Day of *Rogation* Week, till ſeven Days after *Pentecoſt*; and hence Marriage may be lawfully celebrated on *Trinity* Sunday*.

* X. 2. 9. 4. ni fin.

But

But theſe Seaſons are only appointed by the Papal *Canon* Law, for the ſake ſo purchaſing Diſpenſations: for tho' the Banns of Matrimony are ſeldom or never publiſh'd in *Lent*, *&c.* according to that Law; yet People may marry at that Time with Licences. But as for the Time of *Advent*, which was never obſerv'd in our Church as a Faſt, there is no Foundation for ſuch a Prohibition with us: And though on ſolemn Faſting Days our Anceſtors thought fit to reſtrain the Common Liberties of Marriage during that Time, becauſe the Mirth and Rejoycings which uſually accompany Marriages, are not ſuitable to the Humiliation and Sorrow which we ought to ſhow at ſuch times for our Sins; yet *Eaſter* and *Whitſon* Weeks are uſually Times of Mirth and Jollity; and therefore, Marriages at thoſe Times ought not to be forbidden, as they are not with us.

A matrimonial Cauſe is in the *Canon* Law deem'd a Cauſe of an arduous and important Nature *, *Abb. poſt Ant. de Butrio* †: And hence it is, that in a matrimonial Cauſe, an Oath is not given in ſupply of Proof, according to the common receiv'd Doctrine of all the Doctors and the Gloſs on the *Canon* Law ‖. And in matrimonial Cauſes, the Proceſs ought to be in a ſummary manner, *viz. Simpliciter & de plano, & ſine Strepitu & Figurâ judicii* †: inſomuch that a definitive Sentence is uſually pronounced in theſe Cauſes on bare Cognizance only had thereof, even without exhibiting any Libel at all, nor any Exceptions of *Stipulation* or *Guaranty* admitted herein by the *Civil* Law. Moreover, 'tis to be obſerv'd, That by that Law marry'd Women and Virgins may, in ſuch Cauſes, appear in Judgment without a *Curator* or Guardian, and may be Advocates in their own proper Suits. Matrimonial Cauſes do alſo include Cauſes of Divorce, ſince the Diſpute in this as well as in the Caſe of affirming a Marriage is *de Fœdere Matrimoniali* *: And ſo likewiſe do all Cauſes incident and acceſſory unto Marriage come under the Stile of matrimonial Cauſes. But ſome have doubted whether Expences of Suit made in a Cauſe of Matrimony or Divorce, may be reckon'd under this Head. And *firſt*, It ſeems, that Expences made in a matrimonial Cauſe, or Cauſe of Divorce againſt the Party caſt therein, ought not to be included, becauſe all Marriages ought to be free, and ſo, conſequently, (ſay ſome) ought the Proſecution thereof to be ſo too †. But, on the contrary, I think, that the Perſon caſt, ought to be condemn'd in Expences to the Perſon that obtains in the Cauſe, ſince the Law does hereby repreſs Calumny and malicious Proſecutions. And this is ever true, when there is a Divorce or Separation of Matrimony pray'd at the Inſtance of either of the Parties: But 'tis otherwiſe, if the Marriage be affirm'd; for then a demand of Expences (peradventure) ceaſes, becauſe the Eſtate and Goods of the marry'd Couple are as it were in Common ‖, or (at leaſt) the Husband, as long as the Marriage ſubſiſts, is made Lord and Proprietor of the Woman's Eſtate *, in ſuch a manner that ſhe can make no demand on him in this Behalf during the Continuance of Matrimony †.

* X. 4. 14. 8. Gloſs. in c. 34. X. 2. 24. v. *abſoluto*.
† In c. 3. X. 1. 29.
‖ In c. 34. X. 2. 24.
† Cl. 2. 1. 2.
* X. 4. 14. 1.
† X. 4. 1. 14.
‖ X. 1. 41. 8.
* C. 3. 32. 9.
† C. 5. 20. 2.

I have before obſerv'd, that Marriage was by the *Canon* Law interdicted to the Clergy rather to ſupport the Papal Power againſt the State, than that it was unlawful in itſelf; well knowing that they would have leſs regard for the State, when they gave no lawful Pledges to ſupport it. But tho' there were ſeveral Canons made againſt the Marriage of Prieſts; yet they were never receiv'd here, but only in *France* and *Italy*: For the *Britiſh* Clergy had their Wives, when the *Saxons* ruled here, tho' King *Edgar* at *Dunſtan*'s Requeſt, to favour the Monks, preſſed the marry'd Clergy to leave their Wives; which they refuſing to do, were depriv'd, and the Monks put into their Benefices. But 'tis certain, that

the Prieſts here kept their Wives long after the Conqueſt: For, at a Synod held at *Weſtminſter* about the third Year of *Henry* the firſt's Reign, a Canon was made prohibiting all Prieſts to marry. And *Henry*, Archdeacon of *Huntington*, obſerves on that Canon, *viz.* That it *ſeem'd very pure to ſome, but as dangerous to others; for ſuch Prieſts as were not able to contain, would by this means fall into horrible uncleanneſs, to the great Diſgrace of the Chriſtian Religion.* Cardinal *Crema*, who was ſent hither by Pope *Honorius*, afterwards held a Synod at *London*, wherein he made very invective Speeches againſt the marry'd Clergy, telling them, that it was a horrid Sin for a Prieſt to riſe from a Woman, and immediately to make the Body of Chriſt: But the next day after he made this Speech, he ſaid Maſs himſelf, and at Night was taken in Bed with a Whore. This Story is deliver'd to us by the Writers of that Age, and we have no Reaſon to doubt the Truth of it, ſince *Henry* of *Huntington* who liv'd at that Time, and was a Prieſt himſelf, and the Son of a Prieſt, gives us a large Account of this matter; and concludes, that it was too notorious to be deny'd.

Two Years afterwards another Synod was called at *London*, where ſome Canons were made to enforce thoſe touching the Celibacy of the Clergy: And two Years after that, another was held at *Weſtminſter*, where it was decreed, that Prieſts ſhould leave their Wives before the next St. *Andrew*'s Day, under Pain of Deprivation. But the Clergy being unwilling to ſubmit to this Decree, the Execution thereof was left to the King *, who took Money of ſeveral Prieſts by way of Commutation, and ſo permitted them to live with their Wives; and by this means that Conſtitution was in a manner ſet aſide. By theſe Canons, the Regulars were under a ſtricter Obligation than the Secular Clergy, as having made a Vow of Chaſtity: And, therefore, if a Deacon or Secular Prieſt had taken a Wife, the Marriage was not void, but voidable; but if a Monk or Nun marry'd, it was void; becauſe they had vow'd Chaſtity. But the Incontinency of the Prieſts was ſo notorious, that about Forty-ſix Years after the laſt Canon was made concerning the Celibacy of the Clergy †, Men in Orders were, by a Synod held at *Weſtminſter*, prohibited not only from Marrying, but from keeping Concubines: And the like was done by *Hubert* Archbiſhop of *Canterbury* in a Synod held at *York* ||, wherein he preſided for that Purpoſe. Afterwards *Stephen Langton* revived thoſe Decrees, and added a Puniſhment to be inflicted on the Concubines of benefic'd Prieſts and Men in Orders, not when they were living, but after their death, *viz.* That they ſhould not have Church-Burial, unleſs they repented; and that the Prieſts ſhould not be admitted to the Sacraments whilſt they kept ſuch Women. But notwithſtanding theſe Conſtitutions, ſeveral of the marry'd Clergy kept their Benefices till Cardinal *Otho* made a *Legatine* Conſtitution *, whereby ſuch Prieſts were *ipſo Jure* depriv'd of their Eccleſiaſtical Benefices, as did either privately or openly contract Matrimony, or did in a clandeſtine manner retain their Wives with their Churches, or did acquire ſuch Benefices *de novo* after Marriage, or were promoted to holy Orders, as being contrary to the Canons of the Church †. And ſo ſevere was this *Legatine* Conſtitution againſt the Marriage of Prieſts, that the Eſtates, which they gain'd by the Church after ſuch Marriages, were to be reſtor'd and given back to the Church, and their Children were not to be admitted to the Prieſthood, though they ſhould have the Pope's Diſpenſation. And thus this matter continued for almoſt three Hundred Years, *viz.* till *Henry* the VIIIth's Reign, during all which Time ſuch ſcandalous Crimes were committed by the Clergy, that Diſpenſations to keep Concubines were very

* Hen. 1.

† Anno. 25 H. 2.

|| Anno. 7 R. 1.

* Tit. 14.

† 28 Diſt. 1. 2 & 5.

very common in thoſe Days, if the Prieſts had Money enough to purchaſe them. And to ſuch an open Defiance of all Shame were they grown, that the Biſhop of *Wincheſter* (as we read) for the Time being, had a Grant from the Pope to licenſe Stews and Brothel Houſes in his Dioceſs, as was done here in *Southwark*; and hence came the ſaying of the *Wincheſter* Gooſe, for the foul Diſeaſe among the Clergy. For leſt they ſhould give a bad Example to the Laity, they kept theſe Concubines not in their Houſes, but were privately maintain'd in the Stews; for there was a Conſtitution made againſt ſuch as *publickly* kept Concubines in their Houſes, and did not remove them within a Month, *&c.* *: And this made them take Lodgings for them, which occaſion'd the making another Provincial Canon, *viz.* That they ſhould not have *publick* acceſs to them *cum ſcandalo* †. And Sir *Simon Degg* obſerves, that it was wiſely done by the *French* and *German* Laity to ſollicit the Council of *Trent*, that Prieſts might be ſuffer'd to marry, as being unwilling to truſt their Wives and Daughters at Confeſſion with Men who might have Concubines tho' no Wives: And Pope *Pius* II. affirm'd, That tho' there were ſeveral good Reaſons againſt the Marriage of Prieſts, yet none which could ſtand in competition with thoſe Reaſons which were for it.

* Othon Tit. 15.

† Lindw. Lib. 3. Tit. 2. cap. 1.

But I don't find, that the Clergy were in thoſe Days reform'd by all thoſe Canons: and therefore it was thought neceſſary to add a Temporal Law ‖ to thoſe Canons, in order to puniſh their Incontinency; and it was, *That the Ordinary might commit ſuch Prieſts to Priſon during Pleaſure*; and this Law is ſtill in force. Afterwards an Act was made to declare it *Felony* for a Prieſt to marry; or if marry'd, carnally to know his Wife, or ſo much as publickly to converſe with her; or for any Perſon to preach or affirm the Lawfulneſs of a Prieſt's Marriage *. But the puniſhment of Death being thought too ſevere, this Act was repeal'd the very next Year: And then it was enacted †, That if a Prieſt was guilty of *Incontinency*, he ſhould forfeit all his Goods, *&c.* and all his Spiritual Preferments except one; and upon a Conviction of the ſecond Offence, he was to forfeit all his Goods, and the Profits of his Lands, Benefices, and Promotions; and for the third Offence, beſides the aforeſaid Forfeitures, he was to be impriſon'd during Life. But theſe Severities were not effectual enough to prevent this Vice: And, therefore, in the ſame Year, another Act was made, by which all Marriages were declared to be lawful which were not prohibited by God's Law ‖. And this was a general Law, in which the Clergy as well as the Laity were comprehended: But the Statute, which more nearly concerns them, was that of *Edward* the VIth *; the Preamble ſetting forth, That though it would be better for Prieſts to live chaſte and ſeparate from Womens Company, that they might with more Fervency attend the Miniſtry of the Goſpel; and that it was to be hoped, they would of themſelves vow perpetual Chaſtity, but that when it was enforced by ſevere Laws, ſuch Inconveniencies follow'd as were not fit to be mention'd: And, therefore, it was enacted, *That all Laws, Canons and Conſtitutions, prohibiting the Clergy to marry (who by the Laws of God might marry) and all Pains and Forfeitures therein contain'd, ſhould be void.* And by another Act made *Anno* 5 *&* 6 *Edw.* VI. it was declared, That the Marriage of Prieſts ſhould be held Lawful, and their Children be Legitimate and Inheritable, *&c.* For the former was only taken to be an Act of Toleration for Prieſts to marry, to prevent greater Inconveniencies; and that notwithſtanding that Act, it was ſtill unlawful for the Clergy to marry, and the Iſſue of ſuch Marriages were accounted Baſtards: Wherefore another Act was made, declaring the Marriage of Prieſts lawful, and their Children legitimate †.

‖ 1 H. 7. c. 4.

* 31 H. 8. c. 14.

† 32 H. 8. cap. 10.

‖ 32 H. 8. cap. 38.

* 2 & 3 E. 6. cap. 21.

† 5 & 6. E. cap. 12. 6.

Of

Of Monks, Monaſteries, and the like.

HAVING already in the Beginning of this Work ſaid ſomething of Abbots, Priors, *&c.* I ſhall here diſcourſe of Monks, Monaſteries, and the like, tho' we have nothing to do with theſe Pretenders to Religion among us ; and (I hope in God) never ſhall again : But as they are the Ground-work, and beſt Support of the Papal Power, and make a conſiderable Figure in the *Canon* Law, I could not paſs them over in ſilence without a Chaſm in the Undertaking itſelf, and the Title will ſerve to explain ſeveral other Parts of that Law.

Now a Monk is a Regular, who lives in a Monaſtery or Religious Houſe, under the Pretence of giving himſelf up entirely to the Service of God, and the Good of the Church, by quitting the Cares of this World : And Perſons become Monks three ſeveral ways. *Firſt*, By paternal Devotion ; *Secondly*, By proper Profeſſion * ; and, *Thirdly*, By the Emiſſion of a Vow. A Perſon becomes a Monk by paternal Devotion, when a Father delivers up his Child to ſome Religious Houſe before his Age of Puberty † : in which Caſe, the Child being under Puberty, and undergoing the ſacred Tonſure, or putting on the Habit of his Order, ought, upon a Summons at Fifteen, to be ask'd ‖, Whether he will continue in that Habit or not ? and if he ſhall by his continuance in ſuch Habit ratify his Profeſſion formerly made, he ſhall not afterwards quit the ſame *. But if he will return to a Secular Habit or State of Life, he ſhall have Liberty ſo to do †; becauſe (ſays that Law) it would be for the Diſadvantage of Religion, to have the Services thereof perform'd by Compulſion. And, therefore, 'tis decreed, that no one ſhall be forced into Holy Orders, nor be compell'd to enter into any Religious Order, either by his Father, or any others whatſoever. But 'tis Lawful to induce a Perſon hereunto by ſweet and gentle Means, tho' not by Violence, Simony, and the like. Before the Age of Puberty, *viz.* Fourteen in the Male ‖, and Twelve in the Female * Iſſue, Children thus devoted by their Parents cannot quit this Religious Bondage without the Parent's Conſent †; which they might otherwiſe do, if an Offering of this kind had not intervened. But if a Child under the Age of Puberty has taken on himſelf the Monachal or Monkiſh Tonſure without his Parents Conſent, they may irritate and annul this Act : yet if they will not reclaim him within a Year, by applying to ſome competent Judge, they ſhall not be able to do it afterwards. A Guardian or Tutor may, according to *Felinus*, reclaim his Ward or Pupil from a Monaſtery, though he cannot make a Tender or Oblation of him : But *Innocent* is of another Opinion, in reſpect of this part of the Law, according to this Maxim, *viz. Contrariorum eadem eſt ratio.* Note, therefore, that a Child under the Age of Puberty ought not to go into a Monaſtery contrary to Conſent of Parents ; and if he ſhould thus liſt himſelf before ſuch Age, or be devoted by his Parents, he does not thereby ceaſe to be in his Parents power : But 'tis otherwiſe, if he does it after ſuch an Age ‖. And if Parents will offer up a Child before ſuch Age, contrary to ſuch Child's Inclination, the Act is invalid, according to *Innocentius* ; for the Child may leave the Monaſtery at his pleaſure.

* 20 Q. 1. 3.
† 20 Q. 1. 3.
‖ X. 3. 31. 8.
* X. 3. 31. 22.
† X. 3. 31. 14.
X. 3. 31. 11.
‖ X. 3. 31. 8.
* 3. 31. 12.
† X. 3. 31. 12.
‖ 20 Q. 2. 1.

ſure. But if ſuch Monaſtery into which the Child has thus entred himſelf without or contrary to his Parents Conſent, be at ſuch a diſtance, that it cannot be known within a Year's time, then a larger ſpace of Time ſhall be allow'd*. But if Perſons of an *adult* Age ſhall devote themſelves to a Religious Order, the Parents cannot prohibit the ſame; for by entring into ſuch Order, the Father's Power is diſſolv'd and at an end †; ſuch Perſons by a Fiction of Law being dead as to this World. And it would be the ſame Thing, if the Father himſelf ſhould go into a Monaſtery; for his Power would then be at end: becauſe when a Father comes under the Abbot's Power as ſubject to him, he cannot have another in his Power. An *adult* Age is above the Age of Puberty, and under that of twenty five Years ‖.

* Arg. 17 Q. 2. 3.

† Gloſs. in c. 1. 20 Q. 1.

‖ D. 34. 3. 20.

Secondly, A Perſon becomes a Monk by his own proper Profeſſion, and this either *expreſly* or *tacitly*. Expreſly, when any one after the Year of his Probation, takes the *Monkiſh* Habit on himſelf, and profeſſes himſelf willing to obey the Rules of the Monaſtery †. Certain Scholars entred themſelves of the *Franciſcan* Order, but in making their Profeſſion did not all of them obſerve the ſame Method. For one of them made a Profeſſion *à principio*, another within the Year, and a third after the Year ended: whereupon it became a Queſtion, *Quid Juris?* And, *Firſt*, it was well enough to obſerve the Will of the Perſon (without any Diſtinction) entring himſelf, ſince Profeſſion ſimply makes a Monk. But hereunto 'tis objected, That 'tis ſometimes neceſſary to make a Tryal of himſelf; and this Trial ſhall be according to the Quality of a common Caſe. *Secondly*, The ſeveral Orders of Religious differ from each other in reſpect of the Time of Probation, and the Laws concerning this Time are various and arbitrary. Some allow only one Year, ſome two ‖, and others three Years for this End and Purpoſe: But regularly ſpeaking, the ſpace of a Year is obſerv'd. It has been a Query, Whether a Perſon may be ſaid to have compleated his Year, who, after ſix Months continuance in a Monaſtery, quits the ſame, and then after ſome interval of Time returns again, and abides therein for ſix other Months, ſo that ſuch Perſon may be admitted to his Profeſſion? And it ſeems it may, tho' the Doctors differ in Opinion. By what Words this Profeſſion may be made, and what Things are eſſential hereunto, I ſhall not conſider, referring myſelf to the Doctors on the marginal Law*: But, according to them, an expreſs Profeſſion only requires five Things. *Firſt*, That the Perſon profeſſing in a Male be fourteen Years of Age †, and in a Female twelve ‖, according to the ancient Canons: But the Council of *Trent* requires eighteen Years of Age in both*. *Secondly*, That this Profeſſion be by a Perſon that has the Power of incorporating himſelf in ſome Religious Order. *Thirdly*, That this Profeſſion be made to ſome Order approv'd by Law †. *Fourthly*, That the Prelate of the Order do require the Advice of his Chapter touching the ſame. And, *Fifthly*, That this Profeſſion be made with a regard to the three Vows of Religion ‖. But if the Perſon deſirous of Converſion receives the Habit, and profeſſes before the regular Time prefix'd for ſuch Profeſſion, the Party profeſſing is bound to a regular Obſervance, and ſhall be truly deem'd a Monk. But though an Abbot is bound to conſult and ask the Advice of his Chapter touching the Admiſſion of a Monk (as aforeſaid) in order to render ſuch Admiſſion valid; yet he is not bound to follow the ſame, but may alone, without the Chapter, admit him *. Though a Perſon in a Monaſtery of *Mendicants*, making Profeſſion *ante annum probationis*, be not in ſpecial obliged to obſerve the Rules of their Order; yet he is bound in general to purſue the Religious Order which he has choſen. And this is par-

* Arg. 17 Q. 2. 3.

† Gloſs. in c. 1. 20 Q. 1.

‖ D. 34. 3. 20.

D. 32. 1. 69.

† X. 3. 31. 16.

‖ 19 Q. 3. 6.

* X. 3. 31. 13.

† vi. 3. 14. 1.

‖ 20 Q. 1. 8.

* Seſs. 25. c. 15 & 16.

† vi. 3. 15. 1.

‖ Seſs. ut ſup.

* X. 3. 31. 16.

ticular

ticular in the *Mendicant* Order. But as a diſcreet Abbot may on a juſt and reaſonable Account allow of Profeſſion before the Time of Probation, ſo he may for the like Reaſon defer the ſame. Hence 'tis, that if an unknown Perſon deſires Admittance into a Monaſtery, he ſhall not be receiv'd till he has wore the Monks Habit for three Years, leſt he ſhould become a Servant immediately after his Year of Probation, or be otherwiſe found unfit for a Monaſtery. For there are ſeveral Things that render a Perſon incapable of becoming a Monk or a Religious. As firſt, want of due Age*. *Secondly*, Bondage or Servitude; tho' this of a Monk is the greateſt in the World, if they liv'd according to their Rules, being the moſt abject Slaves upon Earth to the Power of the Pope, and the Superſtition of their reſpective Orders. *Thirdly*, If he be liable or obnoxious to Debts. *Fourthly*, If he be made a Biſhop without the Pope's leave. *Fifthly*, If he has conſummated Matrimony, or has had carnal Knowledge of a Woman after Eſpouſals. And *laſtly*, If he comes into the Monaſtery by Compulſion contrary to his own Inclination†. But if a Bondman or Servant ſhall continue in the Monaſtery, and be afterwards made free for his good Services, he ſhall by this means, for the future, become a Freedman: which Artifice of the Churchmen increas'd the number of Monks very much.

* X. 3. 31. 8.

† X. 3. 31. 1.

A Perſon is ſaid to make a *tacit* Profeſſion, when it appears by proper Conjectures, that he is for ever willing to lead the Life of a Monk, and to ſerve God by ſome Religious Vow, and retains the Habit of a Monk after the Year of Probation, when this Habit is common and indiſtinctly given to Novices and Perſons profeſs'd; or takes on himſelf the Habit of Perſons profeſs'd, when this Habit is diſtinct. Whence the Council of *Toledo* ordains, That Clerks, who pretend to be Monks in Name and Habit, and are not ſo indeed, ſhall be puniſh'd, and made true Monks. Therefore the Perſon who will not be thus bound, ought, within the Year, to lay aſide the Habit. I now ſpeak of a Perſon under the Age of Puberty, and of him, who has voluntarily ſubmitted himſelf, and receiv'd ſuch Habit, or worn the ſame (at leaſt). But if the Perſon bearing the ſame, proteſts, that he does not thereby intend himſelf a Monk, 'tis otherwiſe. The Difference between the Habits of Perſons profeſs'd and Novices, is, that the Habit of the firſt is bleſſed by the Prieſt, and the other is not; the Habit of Perſons profeſs'd is given before the Altar, and that of Novices is not, but in any other Place; the Habit of the firſt is given by the Abbot, but of the latter by other Perſons.

There was ſometimes a wide difference made, whether a Perſon did *expreſly* or *tacitly* profeſs a Religious Order: For the firſt does abſolutely and neceſſarily, without any Diſtinction, oblige the Perſon to that Order he has profeſſed, without changing his ſecular Habit‖: For the Habit does not make a Man a Monk, but the Profeſſion of ſuch a Rule or Order of Life*. But if this Profeſſion be *tacitly* made within the Year of Probation by any one's taking on himſelf the Habit, which is given to ſuch as profeſs a Religious Order, he is not particularly bound to that Order, the Habit of which he takes on himſelf. But yet the Perſon receiving the Habit, is in general obliged to ſome Order or other; provided he be of lawful Age, and knowingly and adviſedly continues to wear the Habit for three Days: But 'tis otherwiſe if he labours under any Fit of Madneſs or Indiſpoſition of Mind. A Canon of the Church of *Milan* becoming a *Capuchin*, and having a Prebend, it was a Queſtion, whether his Benefice became void thereby, Regulars being incapable of ſuch ſecular Benefices? and it was held in the Negative; becauſe he might leave the Order, and lead a Clerical Life But if he had been a Regular profeſs'd,

‖ X. 3. 31. 17.

* X. 3. 31. 13.

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it had been otherwiſe, for a bare entring into a Religious Order, does not vacate a Benefice without the Perſon's Conſent, who thus becomes Religious: For Benefices do not become void by reaſon of Eſpouſals contracted, but only on the ſcore of Marriage itſelf; ſince Eſpouſals may be eaſily diſſolv'd again. Therefore, a Perſon entring into a Religious Order, may retain his Benefice during the Probation-Year, and during that Time it ſhall not be conferr'd on another *; but in the *Interim* it ſhall be ſerv'd by another, allowing him a convenient Portion out of the Profits thereof †: But if the Perſon becoming Religious ſhall either *tacitly* or *expreſly* profeſs ſuch an Order, or conſent thereunto, ſuch Benefice ſhall then be given to another. A certain Perſon vow'd to enter into the *Jeſuits* Order, and then repenting thereof, deſired to be promoted to a ſecular Dignity in the Church; and if he did not obtain that, he reſolv'd to enter into ſome other Order: Whereupon a Queſtion in Law ariſing, it ſeem'd at firſt, that he ought to have full Liberty herein; becauſe Services which are by Compulſion, are not acceptable to God. But it was anſwer'd, that becauſe he made a Vow in the Beginning, which is a Matter of Will and Choice, he ought to obſerve it now as a Matter of Neceſſity: which brings me to ſpeak of the third way of becoming a Monk, *viz.* by the Emiſſion of a Vow.

* Gloſs. in c. 4. vi. 3. 14.

† Gloſs. ut ſup.

For if a Perſon being *compos Mentis* ‖, tho' he labours under ſome bodily Infirmity, has made a Vow to enter into a Religious Order, he is thereby bound to become a Monk; for ſuch Vow made, according to the *Papiſts*, ſo far binds a Man unto God's Service, that he ſhall be compell'd to perform ſuch Promiſe, tho' he ſhould, after ſuch Vow made, obtain a Prelacy: But tho' he ought to quit the Prelacy, and go into a Monaſtery *; yet he may afterwards accept of a Biſhoprick, if canonically elected thereunto †. Now a Vow, according to *Aquinas*, is a ſpontaneous and deliberate Promiſe made to God touching Things relating to him: and it is twofold. A *ſimple* Vow is that which is not ſtrengthen'd by any Profeſſion: But a *ſolemn* Vow, is what is confirm'd either by an *expreſs* or *tacit* Profeſſion. He, who puts on the Monkiſh Habit of his own Will, and being of due Age, ought not to quit the ſame; but ſhall be conſtrain'd to live in his proper Monaſtery obedient to his Abbot: But if hereunto compell'd, 'tis otherwiſe, provided the Compulſion be ſuch as may happen to a Man of Courage and Reſolution. A Monk can have no ſuch Thing as Property in any Eſtate or Goods of Fortune *; for if he has, he ought immediately to quit and ſurrender the ſame: For the Abdication hereof is ſo far annex'd to the Rule of a Monk, that the Pope himſelf cannot diſpenſe with it; but before a Perſon becomes a Monk, he may diſpoſe of his Eſtate by his laſt Will and Teſtament. And if any Monk, at the Time of his Death, ſhall be found to have any Thing as Property, he ſhall be deprived of Chriſtian Burial †: Nay, ſo ſevere is the Law in this reſpect, that if ſuch Perſon has been bury'd, it enjoins the Corpſe to be dug and taken up again, if it may be done without Scandal or Offence; as *Gregory the Great* ſays he did it ‖.

‖ X. 5. 31. 15.

* X. 3. 34. 10.

† X. 2. 14. 7.

* X. 3. 35. 6.

† X. 3. 35. 42.

‖ X. 3. 35. 4.

'Tis deliver'd as the common Maxim of the *Canoniſts*, That tho' a Monk be made a Biſhop, yet he is not thereby releas'd from wearing his Religious Habit of a Monk, nor from the three ſubſtantial Vows of his Order: For if ſuch Monk ſhall thereupon lay aſide his Religious Habit, and aſſume the exterior *Tunick* of a Biſhop, he ſhall incur (according to ſome Perſons) the Pain of Excommunication *. *Sed quære*, ſince no Canon inflicts this Puniſhment on a Monk, that aſſumes the white Garment in virtue of his Epiſcopal Dignity, this being worn by Biſhops on their outward Garment: Yet if a Monk wears the Epiſcopal Habit on his being

* X. 3. 35. 6.

being made a Biſhop, he acts an ill Part according to the *Canon* Law. For a Monk is not, by the Epiſcopal Habit, exempt from the ſubſtantial Vows of his Order, tho' he be free from the Prohibition of eating Fleſh, and from the Juriſdiction of his Abbot; and likewiſe from all other Rules and Statutes of the Religious Order itſelf. But when I ſay, that a Monk is exempt from the Juriſdiction of his Abbot on his being made a Biſhop, I do not mean that he is exempt from the Vow of his Obedience, for he ſtill remains ſubject to that Vow: But I would be underſtood to mean, that he is free from the Juriſdiction of a regular Prelate, becauſe he has no Abbot to yield Obedience to. But according to *Aquinas*, a Monk made a Biſhop is (notwithſtanding) ſubject to all the Rules and Statutes of his Religious Profeſſion or Order; provided, they do in no wiſe hinder him in the Exerciſe of his Epiſcopal Office. And hence *Cajetan* obſerves, that a Monk becoming a Biſhop is not entirely exempt from Faſting, and the Prohibition of eating Fleſh, inferring, that ſuch Monk commits a mortal Sin by eating Fleſh on a *Friday*, on which day Chriſt ſuffer'd in the Fleſh.

Abbots ought to be very diligent in ſearching after and reclaiming their fugitive Monks by excommunicating them, if they do not return to their Monaſtery upon a Summons, and lead better Lives for the future *: and ſuch are ſaid to be Fugitives, as ſtay out of the Monaſtery, and conceal themſelves from their Abbot †; for Monks ought not to ramble up and down the Towns and Villages where they dwell, after lewd Women and other Diverſions of the Fleſh, as is too frequently practis'd among them: nor ought they raſhly and giddily to paſs from one Monaſtery to another, unleſs the Monaſtery unto which a Monk deſires to be tranſlated, be of a ſtricter Order; in which Caſe, the Prelate ought, without any Difficulty, to aſſiſt in ſuch a Tranſlation, leſt he ſhould be ſaid (as the Papal Law phraſes it) to hinder a Purpoſe divinely inſpired. And if it be a probable Doubt, which is the ſtricter Order, the Matter ſhall be determin'd by ſome other Abbot; for the immediate ſuperior Abbot to the Monks ought not to be a Judge, as being, as it were, in his own proper Cauſe. And that a Monaſtick Diſcipline may be well obſerv'd, the Abbot ought to be choſen out of the Aſſembly of Monks, and to be a Perſon of eminent Merit for Diſcretion, and in Humility in the Government of the Houſe, that the Monks may pay Devotion and Obedience to him with all readineſs. A Perſon, therefore, that has not been a Monk profeſs'd, cannot be choſen an Abbot according to the *Canon* Law ||; for he that has not taken on himſelf the Form of a Diſciple, ought not to aſſume the Office of a Maſter; nor ought that Man to be ſet over others, who never knew what it was to be a Subject himſelf *. By that Law an Abbot has great Authority over his Monks, inſomuch that he can abſolve them from all Sins and Cenſures, unleſs this Power be ſpecially reſerv'd to another. Though a Monk or Abbot may be conven'd before a local Ordinary; yet Religious Places, and the Perſons of Religious Men, are not ſubject to him in the like manner as other ſecular Places and Perſons are †: for a Monk ought rather to obey his Abbot than the Biſhop of the Place. And an Abbot may in like manner acquire any Poſſeſſion by the means of his Monk or Monks, as a Lord and Maſter may by his Bondmen or Vaſſals; the Life of a Monk being a *Species* of Vaſſalage.

* X. 3. 31. 24.

† Abb. in c. 24. X. 3. 31.

|| X. 1. 6. 49.

* X. 1. 14. 3.

† X. 3. 36. 5.

Having thus far treated of the State and Law relating to Monks, and as they come within the compaſs of the Complaints which St. *Jerome*, and other Fathers, have made againſt Eccleſiaſticks; I will cloſe this Title with the Riſe and Progreſs of them, and ſhew how they came to have a Share in the Revenues and Affairs of the Church. Now their Beginning

is commonly attributed to *Paul* the Hermit and St. *Anthony*, as ſome ſtile him; in imitation of whom, *Egypt* was entirely fill'd with this kind of Locuſt: Some of which liv'd a ſolitary Life, and others liv'd in Community. That kind of Life afterwards got footing in *Syria*, *Pontus*, and the *Leſſer Aſia*: And thoſe of *Egypt* have ſtill retain'd the Name of their Founder St. *Anthony*; whereas thoſe of *Pontus* and the *Leſſer Aſia*, took the Name of *Baſil*, who brought from *Egypt* into thoſe Parts, the Rule and Inſtitution of St. *Anthony*. So that St. *Baſil*, and St. *Anthony*, have ſtock'd the *Levant* with this ſort of Cattle, which at preſent infeſt the World, and bear their Names. *Athanaſius* coming to *Rome*, and having there publiſh'd the Life of St. *Anthony*, ſeveral Perſons in *Italy* alſo embraced that kind of Life, which from thence was propagated into the other Provinces.

We muſt nevertheleſs take care not to confound the Clerks, who lived in Community under the Direction of their Biſhops, with this kind of Herd. *Euſebius*, Biſhop of *Virceil*, was the firſt in the *Weſt*, who (according to the Teſtimony of St. *Ambroſe*) join'd together two Things, which ſeem'd moſt contrary to each other, *viz.* the Monaſtick Rule and Clerks living in Community: for 'tis not to be imagin'd, that theſe Clerks were true Monks, any more than that they embrac'd the ſame kind of Life under St. *Martin*, and St. *Auſtin*. They borrow'd only from the Monks their way of living in common, being for that no leſs ſerviceable to the Church: Whereas in the Beginning, Monks liv'd out of Towns; and, being for the moſt part Laicks, were ſo far from performing any publick Miniſtry in the Church, that their Profeſſion wholly debarr'd them from it; nor ought they by the *Canon* Law, even at this time, to be preferr'd to the Rectories of Parochial Churches. All their Employment conſiſted in Prayer, and labouring with their own Hands; and reading the Holy Scriptures*. 'Tis true, Biſhops ſometimes drew Monks out of their Monaſteries, and aſſociated them to their Clergy, to maintain an idle Prieſthood; but then they were no longer Monks, being reckon'd in the number of Clerks. St. *Jerome* alwas diſtinguiſhes this kind of Life; and, ſpeaking of himſelf as a Monk, ſays †, *Clerks are Shepherds, for my part I am one of the Sheep*: And he ever builds on this Principle, *viz. That 'tis one Thing to be a Monk, and another Thing to be a Clerk.* He nevertheleſs acknowledges, that Monks by their Profeſſion were not excluded from Eccleſiaſtical Employments: But on the contrary, that Monachiſm ought to ſerve them as a State of Probation thereunto, when Biſhops ſhall judge them worthy. *Live* (ſays he in his Letter to *Ruſticus*) *in ſuch a manner, as you may deſerve to be a Clerk, and if the People or your Biſhop fix their Eyes upon you for that end, do that which is incumbent on a Clerk.*

* Can. 9. Diſt. c. 33.

† Hieron. Epiſt. ad Heliod.

The Monks were then ſubject to Biſhops and ordinary Paſtors, having not ſo much as diſtinct Places in the Church from the reſt of the People, becauſe they were of the number of Laicks. But when ſeveral Hereſies happen'd in the Eaſtern Church, which were to be oppos'd by Men of Learning, it was thought convenient to draw them from their Solitudes, and to ſettle the moſt learned of them in the Suburbs of Cities, that they might be uſeful to the People. But St. *Chryſoſtom* thinking fit to call them even into Cities, they thereupon moſt of them apply'd themſelves to Study, and by their aſpiring Thoughts, with great Precipitation, got into Orders; whereof Pope *Zozimus* complains in one of his Epiſtles. But as they were uſeful to Biſhops not only in ſpiritual but even in temporal Affairs, they acquired great Reputation for a Time; and ſuch Biſhops as rejoiced to have a numerous Clergy, and fit Perſons about them to

carry on their wicked Deſigns againſt the State, gave them conſiderable Offices, wherein they behav'd themſelves well enough for a Seaſon, as appear'd in the Affair of *Neſtorius*. But having abus'd the Authority put into their Hands, and growing inſupportable to all People, even to the Biſhops themſelves, by their Vanity, and meddling in all kinds of Buſineſs, without the Permiſſion of their Ordinaries, the Council of *Chalcedon* thought fit to make Canons againſt Monks, for putting a ſtop to the Diſorders they occaſion'd in the Church. Wherefore that Council decreed, That for the future, Monks ſhould be wholly under the Juriſdiction of Biſhops, without whoſe Leave they ſhould no more meddle in any Affairs either Civil or Eccleſiaſtical; That they ſhould not leave their Monaſteries, by rambling up and down, and frequenting Towns; That they ſhould not build any Chapel or Monaſtery without the Dioceſan's Conſent; and that they ſhould be ſecluded from all Church Employments, unleſs called thereunto by their Biſhops on neceſſary Occaſions *.

* Can. 4.

And thus was the *Canon* Law re-eſtabliſh'd in reſpect of Monks, who continu'd not long without ſhaking it off; and they were put into an abſolute dependance on Biſhops, who had the Inſpection as well of the temporal as ſpiritual Concerns of the Monaſtery. As the Monks, at that Time, were but part of the People, ſo they had no other temporal Revenue but what they gain'd by their own Labour, and a ſhare in the Alms which the Biſhops caus'd to be given them, if they were in want, in the ſame manner as to the other Poor. Beſides that, the People gave them private Alms, that they might pray to God for them. Some of them, nevertheleſs, kept ſomewhat of their own Patrimony; but *Jerome* blames them as falſe Monks, who follow'd not the Rules of Evangelical Poverty. As to Spirituals, they came to the Pariſh-Church with the reſt of the People, and were ſometimes allow'd to ſend for a Prieſt to adminiſter the Sacrament to them. But at length they were ſuffer'd to have a Prieſt of their own number; provided, he continu'd a Monk, and only officiated in the Monaſtery. This gave them an opportunity of having Churches apart, and making a kind of ſeparate Body, by Incroachments on the ſecular Clergy. After this, 'twas impoſſible for Biſhops to hinder them from performing all Eccleſiaſtical Functions in their Monaſteries; and ſince that time, there has always been Diſputes betwixt the Biſhops and the Monks, becauſe the Monks on many Occaſions refus'd to ſubmit to the Orders of the Biſhops, which they pretended to be contrary to the Diſcipline of their Monaſteries.

Though at that Time, moſt part of the Monks were in the *Eaſt*; yet for all that, there were a great many in the *Weſt*, before St. *Bennet* planted a particular Order there. St. *Jerome*, *Ambroſe*, and *Gregory*, mention Monks in *Italy* amongſt the *Gauls*, and in ſeveral other parts of *Europe*. Beſides, ſuch as have written of the Beginning of Chriſtianity in ſeveral Countries, ſpeak of Monks that were there. But there was this Difference betwixt the firſt Monks that were in *Europe* before St. *Bennet*, and thoſe that ſucceeded him, that they were barely Monks, without being addicted to any particular Order. To be a Monk, was ſufficient to make them receiv'd as ſuch in all Monaſteries wherever they travelled. There was no Talk then of particular Rules and Inſtitutions, but every Monk labour'd to improve himſelf by the Example of others; and to embrace what he thought moſt perfect in the Monaſtick Life. So that it may be ſaid, that the Monks both of the *Eaſt* and *Weſt* were all of one Order, having at that Time no mark of Diſtinction amongſt them. The ancient Rules, written by the primitive Monks, ought

ought rather to be look'd on as different Commentaries on a Monaſtick Life: For the Deſign of ſuch as embraced a Monkiſh Life, was not to diſtinguiſh themſelves by particular Rules from the manner of other Mens living, but to ſubmit themſelves, by a more ſpecial Reſignation, to the Goſpel-Maxims, and to find out all poſſible ways how they might live up to the Counſels of our Saviour, who will have us to wean our Hearts entirely from the World, that we may follow him alone who is above it.

I ſhall not here ſpeak of St. *Bennet*'s Inſtitution, which is in every one's knowledge, but ſhall only obſerve by the bye, that his Intention was not to make any Innovations in the Monaſtick Life, but to collect what he found moſt perfect in the Rules and Inſtitutions of others. But Matters are much alter'd ſince, the ſeveral Orders of Monks now-a-days making ſo many petty different Republicks in the Church; and are all as ſo many little States, having all their ſeveral Intereſts. How great a Nuſance and Burden this Set of Men are at preſent to the World, I ſhall not here enquire, having increas'd their Houſes to a very conſiderable Number; inſomuch that *Trithemius* tells us, there were more than 15000 Monaſteries of the *Benedictine* or St. *Bennet*'s Order, in leſs than 1000 Years after its firſt Inſtitution; and *Volateran* accounted in his Time, 24 Popes of this Order, 200 Cardinals, 1600 Archbiſhops, 4000 Biſhops, 15700 famous Abbots, and 156000 canoniz'd Saints. With us here in *England*, the moſt remarkable Monaſtery was that of *Bangor*, of which *Pelagius* was Abbot, wherein (we read) there were above 2000 Monks, and that when any of them in this, or other Religious Houſes, were found capable of Orders by their Superiors, they were then ordain'd, not by the Abbot, but by the Biſhop. In the City of *Canterbury* there was an antient Church dedicated to St. *Martin*, which was firſt built by the *Romans*, and afterwards rebuilt by *Auſtin* of that See, and by him dedicated to *Chriſt*, which is the Cathedral at this time. He likewiſe built a Monaſtery there, which is now a Church, and call'd by his Name: And he being of the *Benedictine* Order, was the firſt who brought thoſe Monks thither, and placed them in his own Foundations*. Among the *Engliſh Saxons*, there were only two Orders of Monks, of which one follow'd the Rites of the *Egyptian* Monks; and the other were *Benedictines* who came hither with *Auſtin*. A Law was enacted in *Germany*, after the Conqueſt thereof by the *French* King *Clodoveus*, and afterwards confirm'd by *Martel*, *Pepin* and *Charlemagne*; forbidding all Freedmen from entring into a Monaſtery without the Prince's Leave for ſo doing. For before this Law, ſeveral Perſons were found to have acted this Part not on the ſcore of Piety, but to avoid the danger of being Soldiers, and to exempt themſelves from the Trouble of Civil Offices and Employments: And another Reaſon aſſign'd for this Law, is, that very rich Men were often circumvented by the crafty Wiles of the Monks; and, like Fiſhes, drawn into their Nets, to the manifeſt Impoveriſhing of the State. From the Time of King *Edgar*, to the Reign of *Henry* VIII. Monachiſm had been growing here in *England*, and it was ſettled in ſome of the great Cathedrals: But the Ignorance and Vices of theſe Men was ſo exorbitant, that that wiſe Prince, who was a great encourager of Learning, perſuaded Cardinal *Woolſey* to build two Colleges for the Increaſe of learned Men. And that theſe Colleges might be endow'd, it was, even in that Age, thought very juſtifiable to ſuppreſs ſome Monaſteries, and to annex their Revenues to thoſe new-built Foundations: And this was the Beginning of the Suppreſſion of ſome Monaſteries, and the total Diſſolution of them follow'd in that Reign. 'Tis certain the Monks had the greateſt

*A. D. 1615.

greateſt Revenue of the Church in their power, which made them idle and laſcivious, ſenſual and illiterate. And they diſparaged all manner of Learning, as the Foundation of Hereſies and other Miſchiefs, which render'd it contemptible to all good Men: But as we are deliver'd from them, I will leave their Actions to be enquired into by ſuch as are peſter'd with them.

Of Mortmain, the Riſe and Conſequences thereof, &c.

ESTATES, or Things temporal, which are immoveable and given to the Church for the Celebration of Divine * Worſhip by the *Canon* Law, ought not regularly to be ſold or alienated, neither by Prelates preſiding over Churches, nor by the Pope himſelf †: Yea, if ſuch Perſons ſhall ſell or alienate theſe Eſtates, they may be reclaim'd and revok'd again by the Church ‖. And, therefore, we ſay, that when an Eſtate is thus given to the Church, it is given *in mortuam manum*, or, as we call it, in *Mortmain*; becauſe, according to *Pol. Virgil*, in the 17th Book of his *Engliſh* Hiſtory, ſuch Eſtates as do accrue to the Church, are unalienable: See the Life of King *Edward*. And ſuch an Eſtate returns to the Church, even without the Church's making any Reſtitution of the Price paid for it *. It is called *Mortmain*, ſays my Lord *Coke*, *quia Poſſeſſio eorum eſt immortalis*: For the *Latin* Word *Manus* here, imports the ſame as Poſſeſſion; and the Word *mortua* does, by the Figure *Antiphraſis*, ſignify *immortal*, becauſe Bodies politick and corporate never die. Others ſay, that 'tis called *Mortmain* in reſemblance to the holding of a Man's Hand that is ready to die; becauſe what he then holds, he does not let go till he be dead. But theſe and others are fram'd out of Man's Wit and Invention; but the Cauſe of the Name, and the Meaning thereof, was taken from the Effects, as 'tis expreſs'd in the Statute itſelf †, *viz. Whereby the Services that are due from ſuch Fees, and which, at the Beginning, were provided for the Defence of the Realm, are wrongfully withdrawn, and the chief Lords loſe their Eſcheats of the ſame:* So that in reſpect of the Lords, the Lands were ſaid to come to dead Mens Hands; for that by Alienation in *Mortmain*, they wholly loſt their Eſcheats, and in effect, their Knights-Services for the Defence of the Realm. For a dead Hand yields no Service.

* X. 3. 13. 5.

† 12 Q. 2. 20.

‖ X. 3. 13. 6.

* X. 3. 13. 12.

† 7 E. 1. De Religioſis.

But King *Edward* I. by a Parliament held in his Reign, wiſely enacted a Statute, reſtraining People at the Time of their Death or otherwiſe, to give or make over any Lands or Rents to Churches or Religious Houſes without the King's Leave firſt obtain'd, which was called the Statute of *Mortmain*. For the Clergy in thoſe Times, under a Pretence of viſiting the Sick, and aſſiſting them on their Death-Beds with ſpiritual Advice, ſo artfully manag'd the matter, either by Threats or Perſuaſions, that they had acquired by Legacies to the Church, almoſt two Parts in three of the whole Lands of the Kingdom into their Hands, according to a Particular, which (my Lord *Coke* ſays) he had ſeen: and whatever they got, they could not part with either by the Laws of the Church or the Realm, tho'

tho' they might get what they could lay their Hands on. And, indeed, theſe pretended Religious liv'd ſuch fat and lazy Lives on the Spoils of the Laity, having thus, by their inſinuating Ways, gotten into their Poſſeſſion the greateſt part of the beſt Lands in the Kingdom, that the People began to grow very uneaſy to ſee themſelves live ſo poor to maintain a pamper'd Clergy: And theſe Lands being exempted from Taxes*, unleſs they voluntarily ſubmitted to them, or the Pope, for the furtherance of his Deſigns, order'd the Payment of them; the Crown was thereby much diſabled in times of War. So that this wiſe King was oblig'd to put a ſtop to theſe Superſtitious Gifts. But the Clergy ſoon after this Act grew very reſtleſs at this reſtraint laid on the Weakneſs of the Laity, and labour'd to ſtir up his Subjects to a Rebellion againſt him; but failing in their Purpoſe, they demanded, That the Statute againſt *Mortmain* might be repeal'd by him: To which the King gave this reſolute Anſwer, *viz. That as of himſelf he had not the Power of making Laws, ſo that without his Parliament's Conſent he could not annihilate any.*

* X. 3. 39. 1 & 2.

Mortmain had its firſt Riſe from the Monks perſuading ignorant People into a Belief of Purgatory, from whence the Souls of the deceas'd might be redeem'd by Maſſes ſaid for ſuch as were in Torment there, which otherwiſe they would ſuffer; and this made them give Lands to the Religious Houſes, to find a Prieſt to ſay Maſſes every Day for their Souls: And ſo great was the Superſtition of former Ages, that theſe Monaſteries would have got moſt of the Lands in *England*, if ſome Statutes had not been made to reſtrain ſuch Gifts; the Purport of which were, *viz.* That Grants of Lands to Religious Houſes ſhould be void, if made without the King's Licence, that is to ſay, if they were immediately held of him; but if ſuch Lands were held of an inferior Lord, then the Licence was to be had both from the King and him. And if there was no ſuch Licence, then whoever had the Inheritance, might enter within a Year after ſuch Alienation; and if he neglected, then the immediate Heir might enter in half a Year; and if he did not, then the King might †. But theſe Statutes did not entirely prevent the Inconveniencies intended; for the Kings ſeldom or never refus'd to confirm ſuch Grants: For if they did, their Reigns were ſure to be made uneaſy to them by the Clergy.

† 7 E. 1. *De Religioſis.*

The firſt Statute we meet with againſt *Mortmain* was that of *Magna Charta* *, declaring, that if any one ſhall give Lands to a Religious Houſe, the Grant ſhall be void, and the Land forfeited to the Lord of the Fee. The next was that of *Edward* I. already remembred. But Eccleſiaſticks being thus debarr'd by the former Statutes from obtaining Lands in *Mortmain* by Alienation, they were reſolv'd to acquire them by fraud, and to elude the aforeſaid Acts by a Default in a Suit: And, therefore, it was in the 13th Year of *Edward* I. by a Statute † ordain'd in ſuch Caſe, That it ſhould be enquired by the Country, whether or no the Demandant had a juſt Title thereunto; and if ſo, then he ſhould recover Seiſin; but if otherwiſe, then the Lord of the Fee ſhould enter, as aforeſaid. And by this Statute, each mean Lord has a full half Year given him after the Lord next before him, till it comes to the King. The next Fraud the Clergy were guilty of, in order to obtain Lands in *Mortmain*, was the procuring them to be converted into Church-yards, and then they became of courſe to be annex'd to the Church, and unalienable as ſacred Ground: And, therefore, a Statute was made in *Richard* the IId's Time ||, declaring, That it is within the Compaſs of the Statute of *Edward* I. * to convert any Land into a Church-yard, though it be done with the Conſent or Connivance of the Ter-tenant, and confirm'd by the Pope's Bull.

* 9 H. 3. c. 36.

† 2 Weſt. 32.

|| 15 Ric. 2. c. 5.

* 7 E. 1. ut ſupr.

There have been various Statutes, at ſeveral times, made hereupon, but the Eccleſiaſticks always found ſome means or other to evade them till *Henry* the VIIIth's Reign †, when they were pretty well bound down by a Law then made, enacting, That if any Grants of Lands or other Hereditaments, ſhall be made in Truſt to the Uſe of any Churches, Chapels, Church-wardens, Guilds, Fraternities, *&c.* to have perpetual Obits, or a continual Service of a Prieſt for ever, or for ſixty or eighty Years, or to ſuch like Uſes or Intents; all ſuch Uſes, Intents, and Purpoſes, ſhall be void, they being no Corporations, but erected either of Devotion, or elſe by the common Conſent of the People. And all collateral Aſſurances made for defeating this Statute ſhall be void; and the ſaid Statute ſhall be expounded moſt beneficially for the Deſtruction of ſuch Uſes as aforeſaid. But this Act was not to prejudice Corporations, where there is a Cuſtom to deviſe Lands in *Mortmain*.

† 23 H. 8. c. 10.

Of a Mortuary, and the Payment thereof.

A *Mortuary*, is a Gift which was left by a Man at the time of his Death to his Pariſh Church or Prieſt, as is ſaid, for a Recompence of his perſonal Tithes and Offerings not duly paid in his Life-time *: and it is called a *Mortuary*, becauſe in the Days of *Popery* here in *England*, it was left to the Church for the Soul of the Perſon deceas'd, and for that it was to be brought to the Church, together with the Corpſe of the deceas'd, at the time of his Funeral or Burial; and it was paid of all kinds of Animals whatever, provided they were ſuch as we could have a Property in, whether of a wild or tame Nature. For there are ſome ſort of Animals of ſo fierce and wild a Nature, that we cannot have the Uſe and Cuſtody of them; and, conſequently, they are no Man's Property. Under the Name of *Animals*, we not only reckon Beaſts on the Land, but even Birds in the Air, and Fiſhes in the Sea. Therefore, if the Perſon deceas'd, had three or more of theſe Animals ‖, whether they were Beaſts, Birds, or Fiſhes, they were liable to become a *Mortuary*, provided they were found among the Goods of the Perſons deceas'd.

* Lindw. lib. 1. Tit. 3. cap. 1.

‖ Lindw. lib. 3. Tit. 15. cap. 2.

Dugdale, in his Antiquities of *Warwickſhire*, ſays, That in antient Times a Mortuary was ſtiled a *Corpſe Preſent*, becauſe the Beaſt was preſented with the Body at the Funeral as aforeſaid: And *Selden*, in his Hiſtory of Tithes, ſpeaking of the Conſtitution of *Robert*, Biſhop of *Durham* †, is of the ſame Opinion; Rubrick *De rebus Liberorum decimandis & mortuariis indè ſolvendis*. And *Lindwood* in the Text of the Law, ſhews, that if there be a Mortuary *de bonis propriis*, it ought to be paid to the Mother Church *. But this Word *Mortuarium*, was ſometimes uſed in a Civil as well as in an Eccleſiaſtical Senſe; and was payable to the Lord of the Fee, as well as to the Pariſh-Prieſt. For, according to the Cuſtom of *England* in thoſe Times, if a Perſon had, at the time of his Death, three or more Animals among his Goods and Chattels, of what kind ſoever they were, the beſt was reſerv'd for the Lord of the Mannor, and the ſecond beſt was reſerv'd for the Church where he uſually receiv'd the Sacraments during his Life †; and this was to be paid without any Fraud or Contradiction whatſoever, as a Compenſation for his ſub-

† A.D. 1276.

* Lindw. ut ſupr.

† Lindw. ut ſupr. v. *Eccleſiæ ſuæ.*

ſubſtraction of Perſonal Tithes and Oblations, and was given to the Church (according to the Faſhion of thoſe Times) *pro ſalute animæ*. But then this ſubſtraction of Tithes and Offerings ought to happen thro' Ignorance; for if perſonal Tithes and Offerings were ſubſtracted knowingly and wilfully by him, and theſe Tithes and Offerings amounted to a conſiderable Sum or Quantity, *viz.* If they exceeded the Value of the ſecond beſt Animal, this was no juſt Recompence for withdrawing the ſame*; ſinceto give an Animal of five Shillings Value could not be thought to be a ſatisfaction for Tithes and Offerings amounting to twenty Shillings or upwards. But tho' the Perſon had made no ſuch Subſtraction at all, yet ſo greedy were the Clergy in thoſe days, that they would have this Chattel paid them, if they could find any Traces of a Cuſtom that this had been practis'd for any length of Time: And ſo they had a regard to Uſage for an unwarrantable Payment. And if a Perſon had a live or a quick Stock in common with another, he was (notwithſtanding) bound to obſerve this Conſtitution in reſpect of Payment; eſpecially, if the Perſon had living Animals of this kind in ſuch a manner, as that he could reckon them among his own quick Stock; and if ſuch a Chattel was reputed to be his in the Opinion of other Men: For by this Law, in favour of the Church, and relating to the Welfare and Salvation of Mens Souls (as pretended) the Church might, on the ſcore of a Mortuary, claim even ſuch a Chattel, as the Perſon deceas'd had in common with another Man, making (at leaſt) entire Satisfaction to him, according to his Part for his Partnerſhip therein†. But though if a Woman died before her Husband, no Mortuary was due; yet it was a good Law, that if ſhe liv'd a Widow in her own Houſe, or elſewhere, after his Deceaſe for a Year, with the Government of her Family, ſhe was bound to pay a Mortuary. And all ſuch Perſons as refus'd to pay this Debt of a Mortuary to the Church, whether it was founded upon Law or Cuſtom, did incur the Cenſure of the Church‖; tho' it was originally eſtabliſh'd upon the Good will and Superſtition of Perſons dying under an Apprehenſion of eternal Damnation for their ſubſtracting the Prieſt's Dues, according to the Doctrine then preach'd up among them for filthy Gain and Lucre.

* Lindw. lib. 1. Tit 3. c. 1. v. *Subſtractionis.*

† Lindw. ut ſupr. v. *in bonis.*

‖ Lindw. ut ſupr.

*Hoſtienſis**, gives us an Inſtance of a Cuſtom at *Venice*, where the tenth part of moveable Effects is paid to the Church upon any one's Death; and there ſays, that in *Britain* formerly a third part was thus given and paid thereunto: And hence it became a Cuſtom in ſome Places, for the Church to have the wearing Apparel, and Bed on which the deceas'd Perſon died†. And if a Perſon, at the Time of his Death, had an Eſtate in Goods in ſeveral Countries and Provinces, they were to be diſtributed according to the Cuſtom of each Country or Province, *viz.* That the Goods in one Place ſhould be divided into three Parts; and the Goods in the other, likewiſe divided according to the Cuſtom of the Province. There was a Duty paid at Funerals by our *Saxon* Anceſtors, which was call'd the *Saxon Soul-ſhot*; and this Payment was not only enjoin'd by Councils, but by the Laws of *Canutus*, one of our *Daniſh* Kings: But I cannot find any Foundation of Truth for the Cuſtom mention'd by *Hoſtienſis*, in all our antient Hiſtories, tho' ſome think this to be the original of Mortuaries, and others, that of the *Saxon Soul-ſhot*.

* In c. 42. X. 5. 3.

† Hoſt. ut ſupr.

A Mortuary was not properly and originally due to an Eccleſiaſtical Incumbent from any Perſon, beſides from thoſe of his own Pariſh‖: But, by an unwarrantable Cuſtom in ſome Places of this Kingdom, they are now demanded by Parſons of other Pariſhes, as the Corpſe paſſes thro' them*, under the falſe and fraudulent Name of *Obventions*, ſo called (as pretended) from meeting the Corpſe; whereas an *Obvention*, properly ſpeak-

‖ Lindw. ut ſupr. v. *Eccleſiæ ſuæ.*

* Hob. Rep. p. 175 & 176.

ſpeaking, is a generical Term for all Church-Dues whatſoever; and ſo is the Word uſed in the *Common* *, *Civil* †, and *Canon* Law, to denote a general Revenue. For, by virtue of the Provincial Conſtitution, a Mortuary is only due to that Church unto which the Perſon deceas'd did belong as a Pariſhioner, tho' he died in another Pariſh, or was bury'd elſewhere. But if the Perſon dwelt at ſeveral times in divers Pariſhes, and was in his Life-time to receive the Sacraments in each of them, then as the Animal was but one, and could not be divided, it was to be valued, and each Church was to have its Share in Money according to the Rate thereof: But if the Perſon was only inſtructed in one of theſe Pariſhes, it was otherwiſe ||; for a Denomination ought to be made *à Majori*.

* Cok. 11. Rep. fol. 15.

† D. 14. 1. 1. 15. D. 7. 1. 7. 1.

|| Lindw. ut ſupr. v. *Eccleſiæ ſuæ.*

It has been already related, That Mortuaries were formerly payable in Beaſts or Animals, as Horſes, Cows, Oxen, Hogs and the like; and it was enough to render a Mortuary due, if there were three Animals of one and the ſame kind, as three Horſes or three Cows; or if there were but two of the ſame kind, as two Horſes, and the third of another kind, as one Cow *, (for the Clergy never wanted their Diſtinctions, if they could gain by them). And, according to *Lindwood*, it was the ſame Thing, if theſe three Animals were of three different kinds; as one Horſe, one Ox, and one Sheep. And as the Payment of Mortuaries was enjoin'd by ſeveral Provincial Conſtitutions; ſo it was likewiſe commanded by the Statute of *Circumſpectè agatis*; yet ſtill left to Cuſtom. But, by a Statute in *Henry* the VIII's Reign †, a Rate or Order is there ſet down for the Payment of Mortuaries in Money; which is now a ſtanding Law concerning Mortuaries. The Preamble of which Statute recites, "That "Doubts and Queſtions had been made not only on the Manner and "Form of demanding, but of the Quantity and Value of Mortuaries:" And, therefore, it was enacted, That *no Perſon ſhould demand a Mortuary, where by Cuſtom it hath not uſually been paid, nor by the Death of a Feme Covert*; and in this Reſpect, that Law was conformable to the aforeſaid Conſtitution. But it was further enacted, *That it ſhould not be demanded on the Death of a Child, or of a Perſon that was not a Houſekeeper, or of a Traveller, or of one not reſiding in the Place where he died, nor where the Goods of the deceas'd were not of the Value of ten Marks, his Debts being deducted: and no Perſon ſhould take above* 3 *s.* 4 *d. where the Goods did not exceed* 30 *l. nor above* 6 *s.* 8 *d. where they exceeded* 30 *l. and not* 40 *l. nor above* 10 *s. where they amount to* 48 *l. or more, under the Penalty of forfeiting ſo much as he takes or demands more, and likewiſe* 40 *s. to the Party grieved to be recovered by Action. And if a Perſon ſhould happen to die in the Place where he did not dwell, the Mortuary muſt be paid where he did moſt commonly live; and that ſuch Mortuaries which then had been ſettled by Cuſtom, if leſs than abovemention'd, ſhould not be alter'd. No Mortuaries ſhall be paid in* Wales *or* Berwick, *or any of their Marches, ſave only in* Wales *and the Marches thereof, where they have been accuſtom'd to be paid; and ſuch as are there paid, ſhall be regulated according to the Order preſcrib'd by this Act. But the Biſhops of* Bangor, Llandaff, *St.* David's, *and St.* Aſaph, *and the Archdeacon of* Cheſter, *ſhall take Mortuaries of the Prieſts within their Juriſdiction, as has been accuſtom'd, notwithſtanding this Act.*

* Lindw. ut ſupr. v. *cujuſcunque generis.*

† 21 H. 8. cap. 6.

Before this Act, it was the receiv'd Opinion, That a Mortuary could only be recover'd in the Spiritual Court; and if a Prohibition was brought, Conſultations in ſuch Caſes had always been granted. For ſays *Fitzherbert* ||, where a Cuſtom is alledg'd for the Payment of a Mortuary, it ſhall be try'd in the Spiritual Court, becauſe that Court had the Original Cog-

|| F. N. B.

Cognizance of Mortuaries: And, therefore, it was held reaſonable, that all Dependencies on it ſhould be try'd there. It cannot be deny'd but that there are ſome Caſes in the Year-Books tending this way *. A *Præmunire facias* was brought againſt the Vicar of *S.* for ſuing in the Court Chriſtian for a Heifer, *&c.* who pleaded a Cuſtom in the Pariſh to have the beſt Beaſt for a Mortuary of every Pariſhioner dying there, and that ſuch a Perſon died poſſeſs'd of the Heifer which the Vicar would have ſeiz'd, but the Plaintiff privately drove it away; and thereupon the Vicar ſued him in the Spiritual Court to produce it: Now it was objected, that this was only a Chattel, and the Queſtion was only about the Poſſeſſion, and for that Reaſon it ought to be try'd at the Common Law; yet the Plea was held good, becauſe the Temporal Courts have no Juriſdiction of Mortuaries, or of its Dependencies. So in an Action of Treſpaſs for taking a Horſe †, the Defendant pleaded to the Juriſdiction of the Court, for that he was Vicar of *G.* and the Plaintiff was Parſon of the ſame Church; and that *R.* a Pariſhioner died poſſeſs'd of the Horſe which the Vicar took as a *Mortuary*: And now this had been a good Plea, if the Property of the Horſe had been admitted to be in the Pariſhioner at the time of his Death; but that was denied, he only having the Poſſeſſion, but the Plaintiff claiming the Property. I might cite more Caſes to this Purpoſe: But ſince the Statute, the Law has been adjudg'd to be otherwiſe. For if the Cuſtom be deny'd, it ſhall be try'd at the Common Law ‖; and a Prohibition ſhall be granted, unleſs it be for ſo much Money due for a Mortuary; and the Plaintiff ſuggeſts, that the *Quantum* is ſettled by the Statute, but does not alledge it to be of leſs Value: For in ſuch a Caſe, no Prohibition ſhall go, becauſe the Statute does not toll the Juriſdiction of the Spiritual Court. A Prohibition was pray'd on a Libel in the Spiritual Court for a Mortuary; and the Defendant ſuggeſted, that by the Statute *, no Mortuary ought to be paid but in ſuch Places only where it had been uſually paid before the making of that Statute; and there was no Cuſtom in this Place to pay a Mortuary: for Mortuaries are not due by Law, but only by the particular Cuſtom of Places ‖. 'Tis true, a Prohibition was deny'd in *Mark* and *Gilbert*'s Caſe, becauſe 'twas admitted that a Mortuary was due there by Cuſtom, tho' they differ'd in the Perſon to whom it was to be paid. The Court ſaid, that Prohibitions had been granted and deny'd on ſuch Suggeſtions: Wherefore, the Defendant was here order'd to take a Declaration in a Prohibition as to the Cuſtom, and try the Cuſtom at Law †.

In a Prohibition pray'd to the Court of Arches, in a Suit by an Appeal thither for a Mortuary begun at *Llandaff*, on the aforeſaid Statute, *viz.* That after Debts and Legacies paid, he ſhould, as Vicar, have a Mortuary, without ſetting forth in his Libel any Cuſtom for the Payment of them as uſual; becauſe *Wales* and *Cheſter* are excepted out of the Statute: And the Suggeſtion was, that no Mortuary had been uſed to be paid; and that this Plea was refuſed in the Spiritual Court. And in the firſt of *Croke*'s Reports ‖ it be held, that the Cuſtom is tryable in the Spiritual Court, and not at Common Law; yet the Court was inclin'd to think, that no Suit can be in *Wales* on the Statute of Mortuaries *. See *Keble*'s Rep. pt. 3d. pag. 75. But *Lutwich* ſays, That where a Cuſtom is deny'd, it ſhall be try'd at Law; becauſe Cuſtoms are part of the Law of the Land †: as where 'tis alledg'd *de modo Decimandi* it ſhall be try'd at Common Law, 2 Roll. Abr. 307. But this ſeems to be a Fetch of our common Lawyers to extend the Cognizance of their own Courts, ſince Cuſtoms relating to Eccleſiaſticals may be as well try'd in the Spiritual Courts.

* 10 H. 4. Pl. 2.

† 2 H. 5. 10.

‖ Crok. Eliz. p. 151. 3. Mod. Rep. 268.

* 21 H. 8. c. 6.

‖ 2 Inſt. 491;

† Mod. Rep. ut ſupr.

‖ Pag. 172.

* Kelw. Rep.

† Lutw. Rep. pt. 2. pag. 1069.

Of a Notary or Regiſter, and his Office.

THAT the Truth of Things may the better appear, the Law enjoins all Acts, which are ſped either in an ordinary or extraordinary *judicial* Proceſs, to be written by a *Notary Publick* or Regiſter, in *Latin* ſometimes ſtiled *Tabellio* ‖; and, according to *Bartolus*, *Baldus*, and other Writers, ſometimes term'd *Judex chartularius* †; becauſe (ſay they) a Notary approaches and comes near the Nature of a Judge: or elſe it requires that two or three * fit and credible Witneſſes be made uſe of to atteſt the Truth thereof in the Place of a Notary, whoſe Duty 'tis to write down whatever is tranſacted in Judgment, as it literally appears to them; and if the Judge ſhall neglect theſe Matters aforeſaid, he ſhall be puniſh'd by his ſuperior Judge; and no Preſumption ſhall lie in favour of the Proceſs, any further than the Cauſe appears by proper and lawful Documents. A Notary Publick that writes the Acts of Court, ought not only to be elected by the Judge, but approv'd alſo by each of the Parties in Suit; for though it does of *common Right* belong to the Office of the Judge to aſſume and chuſe a Notary for reducing the Acts of Court in every Cauſe into Writing ‖; yet if a Notary be a ſuſpected Perſon, he may be recus'd and ſet aſide by the *Litigants*: For the Uſe of a Notary was not introduced ſo much on the Judge's Account, to help his Memory in the Cauſe, but that an innocent *Litigant* might not be injur'd by the Injuſtice of a wicked Judge; and likewiſe that Truth might appear, and Falſhood be aboliſh'd in all *judicial* Pleadings.

‖ Nov. 44. cap. 1.
† In L. 1. D. 5. 1.
* 16 Q. 3. 15. 4.
‖ vi. 1. 3. 9. 7.

A Notary was anciently a Scribe or Scrivener, that only took Minutes and made ſhort Draughts of Writings, and other Inſtruments, both publick and private. But at this Day, we call him a *Notary Publick*, who confirms and atteſts the Truth of any Deeds or Writings, in order to render the ſame more credible and authentick in any Country whatever: And he is principally made uſe of in Courts of Judicature, and in Buſineſs relating to Merchants. For a Notary Publick is a certain kind of Witneſs; and, therefore, ought to give Evidence touching ſuch Things as fall under his corporeal Senſes, and not of ſuch Matters as fall under the Judgment of the Underſtanding: Becauſe it only belongs to the Judge to pronounce Sentence and Judgment according to the Underſtanding, and not to Witneſſes or Notaries and the like †. Nor can a Notary give Evidence of that, touching which he was not requeſted to make a *notarial* Act; and, therefore, he ought to be ask'd, and requeſted *: But 'tis otherwiſe in a *judicial* Production made in his Preſence. And a Notary being requeſted by the Parties, ought to hear the Buſineſs in his own proper Perſon, and to write the Acts himſelf; and not to delegate this Matter to another †, under a Penalty to be inflicted on ſuch Notary as ſhall act contrary hereunto. But though a Notary cannot delegate another Perſon to make an Inſtrument; yet if the Perſon be a Notary, ſuch Inſtrument ſhall be valid, tho' the Notary delegating the ſame ſhall be puniſh'd. A Notary, after his Creation, cannot refuſe to make an Inſtrument and to do other *notarial* Acts, without incurring the Guilt of Per-

† Abb. in c. un. X. 1. 39. N. 8.
* Abb. in c. 1. X. 2. 22. N. 4.
† C. 10. 69. 3. X. 2. 22. 15.

Perjury, if he be requeſted thereunto; becauſe he ſwears at the Time of Admiſſion into his Office, that he will conform himſelf hereunto, if requeſted at any time; and if he fails herein without a ſufficient Reaſon given to excuſe himſelf, he ſhall (according to *Hoſtienſis* *) be depriv'd of his *notarial* Office.

* In ſum de fid. Inſtr. §. ex quibus.

A Notary is in our Law-Books, therefore, ſaid to be a publick Servant, becauſe he ſerves in a publick Manner and Capacity ‖; and on Requeſt made to him, is bound to ſerve all Perſons whatſoever, and ſhall be compell'd to make Inſtruments for them (as aforeſaid) if need be: But he is not bound to do it *gratis*, but may lawfully demand a reaſonable Fee in Money for the Execution of his Office *; and ſue for the ſame if it be not paid him. A Notary that has been requeſted to make an Inſtrument, ought to finiſh and compleat the ſame by his own Hand (as above-hinted) unleſs the Judge orders it to be finiſh'd by another †: But in other Caſes, if an Inſtrument be written by the Hand of one Notary, and ſubſcrib'd and ſign'd by the Hand of another, ſuch Inſtrument ſhall be held and deem'd as a ſuſpected Inſtrument ‖. But a Notary cannot make an Inſtrument that concerns his own Act and Deed, ſince the Subject of his Buſineſs ought to be the Act and Deed of ſome Perſon that applies to him *. A Notary is oblig'd to make and publiſh all common Inſtruments by reaſon of the Matter therein contain'd; and, by Conſent of Parties, Notaries have an ordinary Juriſdiction between ſuch Parties. A Notary ought not to add any Thing to an Inſtrument without the Leave and Authority of the Judge, after ſuch Inſtrument has been once publiſh'd and deliver'd to the Party: And this is more eſpecially true, when ſuch Inſtrument has been *judicially* exhibited.

* D. 2. 13. 10.

† Abb. Conſ. 68. vol. 2.

‖ X. 2. 22. 6.

* Abb. in conſ. 37. X. 2. 21. N. 12.

Our Law-Books give a Notary ſeveral Names and Appellations, as *Tabellio* †, *Actuarius*, *Regiſtrarius*, *Scriniarius* ‖, and the like; all which Words are put to ſignify one and the ſame Thing: tho' we here in *England*, confine the Word *Regiſtrarius* to the Officer of ſome Court, who has the Cuſtody of the Records and Archives of ſuch Court, and oftentimes diſtinguiſh him from the Actuary thereof; but (I think) a Regiſter ought always to be a Notary Publick, becauſe it ſeems to be a neceſſary Qualification to his Office *. Now the Office of a Notary in a *Judical* Cauſe is employ'd about three Things. *Firſt*, He ought to regiſter and enroll all the *judicial* Acts of the Court, according to the Decree and Order of the Judge, ſetting down in the Act the very Time and Place of Writing the ſame: For the Judge's Precept and Authority is neceſſary hereunto. *2dly*, He ought to deliver to the Parties, at their ſpecial Requeſt, Copies and Exemplifications of all ſuch *judicial* Acts and Proceedings, as are there enacted and decreed. And, *3dly*, he ought to retain and keep in his Cuſtody the Originals of all ſuch Acts and Proceedings commonly called the *Protocols*; that in caſe any Diſpute or Difficulty ſhould afterwards ariſe touching the ſame, Recourſe may be had thereunto. So that if the Judge ſhould ſay, that he would have the Acts of Court remain with him, the Will of the Notary or Regiſter herein is ſurely to be prefer'd, as I have already remembred under the Title of *judicial Acts* †: For if any Doubt or Queſtion ſhould happen touching his own Writing of them, he may with more Truth and Certainty aver the ſame. Whereas otherwiſe he might incur the imminent Danger of Perjury and Falſification; and hence 'tis the Notary's Intereſt, that all ſuch Acts and Proceedings ſhall continue with him. But if Notaries are Officers to Biſhops, Counts and Rectors of Cities and the like, they may be compell'd to ſend all ſuch Acts and Proceedings into the Office-Chamber, as ſoon as they have perform'd and finiſh'd their Duty herein.

† Nov. 44. c. 1.

‖ Nov. 41.

* Paul. ut ſupr.

† Vid. Pag. 29.

As

As to the Qualifications of a Notary, there are four Things principally requir'd thereunto, *viz.* *First*, He ought to be a Perſon of Truſt and Fidelity. *Secondly*, A Perſon of ſome Worth and Dignity, and not a Perſon of a low Fortune and Station in the World. *Thirdly*, A Perſon well inſtructed in the Buſineſs of a Notary, and intirely *adroit* in framing Acts of Court, and in taking the Examination of Witneſſes. And *Fourthly*, by the *Civil* and *Canon* Law he ought to be born in lawful Wedlock, and no Baſtard. Now *Fidelity* conſiſts in ſeveral Things. *First*, in Diligence, ſince every Notary at the time of his Creation, ſwears thus to execute his Office; and accordingly he is preſum'd to execute the ſame with Diligence and Fidelity, and not preſum'd to write any thing in the Acts of Court, but what the Witneſſes have really depos'd, the Parties alledg'd, and the Judge decreed. *Secondly*, A Notary ought (according to ſome) to be a Chriſtian Believer: for ſo they underſtand the Word *Fidelis* in the Text; and, therefore, an Infidel cannot be a Notary. *Thirdly*, A Notary, according to others on the Word *Fidelis*, ought to be a Liege-Subject; bearing Faith and Allegiance to him, who made him a Notary; which, by the *Canon*-Law, none can do but the Pope or Emperor *: And hence it is that the Archbiſhop of *Canterbury* did by virtue of his *Legatine*-Power create Notaries with us in *England*. And *Fourthly*, in reſpect of Fidelity, he ought upon demand, or requeſt made to him (as aforeſaid) to regiſter all ſuch things as he ſhall ſee or hear belonging to his Office (for on theſe two corporeal Senſes his Buſineſs turns) making all Acts and Inſtruments without any diminution of Truth, or raſing any Words out of the Regiſters and Records which he has in his poſſeſſion. Yea, he ought to keep all Things committed to his Truſt as the Apple of his Eye, and not to reveal any Secrets enjoin'd him. There are other Conſiderations, that reſpect the Fidelity of a Notary or Regiſter, which I have not leiſure here to mention. But 'tis to be noted further, that 'tis ſufficient for a Perſon to have taken the general Oath of a Notary for the faithful Execution of his Office at the Time of his Creation, and ſhall not be compelled to take a particular Oath for the ſaid Purpoſe, on his being aſſum'd and choſen to execute the Office of a Notary in reſpect of any ſpecial Act †.

* Ar. X. 5. 31. 12. ad fin. Inn. & Hoſt. X. 2. 22. 15.

† Abb. in c. 1. Cl. 5. 3. N. 23.

I ſhall next conſider, whether a Perſon who acts as a Notary, may be preſum'd to be ſuch, and when this Preſumption lies. And, firſt, 'tis laid down as a Rule in Law, that no one is preſum'd to be ſuch, becauſe this is not a Quality born with a Man himſelf ‖: And, therefore, (as we ſay) that as no one is preſum'd to be a Clerk; ſo in the like manner we may affirm, that no one is preſum'd to be a Notary. But *Firſt*, this Rule does not hold true, if we find ſuch Perſon regiſtred and enrolled in the Matriculation-Book of a reputed Notary: For then he is preſum'd to be a Notary *. And thus we ſay, that he is preſum'd to be a Scholar, who is found regiſtred and enrolled in the Matriculation-Book belonging to the Scholars of any Univerſity †: And in the ſame manner he is preſum'd to be a Merchant, who isfound enrolled in the Matriculation-Book belonging to Merchants. For a Preſumption lies in favour of a Matriculation-Book, which proves any one to be of the Number of thoſe, who ought to be matriculated. I ſpeak here of a Notary, that is dead, and whoſe Admiſſion cannot be otherwiſe prov'd: For the Atteſtation of a Notary, even after his Death, ſhall be well regarded, if his Hand-Writing may be prov'd either by Witneſſes, or the Matriculation-Book it ſelf. *Socinus* the younger ſays *, that, according to the receiv'd Opinion of the Doctors, a Notary ought to be ask'd and requeſted to make a publick Inſtrument, in order to give Credit and Authority thereunto: As in a doubtful Caſe if he ſhall

‖ Oldrad. Conſ. Anch. Conſ. 217. Alex. conſ. 166.

* Bald. in l. 2. D. 1. 14.

† Bart. in l. 13. C. 4. 1. Par. Conſ. 149.

* Conſ. 178. N. 3. vol. 2.

ſhall ſay in the Inſtrument, *that he was asked*, according to *Bartolus* *, and *Innocentius* †, he ſhall be preſum'd to have been ask'd, and no one ought to doubt but that ſuch Inſtrument ſhall have Credit given it. Nay, though he ſhould not ſay in the Inſtrument, that he was ask'd, yet if he be ſtill living, and will affirm that he was ask'd, he ought to be believ'd according to the latter ‖. Therefore, the great Queſtion is, Whether a Notary, that is dead, and who has not declar'd in Writing *that he was ask'd*, ſhall be preſum'd to have been ask'd? And herein the Doctors differ very much. For the Gloſs on the Law *, and ſeveral of the Doctors, as *Bartolus*, *Baldus*, *Angelus*, *Jacob. de Belviſio*, *&c.* † held, That ſuch a Notary is preſum'd to have been ask'd: And this is the receiv'd Opinion in our Law-Books. For the Office of a Notary being a publick Office, as that of the *Argentarius* was heretofore among the *Romans*, whoſe principal Buſineſs it was to reduce Accounts into Writing; and, therefore, whatever he wrote in ſuch Accounts, he was preſum'd to write the ſame by the Order and Command of him, that had an Intereſt therein ‖: Wherefore, by a Parity of Reaſon, we ſay, That if a Notary has reduced a Teſtament into Writing, he is preſum'd to have done it by the Order of the Teſtator, who has an Intereſt therein, *viz.* that he may have from ſuch a Will an Heir or Succeſſor to his Eſtate of his own Nomination and Appointment.

* In l. 30. D. 45. 1.
† In c. 1. X. 2. 22. N. 7.
‖ In c. 1. X. 2. 22.
* Nov. 41. c. 1.
† In L. 27. D. 28. 1. & in L. 1. C. 6. 47.
‖ D. 2. 13. 4. D. 2. 13. 6. 4.

The Evidence of a Notary is ſo great, that two Idoneous Witneſſes are not of equal Credit to the Writing of one publick Notary, if his Reputation and Character be free from any Taint of Falſhood: But no Credit ought to be given to a Notary, who ſhall, at the Time of his Death, declare that he has made a falſe Inſtrument. And if a Notary ſhall be convicted or condemn'd of Forgery, or making a falſe Inſtrument, ſuch Conviction, or Condemnation, ſhall prejudice the Perſon, at whoſe Inſtance ſuch Inſtrument itſelf was made. And the Reaſon of this is to oblige all Perſons to be careful what Notaries they employ. For the Buſineſs of a Notary is not ſo much a Dignity, as it is a Matter of great Truſt and Duty: and, therefore, an infamous Perſon may (according to ſome Men) be a Notary *; unleſs his Infamy be ſuch as ariſes from ſome Crime or Offence committed by him in his Office †; and 'tis on this Account, that a Baſtard or ſpurious Iſſue, who is an infamous Perſon by the *Civil* Law, may (according to theſe Men's Opinion) be a Notary, tho' he be a Baſtard. But a Notary charg'd with Falſhood, or accus'd of Forgery, ought not (pending ſuch Charge or Accuſation) to be in the intermediate Time depriv'd of his notarial Office: Yea, Inſtruments made by a Notary, before he ſtands thus deprived of his Office by the *declaratory* Sentence of the Judge, are good and valid in Law; becauſe he is not, *ipſo jure*, deprived thereof, but a *declaratory* Sentence of the Court is neceſſary hereunto.

* Bart. in L. 5. D. 48. 11.
† C. 18. 70. 12.

Here in *England*, the Creation of publick Notaries belongs to the King's Majeſty in his High Court of *Chancery*, as it does to moſt other Princes ‖; becauſe this is an Act or Thing done for the Advantage of the publick Weal, and is a Badge or Enſign of Sovereign Majeſty reſerv'd to the Prince alone, which we in other Terms ſtile the Royal Prerogative. And all Notaries at their entrance into their Office, ought to ſwear, "That they will not make out the Acts of ſuch Perſons as are not of "ſound Mind and Memory; That they will not deny Copies of Acts to "any Perſon requeſting the ſame; And that they will inſert and put in-"to their Inſtruments all the proper and uſual Clauſes." Both a Layman and a Clergyman may execute this Office, tho' ſome will have it, that it does not become the Order of Clergymen to execute the ſame

‖ Inn. in C. X. 2. 22.

† X. 3. 50. 8. *ob eorum insigne Ministerium* † ; becauſe (ſay they) the Office of a Notary is *vile Munus*. But this Rule (I think) ſeems to fail, unleſs there be a Cuſtom to the contrary; eſpecially if he was created a Notary before he became a Clerk. Others will have it, that he may execute this Office in Eccleſiaſticals, but not in Temporals. But the Office of a Notary, according to ſome, is an honourable Employment, and an Office of Dignity: And therefore (ſay they) as 'tis juſt and fit that it ſhould be conferr'd on a Man of Worth and Dignity, a Clergyman may (according to them) execute the ſame, tho' the *Canon* Law ſeems to diſallow of it. And as the Office of a Notary is a publick Office reſpecting the Advantage of the State, he ought to have a Houſe of his own, where he may be found and apply'd to, and not wander up and down without a fix'd Habitation. Notaries (ſays a certain Author) ought to have *proprias Bancas ſivè Scribanias*; and it matters not, whether they are their own in Propriety of Speech, or whether they rent or hire them of others. And theſe Houſes they ought not to have in bye and ſecret Places, but in publick, and near the Streets.

As a Notary is a publick Perſon; ſo, conſequently, all Inſtruments made by him are called *publick* Inſtruments *, as before remembred; and a *judicial* Regiſter or Record made by him, is Evidence in every Court according to the *Civil* and *Canon* Law †: And a Biſhop's Regiſter eſtabliſhes a perpetual Proof and Evidence, when 'tis found in the Biſhop's Archives; and Credit is given not only to the Original, but even to an *Authentick* Copy exemplify'd, if the ſame be not any wiſe ſuſpected; and we muſt abide by it ‖. And 'tis the ſame Thing, when the *Exemplar* is regiſtred and inſinuated by the ordinary Judge *. But what ſhall be done in ſuch a Caſe, where the Regiſter-Book, touching the ſame Fact, ſhall be contrary to a publick Inſtrument ſealed with the Judge's Seal? To which I anſwer, that in ſuch a Caſe, we ought rather then to abide by the Original, according to the Doctrine of ſome Men †: But, I think, that the contrary ſeems to be the truer Opinion; ſince ſuch *authentick* or *publick* Inſtrument is not extracted from the Acts of Court, but is repugnant thereunto ‖; for (perhaps) elſe it would be otherwiſe. If a Notary has in the Protocol of an Inſtrument ſet down the Day of the Month, and has afterwards made out ſuch Inſtrument without the ſaid Day mention'd therein, ſuch Day ſeems to be repeated in the Inſtrument, as is expreſs'd in the Protocol, and it ought to be inſerted therein. One Notary Publick is ſufficient for the Exemplification of any Act, becauſe there is no Matter that requires more than one Notary to atteſt it.

* Decius in c. 11. X. 2. 19.

† X. 2. 19. 11. circ. Med.

‖ D. 34. 1. 3. 1.

* X. 1. 41. 5. 1. v. *perſpeximus*.

† In L. 7. C. 2. 1.

‖ C. 7. 52. 6.

Of Notice or Intimation in Law.

AS there are many Caſes in Law relating to Eccleſiaſtical Affairs, which depend purely upon Notice or Intimation, it will not be improper to inform the Reader in what Caſes Notice is neceſſary, and where not: And this chiefly relates to Appeals, Avoidances of Eccleſiaſtical Livings, the Refuſal of a Clerk by the Ordinary; and, laſtly, to the Buſineſs of ſetting out Tithes. As *firſt* in reſpect of Appeals, that an Appeal ſhould affect the Judge *à Quo*, in ſuch a manner as to prevent and

and hinder him from proceeding any further in the Cauſe, Notice or Intimation ought to be given to him in a proper Way; otherwiſe, according to the receiv'd Opinion of the Lawyers *, a Proceſs had in ſuch Appeal is not valid, nor ſhall the inferior Judge be puniſh'd for an *Attentate* againſt ſuch Appeal. Yea, an Appeal, whether it be *judicial*, or *extra-judicial*, ought always to be intimated by the Party *Appellant*, to the Party *Appellate*, if he be ignorant thereof, in order to affect him in the point of an *Attentate* †: But 'tis otherwiſe, if he has knowledge thereof, becauſe an Intimation is only made to give him notice of the Appeal, that he may proceed no further in the Court below. Now to the end that ſuch an Intimation or Notification may affect the Perſon to whom it is made, in ſuch a manner, as to make him incur a Delay or Penalty for not obſerving the ſame, it ought to be made by a legal Perſon, having an Intereſt or Concern therein ‖, or a Commiſſion and Authority to make the Appeal known, otherwiſe ſuch Intimation is not valid: And 'tis neceſſary, that the Perſon, who gives ſuch Notice or Intimation, ſhould ſhew his Warrant and Authority for ſo doing; and eſpecially, when the Party that gives the ſame is a Proctor, for that, in ſuch a Caſe, he ought to prove himſelf to be a Proctor, by producing his Warrant or Proxy.

* Anchar. Conſ. 158. N. 31.

† Roman. Conſ. 251. N. 9.

‖ Roman. Conſ. 6. per tot.

As to the Avoidance of Eccleſiaſtical Livings, tho', generally ſpeaking, the Law does not require any Notice to be given to the Patron, where a Benefice becomes void by Act of Parliament; becauſe all Parties are virtually Parties to a Statute-Law: yet there are ſome Acts, whereby 'tis expreſly required that notice ſhould be given, as by a Statute of *Eliz.* *, 'tis provided, That no Title to preſent by Lapſe ſhall accrue on any Deprivation, *ipſo facto*, 'till after ſix Months Notice of ſuch Deprivation given to the Patron by the Ordinary. And by the ſaid Statute, if a Layman, or one not in Deacon's Orders, and of the Age of 23 Years, be admitted to a Benefit with Cure of Souls, his *Admiſſion is void*; and the Patron may preſent again without notice †. But becauſe the Statute only makes the *Admiſſion void*, and leaves the *Preſentation* as it was before; therefore, in the Caſe of a Deacon (the *Preſentation* being in force) no Lapſe ſhall incur, if he be depriv'd for Incapacity without notice given. The like is required by a Statute of *Charles* II. ‖ *viz.* That no Title or Lapſe ſhall incur, if a Man be depriv'd for not declaring his Aſſent and Conſent to the Book of Common-Prayer, and Subſcribing the Declaration, *&c.* without notice given of the Sentence of Deprivation. But where a Benefice is void by *Ceſſion* or *Incompatibility*, the Patron is bound to take notice thereof at his own Peril. And ſo likewiſe he is upon a Voidance by Death; and in ſuch a Caſe, the ſix Months are to be accounted from that Time, in which he might reaſonably have notice, and not immediately after the Incumbent's Death *. But in Caſes of *Deprivation*, notice muſt be given to the Patron by the Ordinary, before the Title can accrue to him by Lapſe: And this muſt be perſonal notice, if the Patron lives in the ſame County; but if in another County, then notice muſt be publiſh'd in the Pariſh-Church, and fix'd on the Church-Door, tho' *Dyer* calls this the *laſt Refuge* †; for if it be done in Perſon 'tis much better: and 'tis to be obſerv'd, that ſuch notice muſt expreſs the Cauſe of Deprivation ‖. But in this Caſe, Notice or not ſeems chiefly to affect the Ordinary; for he ſhall have no Benefit of a Lapſe, till notice given to the Patron, and his refuſal to preſent for ſix Months: But the Church being actually void upon a Deprivation, the true Patron is, at his Peril, to take notice of it in reſpect to a Stranger, tho' not bound to it in reſpect to the Ordinary; for if a Stranger ſhould preſent *, and his Clerk be admitted and inſtituted, and the ſix Months

* 13 Eliz. c. 12.

† March. Rep. p. 119.

‖ 13 & 14 Car. 2. c. 4.

* 2 Rolls Abr. 363.

† Dyer's Rep. p. 328.

‖ Yelv. Rep. p. 7. Cok. 6. Rep. 29.

* 2 Rolls Abr. 369. Hob. 318.

Months paſt, he has got a Right by Uſurpation. But where a Voidance is by taking a ſecond Benefice, 'tis neceſſary to know wherein the *Canon* Law differs from the Statute-Law as to this Matter, *viz.* By the Canons of the Church, if a Clerk has a Benefice under eight Pounds *per Ann.* and is inſtituted into another of what value ſoever it be, whether little or great, the firſt is void *de Jure*, but not *de Facto*, till Sentence of Deprivation, and becauſe the Voidance was by the *Canon* Law, therefore no Lapſe can incur to the Ordinary till notice given to the Patron. But he may Preſent within the ſix Months, and before any Sentence of Deprivation, or he may refuſe 'till the Clerk is actually depriv'd, and notice given*. By the Statute, if a Clerk has a Benefice of Eight Pounds *per Ann.* or upwards, and takes another of any Value, the firſt is, *ipſo facto*, void; and the Patron is not to expect any notice from the Ordinary, becauſe the Voidance in Caſes of Plurality is now eſtabliſh'd by Act of Parliament †; and of ſuch Avoidances, the Patron muſt take notice at his Peril.

* Moor Rep. 542. Crok. Eliz. 601. Vaugh. Rep. 131.

† 21 H. 8. c. 13.

But in Caſes of Reſignation, notice muſt be given to the Patron, and that by the Ordinary into whoſe Hands the Benefice was reſign'd; and if he ſhould die before he gives notice, the Guardian or Guardians of the Spiritualties muſt do it, and if he or they refuſe, then it muſt be done by the ſucceeding Biſhop before any Title of Lapſe ſhall accrue to him. Now in this Caſe, as well as in Caſes of Deprivation, the Patron may take Notice of it, if he pleaſes; but if he ſuffers a Stranger to Preſent, and his Clerk gets Admiſſion, *&c.* and the ſix Months paſs, this Preſentation and Incumbency make an Uſurpation, becauſe the Induction is a publick and notorious Act‖: And, therefore, the true Patron ought to take notice of it at his Peril, that he may provide a proper Remedy within Time, and not loſe his Preſentation, unleſs the Reſignation was made by Fraud and Contrivance, on purpoſe to defeat the true Patron, for then notice muſt be given of the Reſignation. If the Biſhop refuſes to admit the Clerk preſented to him, he muſt, in ſuch a Caſe, give notice to the Patron, and ſhew for what Reaſon he refuſes him*; and this muſt be in ſome reaſonable Time, ſome think a Month too long. But the *Canoniſts*, as well as our Common Lawyers †, diſtinguiſh between a Clerk of a Spiritual Perſon and of a Layman: for in the firſt Caſe he is not bound to give notice ‖, becauſe a Spiritual Perſon ſhould have preſented one qualify'd in all reſpects fit for the Cure*; but he is bound to give notice to a Lay-Patron, where he refuſes his Clerk, becauſe (ſay the *Canoniſts*) a Layman may vary his Preſentation. But (I think) this diſtinction does not hold with us.

‖ 2 Roll. Abr. 369.

* Crok. Eliz. 119. 1. Leon. p. 31.

† 3 Leon. Rep. p. 46. Latch. Rep. 192. 253.

‖ 14 H. 7. 21. a. Kelw. Rep. 49. v.

'Tis a receiv'd Opinion, that the Pariſhioners are bound to give the Parſon notice of their ſetting forth their Tithes: 'Tis true, the *Canon* Law obliges them ſo to do; but 'tis otherwiſe by the *Common* Law, which prevails in this Caſe: For if the Pariſhioner ſets out his Tithe fairly and truly †, he is not bound to give notice either to the Parſon himſelf, or any general notice at the Church, of the Time when he ſhall ſet them out. But ſome think that he ought to give a general notice of the time when he begins his Harveſt, and the Parſon then is bound to look after his own Tithes; and this ſeems to be moſt reaſonable. But the Pariſhioner cannot obſtruct either the Parſon or his Servant to be preſent‖, when the Tithes are ſever'd, who are bound to carry them away in a convenient Time after ſuch ſeverance; and if they neglect ſo to do, the Pariſhioner in ſuch a Caſe muſt give notice that the Tithes are ſet forth, elſe he cannot have an Action of Treſpaſs for not carrying them. But more of this Matter hereafter under the Title of Tithes.

* Kelw. Rep. 154. 31 E. 1.

† Styl. Rep. p. 342. 1 Rolls. Abr. 643.

‖ 2 Vent. Rep. p. 48. Noy Rep. p. 19. 3 Bulſ. Rep. p. 336. Godbo. Rep. 229.

By

By an Act of Parliament in the first Year of *William* and *Mary**, it is enacted, That if any Truſtee, Mortgagee, or Grantee, of any Right of Preſentation, Collation, or Nomination to any Eccleſiaſtical Living, Free-School, or Hoſpital, ſhall by way of Truſt, preſent, nominate, or collate unto ſuch Living, Free-School, or Hoſpital, belonging to a *Popiſh* Recuſant Convict, upon the Voidance thereof, without giving notice of ſuch Voidance in Writing to the Vice-Chancellor for the Time being of the Univerſity, to whom the Preſentation, Nomination, or Collation ſhall belong, according to the true Intent of this Act, within three Months after ſuch Voidance, ſuch Truſtee, *&c.* ſhall forfeit to the reſpective Chancellors and Scholars of either Univerſity to whom ſuch Preſentation, *&c.* ſhall belong, the Sum of 500 Pounds.

* Seſs. 1. c. 26.

There are many other Caſes, wherein Notice or Intimation ought to be given to the Parties that may have a Concern therein, as in Faculties for granting Seats in Churches, and the like: But as I have handled thoſe Matters under their proper Titles, I need not repeat them here; only thus much I muſt obſerve in concluding this Title, *viz.* That tho' notice or Intimation may be expedient in ſeveral Matters, yet regularly it is not neceſſary, but in ſuch Caſes where the Law expreſly requires it †.

† Card. in Clem. Q. 31. de appell.

Of an Oath, and the ſeveral Species *of it in Judgment.*

AN Oath, according to *Tully* in the third Book of his Offices, is a Religious Affirmation of the Truth of what we ſay; or, according to *Baldus*, 'tis an Aſſertion or Promiſe confirm'd to us by the Atteſtation of ſomething ſacred; which ſeems to me to be but a *Heathen* Definition of an Oath, tho' *Baldus* pretended to *Chriſtianity*. Wherefore, I ſhall here define an Oath to be an awful Invocation on the Name of God, whereby we deſire that he would be a Witneſs to the Truth of our Aſſeveration or Promiſe; and puniſh us if we declare any thing which is falſe, or promiſe any thing which we do not deſign to perform. And though it may be rightly enough taken by any Chriſtian for the Confirmation of Truth ‖, in reſpect of things lawful and honeſt; yet if it be taken *contra bonos Mores*, it is not only a Sin, but in no wiſe Obligatory, according to the *Canon* Law *. The *Romans* were heretofore wont to ſwear by the *Genius* of the Prince or Emperor, or by *Jupiter Lapis*; but good Chriſtians only ſwear by the Name of the High God †, tho' the *Papiſts* ſwear by their Altars, Saints, and the like. I ſay, by *Jupiter Lapis*, which was the moſt ſacred and holy of all Oaths among the old *Romans*: And hence 'tis, that the Perſon ſwearing did pray ſome Evil might befal him, if he was not juſt and true to what he had ſworn. And this Oath they took in the following conceiv'd Form of Words, *viz. Si ſciens fallo, ità me* Dieſpiter (*ſalvâ urbe arceq;*) *bonis ejiciat, ut ego nunc hunc Lapidem*; and then (according to *Livy*, *Cicero*, and other *Roman* Writers) he immediately threw away the Stone with all his Force. Among the *Greeks*, the ſolemn way of ſwearing was by their Acceſs to the Altars, as we read in *Virgil* ‖.

‖ Deut. c. 6. v. 10. Heb. c. 6. v. 16. Rom. c. 1. v. 9.

* vi. de reg. Jur. 58.

† Exod. c. 23. Judg. c. 11. Mat. c. 5.

‖ Æn. 12. v. 201.

Tango aras, medioſq; ignes et numina teſtor.

Nor did the Ancients only ſwear by the Gods they worſhip'd, but even by Men whom they principally lov'd; as *Brutus* in *Livy* ſwears by the chaſte Blood of *Lucretia*; and *Caius Caligula*, by the Name of *Druſilla*, whom he lov'd and admired in the higheſt degree after her Death. And the Emperor *Claudius* thought no Oath could be more Holy than to ſwear by *Auguſtus*; and even in *Auguſtus* his Life-time, the *Romans* were wont to ſwear by his Name and Divinity. And hence 'tis, that the Lawyers often mention an Oath taken by the Name and *Genius* of the Prince or Emperor, the Breach of which Oath was ſeverely puniſh'd among the *Romans*. But God has forbidden us Chriſtians, as he formerly did the *Jews*, to ſwear by the Names and Titles of falſe Gods, ſince no Veneration ought to be paid them by any Means: And we are even forbid to uſe the Name of the true God on a falſe and trivial Account. The ſacred Canons forbid us to ſwear *per Capillum Dei*, or by the Head and Members of God, as being the ſuperſtitious Fictions of Blaſphemy and Idolatry: And yet the *Papal* Law allows of theſe Oaths, and the *Romaniſts* frequently ſwear by them. For according to *Aquinas* and the *Canoniſts* †, we may lawfully ſwear not only by the Members of God (as he ſtiles them) but even by the Creatures too without Sin, ſince we do (ſays he) thereby acknowledge the Majeſty of the Creator: And upon this Account the *Papiſts* allow Men to ſwear by the Virgin *Mary*, and the Croſs of Chriſt, without Sin; ſince he who ſwears by the Croſs (ſay they) ſwears alſo by God himſelf, who ſuffer'd Death upon the Croſs for the Redemption of Mankind. But to this wicked Sophiſtry of theirs, our Divines are able to give a ſufficient Anſwer, it being not my Buſineſs in this Work to take their Office upon me.

† 22. Q. 1. S. 9 & 10.

But yet, after what manner is a Chriſtian permitted to ſwear, ſince Chriſt himſelf ſeemingly prohibits it? Saying, *Swear not at all* *, &c. *but let your Converſation be yea, yea; and nay, nay* †. But theſe Words, we are well aſſur'd from other Texts of Scripture already quoted, do not forbid all manner of ſwearing, but only an evil Habit and Cuſtom of ſwearing without a lawful Occaſion and Neceſſity for ſo doing ‖. A juſt and lawful Oath has no Tendency to deſtroy our eternal Salvation; and, therefore, 'tis not contrary to God's Command to take ſuch an Oath: but when we take ſuch an Oath as cannot be kept without Hazard of our future Salvation, we ought not to take it. But I am running into the *Caſuiſt*, inſtead of acting the part of a Lawyer. Wherefore I ſhall next conſider, how an Oath is divided, and what are the *Species* thereof; and then proceed to ſhew what are the ſeveral kinds of Oaths that are uſually taken in our Courts, according to the Practice of the *Civil* and *Canon* Law.

* Mat. c. 5. v. 34.
† Ibid. v. 37.
‖ 22. Q. 1. 2. X. 2. 24. 26.

As an Oath is commonly made uſe of for four Ends and Purpoſes, *viz. Firſt*, For confirming the Faith of any one's Promiſe: *2dly*, For producing an Obligation: *3dly*, For the Confirmation of Contracts: and *4thly*, For the Deciſion of Law-Suits, by way of ſupply, or in defect of full Proof. So there are four *Species* of an Oath, the firſt ſtiled *Promiſſorium fidelitatis*, the ſecond term'd *Introductorium Obligationis*, the third ſaid to be *Confirmatorium contractus*, and the fourth is *Deciſorium litis*; and this laſt is that which is reckon'd among inartificial Proofs, as I ſhall obſerve hereafter under the Title of Proof *, tho' the Lawyers, or ſome of them (at leaſt) doubt, whether this very Oath may be ſaid to be a proper *Species* of Proof or any Evidence at all. And thus an Oath is made uſe of either in reſpect of a Cauſe that is controverted, or in reſpect of a Cauſe not controverted. In reſpect of the firſt, 'tis uſed either for the ſake of laying a greater Obligation of Religion on Mens Minds only, as the Oath of *Calumny*, the Oath of *Malice*, the Oath of

* Vid. Pag. 443.

of *Teſtimony*, and the Oath of *Purgation*; or elſe on the ſcore of deciding a Cauſe, as the *voluntary*, *neceſſary* and *judicial* Oath is, and likewiſe the Oath *in Litem* *. See *Donellus*'s Treatiſe of an Oath. The Oath of *Calumny* is an Oath of Credulity, which the Litigants take touching the Conſciouſneſs and Goodneſs which they ſuppoſe their Cauſe to have: And tho' it was heretofore taken in every part of the judicial Proceeding; yet 'tis now only taken at the Beginning of a Cauſe or Suit, as I have already remark'd under that Title ‖.

* Dd. & Gloſs. in Rubr. D. 12. 2.

‖ Vid. Pag. 157.

But I ſhall here chiefly ſpeak of the *neceſſary* or *ſuppletory* Oath, which is ſo called to diſtinguiſh it from the *voluntary* and *judicial* Oath, of which hereafter. And as 'tis given in ſupply of other Proof or Evidence, 'tis alſo ſtiled the *ſuppletory* Oath. As when the Plaintiff or Defendant has made an half Proof †, for then the Judge may, at the Petition of the Party, give this Oath to the Perſon that has made this half Proof; and the further Proof or Evidence being thus ſupply'd by his Oath, it is ſufficient either for a Condemnation or an Abſolution. And 'tis therefore called the *neceſſary* Oath, becauſe 'tis given out of neceſſity at the Inſtance of the Party, tho' the adverſe Party ſhould oppoſe the ſame ‖, and it may be given even after a concluſion in the Cauſe, provided it be mov'd for before that Time. But the Judge may *ex officio*, even without any motion of the Party, by virtue of a ſaving Clauſe in the Libel imploring his Office, give this *ſuppletory* Oath, even after a concluſion of the Cauſe; and this he may do on the ſcore of adminiſtring Law and Juſtice, as has been practis'd in the *Imperial* Chamber, in a Cauſe of great Importance †. But if the Plaintiff proves nothing, an Oath ought not be adminiſtred to the Defendant contrary to his Will and Inclination; for if the Plaintiff be entirely wanting in his Proof, the Defendant ought to be acquitted, tho' he himſelf proves nothing of his *defenſive* Plea: But if there be a Preſumption in the Plaintiff's favour, an Oath may be given to the Defendant to toll and deſtroy ſuch Preſumption, and to ſhew his own Innocence. And this is true, unleſs the Judge thinks fit, on due Conſideration of the Circumſtances of the Perſons, and the Cauſe itſelf, to adminiſter an Oath. In giving the *ſuppletory* Oath, the adverſe Party ought to be cited or admoniſh'd to appear; and thus this Oath ought to be adminiſtred in the Preſence of the Party appearing, or (at leaſt) cited to be preſent *. And this Oath may alſo be demanded to be given in a Cauſe of Appeal, in defect, and for want of fuller Proof †. But the Judge ought not *ex officio* to give it in ſupply of fuller Proof to a Perſon making but half Proof, without the motion of the Party himſelf, becauſe (according to ſome) it ought only to be given to the Party on his Petition, who ought to pray the ſame before the miniſtration thereof.

† Dd. in l. 3. C. 4. 1.

‖ C. 2. 59. 2. 7.

† Gail. Obſ. 108. N. 6.

* Jaſ. in l. 9. D. 1. 16.

† Cornel. Conſ. 27.

'Tis the common Opinion of the Doctors, that the Party cannot after a concluſion in the Cauſe move the Judge to give him the *neceſſary* or *ſuppletory* Oath *in eventum probationis*, if he has not fully prov'd his Intention, this Oath being a *Species* of Proof: For a concluſion of the Cauſe being made on each ſide, a Renunciation of all further Proof is made, and the Mouths of the Parties are thereby cloſed ‖; wherefore there is no room for a Petition after ſuch Concluſion. For after the Publication of Depoſitions, the Party, or (at leaſt) his Proctor, which is the ſame thing, ought to know, whether he has fully prov'd his Intention or not, or whether the Defendant has prov'd his *defenſive* Plea; and if either Party doubts thereof, he ought to demand the *neceſſary* Oath to be given him (by imploring the Judge's Office) before ſuch a Concluſion in the Cauſe; and if he neglects to do it, he is *in Morâ*, and muſt blame himſelf. Before this Oath be adminiſtred, the Judge ought to enquire into

‖ Gail. obſ. 108. n. 2.

into the Legality of the Perſon to whom 'tis to be given, and the Importance of the Suit or Cauſe wherein 'tis given ought to concur with ſuch Legaliry *; and that Quality, which ſets a Witneſs aſide from giving his Evidence or Teſtimony concerning the Fact of another Man, does alſo ſet aſide the Party from being admitted to take the *ſuppletory* Oath touching his own Fact †.

* Socin. Conſ. 155. N. 5. vol. 2.

† Socin. ut ſup. N. 9.

Six Things are copulatively requir'd, to the end that the *ſuppletory* Oath ſhould be given; and if either of them is wanting, 'tis not to be adminiſtred, *viz.* *Firſt*, The matter in Queſtion muſt be half prov'd by one unexceptionable Witneſs. *2dly*, The Perſon to whom it is given, ought to have a probable Knowledge of the Truth of the Fact, by ſome corporeal Senſe ||; becauſe herein this Oath is equivalent to a Witneſs: And, therefore, it is not given to an Executor; becauſe 'tis not likely he ſhould know the Truth of the Caſe or Fact. *3dly*, He to whom 'tis given, ought to be an honeſt Man and of a good Fame for his Integrity; for it ought not to be given to a Perſon of a contrary Life and Character, or to any one ſuſpected of Perjury. *4thly*, The Cauſe ought not to be of any great Importance, but of a light Concern *: For in a Criminal Cauſe, generally ſpeaking, or a Cauſe of an arduous Nature, 'tis not adminiſtred †; yet in a Criminal Cauſe *civilly* commenc'd, *viz.* *ad privatum Intereſſe*, it may be given. *5thly*, The half Proof thus made, ought not to be obſcured or defeated by contrary Proofs in any Part thereof; becauſe then this Oath ſhall not be given. And, laſtly, 'tis required, that this Oath ſhould be pray'd and mov'd for (as already remembred) before a concluſion of the Cauſe, unleſs it be given in virtue of the Judge's Office. If the Judge does not give this Oath on the concurrence of theſe ſix Requiſites, he makes the Suit his own; and the Party praying the ſame, may proteſt *de appellando*, *&c.*

|| Gloſs. in l. 7. D. 13. 4.

* Dd. in l. 31. D. 12. 2.

† Gloſs in l. 3. D. 12. 2.

The *voluntary* Oath is that which is given by a Party to a Party *extra-judicially* for the deciſion of a Cauſe *: And, therefore, in other Terms, 'tis ſometimes in *Latin* ſtiled *Juramentum Deciſorium*; but this Oath may be refus'd, tho' the other cannot. And when one of the *Litigants* gives this Oath to the other, he is ſaid to put a great Confidence in his Adverſary, becauſe by this means he makes him a Judge and a Witneſs too in his own Cauſe. The *judicial* Oath is that which is given in Judgment by one Party to the other †, and which heretofore could not be refus'd as the *voluntary* might in an *extra-judicial* matter: But now a *judicial* Oath may be refus'd ||, if it ſhall not be receiv'd and taken according to the common Opinion. And thus the Reader has the three *Species* of an Oath uſually ſtiled *Juramentum Veritatis*, *viz.* the *neceſſary*, *voluntary*, and *judicial* Oath.

* D. 12. 2. 17. & 28. 10.

† D. 12. 2. 25 & 26. 2.

|| C. 2. 59. 1. 7.

Of Oblations, Obits, Obventions, and the like.

UNDER the general Name of *Oblations* we may reckon all ſuch Things, whether moveable or immoveable, as accrue to the Church by any Right or Title whatſoever *: But in a particular Senſe of the Word that is only called an *Oblation*, which is made by the Prieſt and People at the Altar, at the Celebration of the Euchariſt or Maſs, as the *Papiſts*

* Lindw. lib. 1. Tit. 3. cap. 1. v. *oblationum.*

Papiſts ſtile it; and ſuch a kind of Oblation is due, according to the *Canon* Law, on all the chief feſtival Days of the Year. So that there is a Difference between Oblations made at the Altar, and elſewhere: For *Hoſtienſis* ſays *, that a Perſon may be compell'd to make Altar-Oblations on ſuch Feſtivals, it being, as it were, a general Cuſtom in all Countries for the People ſo to do; but other Oblations were free Gifts and Offerings made to the Church without any Compulſion at all. 'Tis probable St. *Paul*'s Example might encourage the primitive Chriſtians to offer theſe Gifts to the Church, when the Miniſtry was not provided for by a ſettled Maintenance, and the poor Saints that embraced Chriſtianity were left expos'd to the inhuman Treatment of the Heathen People: For he appointed every one of his *Corinthians* and *Galatians* || to yield ſomething to God for the Saints every Lord's Day. But this being thought too often, therefore *Tertullian* tells us, that it was afterwards done every Month, and then *ad Libitum*; but it was always the Cuſtom for the Communicants to offer ſomething at receiving the Sacrament, as well for holy Uſes, as for the Relief of the Poor, which Cuſtom is, or ought to be obſerv'd at this Day.

* In. c. 69. con. Diſt. 1.

|| Cap. 6. v. 6.

In the elder Ages of the Church, People were ſo free and liberal in reſpect of *Oblations*, that there were Perſons who would build Churches on their own Land to have a Share in them, as is affirm'd in one of the *Spaniſh* Councils of *Bracara* †, and there forbidden with great Severity. It was not, as the Gloſs on the *Canon* Law || underſtands it, to make a Bargain for the Right of Patronage, but it is expreſs'd to have an equal Share in the *Oblations* of the People with the Clergy. And *Agobardus* obſerves *, *That the Devotion of Perſons in the firſt Ages was ſo great, that there was no need to make Laws or Canons for the Supplies of Churches, ſince they were ſo amply provided for by the Liberality of the People.* *Tertullian* in his Apologeticks †, ſpeaking of theſe *Depoſita Pietatis*, ſays, That they were voluntary *Oblations*, and were receiv'd in lieu of Tithes; for the Chriſtians, at that time, liv'd chiefly in Cities, and gave out of their common Stock, both to maintain the Church, and thoſe that ſerv'd at the Altar: But tho' theſe *Oblations* were at firſt voluntary, yet they afterwards, by a continual Payment became due by Cuſtom. Theſe Allowances were then ſtiled *Stipes & Oblationes*, which were ſo conſiderable, that St. *Cyprian* blamed ſome of the Clergy for ſetting their Hearts too much upon them; *Stipes, Oblationes, Lucra deſiderant, quibus prius inſatiabiles incubabant*, ſays he ||; which could not be ſaid of any meer neceſſary Subſiſtence. But when Chriſtianity came to ſpread itſelf into the Countries, and the Emperors became Chriſtian, a more fix'd and ſettled Maintenance became neceſſary; but ſtill the Clergy retain'd ſomewhat of the ancient Cuſtom in *voluntary Oblations*. Thus we read, That as ſoon as Chriſtianity was ſettled in *France*, Lands were given to the Church by *Clodoveus* after his Converſion, as appears by the firſt Council of *Orleans* called in his Time *: And *theſe Lands were put into the Biſhop's hands, to diſtribute the Revenues ariſing from thence for the Repairs of Churches, Maintenance of the Clergy, and other pious Uſes* †. And beſides theſe, we ſtill read of *Oblations* made by the People on the Altar both in the *Mother Church* and in *Parochial* Churches. If in the *Mother Church*, then one Moiety went to the Biſhop, and the other to the Clergy; if in *Parochical* Churches, then only the third Part to the Biſhop.

† Conc. 3. c. 6.

|| In c. 10. Con. 1.

* De Diſpenſ. c. 20.

† Cap. 39.

|| Epiſt. 64.

* A. D. 511.

† Can. 5. 14 & 15.

In the ſecond Council of *Maſcon* ||, *all the People are required to make an Oblation of Bread and Wine at the Altar* *; and the Payment of Tithes is immediately enjoin'd as founded on *the Law of God*, and the

|| A. D. 585.

* Can. 4.

ancient Cuſtom of the Church, which is thereby reinforced *. In the Council of *Nantz* †, Oblations and Tithes are mention'd together, as making up the Church's Stock, which was to be divided into four Parts, *viz.* to the Biſhop, and to the Clergy, and to Repairs, and to the Poor ||. There were many other occaſional Oblations in thoſe Days upon particular Services, according to the Superſtition of the Times, and the Power the Prieſthood had over the Minds of the Laity. For an Explication of which matter, we ought to conſider, that there was one kind of Oblation which was made to the Church out of the Lands and Goods of Perſons devoted to the Clergy by way of Donation *inter vivos*; and another kind of Oblation, which was made after the manner of a Donation *mortis Cauſâ*. A Donation *mortis Cauſâ*, by the *Civil Law* *, is when ſomething is given *for fear of Death on thoughts of ſome preſent or future Danger*; as when the Giver is ſick or going into the Wars, or when there is a Peſtilence in the Neighbourhood, *&c.* And both theſe kinds of Donations were gratuitous in the beginning, and no one could be then compell'd to make them to the Church, tho' Men were often inveigled thereunto by the Subtlety of the Prieſts: But in reſpect of the other Donations, every one was oblig'd to make them under the pain of an Excommunication, after the Clergy had got the power of ſending Men to the Devil for not ſatisfying their Demands. But I muſt obſerve, that ſuch Oblations as are made on Sundays and Holidays, and other daily Oblations made in the Pariſh Church, are, by the *Canon* Law, due to the Miniſter or Curate of ſuch Church, whoſe Duty it is to pray for the Sins of the People †, and they are never due to Foreigners performing Maſs or Divine Service, tho' they ſhould come to their hands; becauſe the Perſons, that offer them, are not their Pariſhioners: But the Law ſays this is otherwiſe, if there be a Cuſtom to the contrary. And 'tis alſo otherwiſe if the Biſhop celebrates Divine Service in Perſon in any Pariſh Church of his Dioceſs; for he ſhall then receive the Oblations there made into his Hands, and not the Curate or Miniſter of the ſaid Church, it being the Biſhop's Pariſh ||. Wherefore the Law enjoins the Biſhop not to prejudice the Curate herein, by doing this Office oftener in one Pariſh than in another; for if he does, he ſhall not have theſe Oblations *. Again, 'tis to be known, that a Perſon may be oblig'd to make theſe Oblations in the *Romiſh* Church on a fourfold Account. *Firſt*, By virtue of ſome previous Agreement; as when the Occupier of an Eſtate in Land or of a Houſe, offers ſomething certain at ſome ſtated Seaſons of the Year: And ſuch an Offering has the Eſſence of a *Cenſus* or Penſion. *2dly*, On the ſcore of ſome previous Promiſe or Deputation; as when a Man gives any moveable Eſtate to the Church by way of Donation, as aforeſaid: For as long as his Will continues in force, he ought to make good his Promiſe. *3dly*, On the Account of the Church's Neceſſity, *viz.* when the Miniſter has not otherwiſe a ſufficient Maintenance. And, laſtly, on the ſcore of ſome Cuſtom, in virtue whereof, Men are bound to make ſome Cuſtomary Oblations on Holidays; and the Biſhop may compel the Pariſhioners to obſerve this Cuſtom, tho' the Curate cannot do it †.

But here in *England*, ſince the 25th of *Henry* VIII. which aboliſhes this part of the *Canon* Law, in reſpect of Altar-Oblations to the Prieſt, all Oblations there made, are converted into Alms of Charity towards the Maintenance of poor Pariſhioners, which ought to be diſtributed according to the Diſcretion of the Miniſter and Church-wardens: But yet there are ſome occaſional Offerings ſtill remaining, as at Marriages, Churching of Women, *&c.* And theſe are due rather by Cuſtom preſcrib'd, than

* Can. 5.
† A. D. 658.
|| Can. 10.
* D. 39. 6. 2 & 3.
† 10. Q. 1. 13 & 15. 16 Q. 1. 21.
|| X. 5. 17. 1.
* Arg. X. 3. 30. 9.
† X. 5. 3. 42. Raym. in c. 19. X. 3. 30.

than by any written Law; as the Oblation of Fowls at *Chriſtmas*, and the Firſt-Fruits of Corn payable in ſome Places on St. *Martin*'s Day are. The Offerings likewiſe at *Eaſter* are due by Cuſtom; for they are not *voluntary* Oblations, but are paid as a Compoſition for perſonal Tithes due at that time, and not for *Sacramentals*, as ſome have imagin'd: For if ſuch Offerings are not perſonal Tithes, then none are paid in *England*; for who pays any thing out of the Profits which ariſe by manual Occupations, Merchandize, *&c.* beſides theſe cuſtomary Offerings at *Eaſter?* Theſe are confirm'd by the Statute * to ſuch Perſons, and to be paid in ſuch Places where the ſame have been uſually paid for forty Years before the making of that Act, but Day-Labourers are excus'd. That Act likewiſe enjoins, that the Payment ſhall be made in the Place where the Party dwells at ſuch four Offering-days as heretofore, *viz.* at *Chriſtmas*, *Eaſter*, *Whitſontide*, and on the Feaſt Day of that Saint to whom the Pariſh Church was dedicated; and if no ſuch Dedication, then it was to be at *Eaſter*. Thus the Profits of the Churches in *London*, and in other great Cities, were originally Oblations and Obventions, which for many Years have been call'd Tithes: But very falſly ſo ſtiled. For they could not be called *Predial*, unleſs the Houſes grew out of the Ground: nor could they be ſtiled mix'd Tithes; for tho' ſomething might ariſe by the Induſtry of Men, yet it was not out of the Earth. So that it muſt be a perſonal Tithe or nothing; and, therefore, thoſe cuſtomary Offerings at Marriages, Churching of Women, *&c.* which were paid before the Statute, ought to be paid ſtill, and are recoverable in the Spiritual Court.

* 2 Edw. 6. c. 13.

An *Obit* was, at firſt, an Office perform'd at Funerals, when the Corpſe was in the Church, and before it was bury'd; but by Superſtition it afterwards came to be an *Anniverſary*, and then Money or Lands were given towards the Maintenance of the Prieſt, who ſhould perform this Office every Year.

Of the Office of the Judge.

THE Word *Office* in the *Civil* Law, from whence we borrow the Term, has divers Acceptations. For, *Firſt*, It ſignifies *private Duties*, and Things of Conveniency to be regarded and practis'd in the common Courſe and Society of Life between one Man and another. And, *2dly*, It denotes ſome *publick Function:* And in this latter Senſe we find it taken two ways. *Firſt*, for a *miniſterial* Function to ſome or other having Juriſdiction: And *2dly*, for the Power and Authority of ſuch Court itſelf. Now there are three *miniſterial* Functions in the *Civil* Law term'd by the Name of an *Office*. The *Firſt* relates to ſuch Perſons as were publickly appointed to preſent Crimes to the Magiſtrates †. The *Second* denotes to us an Apparitor, as appears in theſe Words, *viz. Officio, quod tuis meritis obſecundat, non curialem quenquam, nec ex cæteris volumus aggregari, &c.* ‖. And the *Third* points out to us an *Actuary*, that entred the Acts of Court, as may be ſeen from the Words of the Laws here quoted *: In both which Laws, by the Word *Officium*, we

† C. 9. 2. 7.

‖ C. 12. 56. 1.

* C. 12. 50. 11. C. 1. 34. 1.

we underſtand an *Actuary*. But when the Word *Officium* imports the Authority and Juriſdiction of the Judge, it is that Power whereby he may of himſelf, without the Inſtance or Petition of either of the *Litigants*, proceed in judicial Matters: And this Office is exercis'd either in civil or criminal Actions. In civil Actions, the Judge does ſometimes *of Office* decree a Thing which he finds to be equitable, beſides the Action or Plea; and beſides the Bond or Obligation whereon the Action ariſes *: And ſometimes alſo he does, in a point of Equity, by virtue of his *Office*, relieve ſuch as ſtrict Law gives no Remedy or Action to. *Calliſtratus* reduces all Civil Cauſes, wherein a Judge has *extraordinary* Cognizance, to theſe two general Heads, *viz.* Either when he exerciſes this Cognizance in relation to ſuch as bear civil Offices and Employments, or elſe when he exerciſes the ſame in reſpect to *Pecuniary* Cauſes. But in Criminal Cauſes, he exerciſes this Authority of *Office*, either when he ſits to take Cognizance whether a Man's Honour or Reputation ought to be attainted; or when he makes Inquiſition touching a capital Crime whereby a Man's Life, Liberty, or Country may be endamag'd; and this kind of Office *Ovid* mentions in theſe Words †, *viz.*

* D. 19. 2. 56. D. 19. 1. 51.

† Lib. 1. de Triſt.

Judicis officium eſt, ut res ita tempora rerum
Quærere ———.

The *Office* of the Judge is of a very large extent, and is divided firſt into what the *Civilians* call the *noble Office* of the Judge, and the *mercenary Office* of the Judge: The firſt is that which is concern'd and mix'd with criminal Pleadings; and the ſecond is that which is only ſerviceable to civil Actions. The diſtinct Parts or *Species* of the Judge's *Office* are, *viz.* *Cognizance*, *Determination* and *Execution*: But of theſe I have treated under their proper Titles, in ſpeaking of a Judge, his Power, Duty, *&c.* ||. and of Sentences, and the Execution of Sentences *. The *noble Office* of the Judge is chiefly concern'd in *extra-judicial* Matters; and the *mercenary* Office of the Judge is employ'd in decreeing Citations, in admitting or rejecting Libels, in hearing Anſwers thereunto, in granting Terms-Probatory, and the like. The *noble Office* of the Judge ſubſiſts of itſelf, being mix'd with Imperial Authority, and which the Judge executes of his own Accord, as in Criminal Caſes: And this is not ſerviceable to any civil Action, as the other is; but is executed by the Judge in virtue of that Authority which the Law gives him, tho' no Action be propounded or commenced. And this is ſometimes exercis'd *ex mero facto Judicis*, as when the Judge interpoſes his Authority for the Advantage of the Publick alone, at his own proper Motion, without any one's Requeſt or Petition to him for ſo doing; and this is by *Civilians* called *Officium Nobile*, *&c.* As in all Inquiſitions and the Puniſhing of Evil-doers, where there is no particular Accuſer promoting the Judge's Office; for the Judge may of himſelf enquire after Offences committed, it being the Intereſt of the Commonwealth that Crimes ſhould be puniſh'd. But ſometimes the Judge's *noble Office* is exercis'd at the Inſtance and Petition of a Party: As when a Judge imparts his Office to ſome Perſon imploring the ſame in a private Manner or Affair, and to ſuch as has no ordinary Action or Remedy at Law; for then the Judge may interpoſe his Office *principally* in the Place of an Action; and thus it is, when a Perſon ſues or demands Reſtitution *in integrum*. Alſo, if a Son be aggriev'd by an unkind and cruel Father, who denies his Son what is due to him by the Law of Nature; for ſuch a Perſon having no Right of Action againſt his Father, he has his Remedy by the *noble* Office of the Judge, and may rightly have recourſe thereunto. The *mercenary Office* of the Judge is that,

|| Vid. Pag. 309, *&c.*

* Vid. Pag. 207, *&c.*

that, which does not ſubſiſt of it ſelf, but is a Servant to ſome civil Action (as aforeſaid): And it is in *Latin* term'd *Officium mercenarium* by a baſer Appellation (in compariſon of the former) from the Word *Merces*, a Reward or Hire; becauſe the *Office* of the Judge, being here (as it were) hired and employ'd to the Advantage of a private Man, is at another's Beck to ſerve his Turn *.

What the *Civilians* term the *Noble Office* of the Judge, the *Canon* Law calls the *meer* Office of the Judge; and what they ſtile the *mercenary Office*, the *Canon* Law calls the *promoted* Office: which, among the *Canoniſts*, is of two kinds. The firſt is, when a Man voluntarily offers himſelf to proſecute an Offence or Suit; who is then call'd a *voluntary* Promoter of the Office: And herein he differs but little from a Party. The ſecond is, when the Court aſſigns one to ſollicit the Office of the Judge, who is then term'd a *neceſſary* Promoter thereof; becauſe he may not refuſe this Employment: For when no Proſecutor ſtirs in the Matter, then the Court does it in Duty to the Publick, for the Puniſhment of Sin, and other Diſorders in the State. For in Temporal Courts of other Realms, length of Cuſtom has eſtabliſh'd the very ſame Courſe of Proceeding in criminal Cauſes †, even at the Inſtance of a Party with that which may be done when the Office of the Court alone proceeds; yet the Law itſelf has given greater Privileges to Proceedings of *meer* Office, than to the other, which may be ſome reaſon why it was call'd the *noble* Office of the Judge. The firſt Privilege is, that whereas by Law, now alter'd by Cuſtom, an *Accuſer* or *Party* (properly ſo call'd) was in danger of the Puniſhment of *Retaliation*, if he fail'd in his Proofs, on a Preſumption of *Calumny*: But no ſuch Preſumption or Intendment of Law lies againſt a Judge executing the publick Laws by virtue of his *Office*, as it does againſt a *Party* *; and, therefore, he isn ot ſubject to that Penalty as a Proſecutor was. The next Privilege the Law gives to Proceedings of *meer* Office in *criminal* Cauſes, which it denies to a Proſecutor, tho' he be not an *Accuſer* or *Party* properly ſo call'd, is, that the Judge proceeding by virtue of his *meer* Office, may give the Defendant an Oath to anſwer ſome criminal Matter †: But 'tis otherwiſe when the Suit is at the Inſtance of a Party which promotes the Office; becauſe the Defendant ought not to be forced to furniſh his Adverſary's Intention with Proof. But this Oath, *ex Officio*, is aboliſh'd by Act of Parliament with us here in *England*. *Thirdly*, When the Suit is at the Inſtance of a *Party*, contrary Proofs are admitted to prove the Defendant's good Fame and Reputation: But this need not be granted on a proceeding *ex Officio mero*; becauſe no Preſumption or Intendment of Law lies againſt the Judge's Sincerity ‖, as againſt a *voluntary* Promoter. *Fourthly*, On the Inſtance of a *voluntary* Promoter of the *Office*, Conteſtation of Suit or Iſſue is join'd in the Cauſe between the Parties *: But if a *neceſſary* Promoter of the *meer Office* of the Judge be aſſign'd by the Court to manage and carry on the Cauſe, a Conteſtation of Suit (properly ſo call'd) is not neceſſary, but only a kind of Contradiction (in lieu thereof) required, betwixt the *Fame* or *Denunciation*, *&c.* on the one ſide, and the Defendant's *negative* Anſwer on the other. *Laſtly*, When the Proceeding is of *meer Office*, more Witneſſes may be admitted, even after a Publication of Depoſitions †; becauſe the fear of Subornation ceaſes in this Caſe: But now Witneſſes may not be receiv'd after ſuch Publication, when the Cauſe is proſecuted by a *voluntary* Promoter, for fear of ſuborning them in ſuch Points, where he finds the Depoſitions of former Witneſſes come too ſhort of his Purpoſe.

* Cravet. conſ. 238. N. 7.

† Alph. lib. 3. c. 11.

* Arg. in c. 4. X. 1. 38.

† Abb. in c. 24. X. 5. 1.

‖ Arg. X. 2. 26. 13. X. 1. 38. 4.

* Hoſt. in c. 53. X. 2. 20.

† Arg. X. 2. 20. 53.

It has been already noted, that the Jndge's Office is ſometimes put in the Place of an Action *, and hence I infer the Judge's Office and an Action to be two different Things in Propriety of Speech †. For an Action accrues to the Party, and is a right of proſecuting in Judgment that which is due to him: But the Judge's Office accrues only to the Judge, though he may ſometimes lend it to the Party upon humble requeſt; and though it be not the ſame as an Action, yet herein it has the ſimilitude thereof. Where the Office of the Judge is *principally* had, and the Cauſe is commenc'd with it, Conteſtation of Suit is there neceſſarily required, as juſt now hinted; but not where the Judge's Office is *incidently* made uſe of: And the Judge's Office may be *incidently* implor'd both before and after Conteſtation of Suit. When the Judge's Office is implor'd, a Concluſion in the Libel is not always required; for the Judge does, by virtue of his Office, in all Criminal Cauſes conclude therein: But in Civil Cauſes, the Judge cannot, *ex officio*, ſupply the defect of any Libel, Exception, Action, Anſwer, and the like; for theſe Things are the Buſineſs of the Parties *Litigant*, and not of the Judge, whoſe Office conſiſts in taking Cognizance of theſe Matters, in pronouncing Sentence in purſuance thereof; and in demanding the ſame to Execution. And the reaſon of this Cognizance, is, that all parts of a judicial Proceſs may be preſerv'd according to Order, that Right may be done to each Party without reſtraint, that their Allegations may be heard according to Equity, and without any Affection or Partiality to either ſide. But the Office of the Judge is extended *ad Acceſſoria* ‖, *viz.* to ſuch Things as happen accidentally, and concern the Matter in Controverſy (pending the Suit or *judicial* Proceſs) tho' theſe Matters are not demanded or ſet forth in the Libel: But then theſe Things muſt happen after Conteſtation of Suit or Iſſue join'd, as our common Lawyers call it, elſe 'tis otherwiſe. And thus far of the Office of the Judge.

* Abb. in c. 2. X. 1. 32. N. 2.

‖ Abb. in c. 2. X. 1. 32.

Of Orders and Ordination in the Church.

THE Apoſtles having appointed certain Perſons to be the ſtanding Governors and Teachers of the Chriſtian Church, it was therefore thought neceſſary that there ſhould be a Power lodg'd ſomewhere, to ſet apart ſome diſtinct Orders of Men for the Exerciſe of thoſe publick Offices: And this Act of appointing or ſetting them apart for the Miniſtry of holy Things, is called Ordination. All Perſons hold it neceſſary, that there ſhould be ſuch a Power; but Perſons are not well agreed with whom this Power is intruſted. The *Presbyterians*, who diſſent from Epiſcopacy, affirm, That a Man ought not to take upon him the Miniſtry, without a lawful Call: And they likewiſe agree, That Ordination ought to be continu'd for the Peace and Preſervation of thoſe Churches, which the Apoſtles had planted, defining it to be a ſolemn ſetting apart ſome Perſon in the Church. But they ſay, 'tis not only to be done by Impoſition of Hands and Prayer, but with Faſting by *preaching Presbyters*; and that thoſe, who are not ſet apart themſelves for the Work of the Miniſtry, have no Power to join in ſetting apart others for that Purpoſe: And this Form of Ordination was propos'd to the Parliament in the Year

Year 1643, by an Aſſembly of thoſe Perſons, in order to be ratify'd. There are another ſort of People diſſenting from Epiſcopacy, who are ſtiled *Independants:* And they hold, That where there are no ſuch *preaching Presbyters*, other Perſons ſufficiently qualify'd and approv'd for their Gifts and Graces by other Miniſters, being choſen by the People, and ſet a-part for the Miniſtry by Prayer and Faſting in the Congregation, may exerciſe that Office; ſo that ſome place the Power of Ordination in ſimple Presbyters, and others in the People.

There are many other ſtrange and modern Notions about Ordination, and ſending out Miniſters to preach the Goſpel; but I ſhall not here enter into a detail of them, but rather content myſelf to follow the Practice of the ancient and primitive Church of Chriſt, ſince there is nothing ſinful or contrary to the Holy Scriptures in Epiſcopal Ordination, as (I think) all good Men ought to do for the ſake of Peace and Unity in the Church, and in compliance to the preſent Eſtabliſhment of Biſhops by the Civil Power: And, therefore, I ſhall proceed to conſider Ordination in the manner that it has been deliver'd down to us by our Forefathers. And here I ſhall take a view of Holy Orders as a ſacred Sign or Seal (as it were) of ſome Grant, whereby a ſpiritual Power is given to the Perſon ordain'd to exerciſe ſome ſacred Office or Miniſtry in the Church: And this (I think) is almoſt unconteſtably acknowledg'd to belong both to Prieſts and Deacons from the very Beginning of Chriſtianity itſelf; tho' ſome Perſons have deny'd Biſhops to be a diſtinct Order from Presbyters or Elders in the Church. But as the Chriſtian Church imitated the Jewiſh Synagogue in ſeveral reſpects which were not Sinful and Superſtitious; ſo it is eaſy to believe that the Church follow'd the Diſcipline obſerv'd among the *Jews* in nothing more, than in that of their Miniſters. The Synagogues were compos'd of a Ruler of the Synagogue, whom the Helleniſtical *Jews* called *Archi-Synagogus*, and likewiſe of Prieſts or Elders, and of Levites or Deacons: And this is thought to be the Reaſon why the Apoſtles eſtabliſh'd in Chriſtian Aſſemblies thoſe three Orders of Miniſters under the Names of Biſhops, Prieſts, and Deacons. The Biſhop, in theſe Aſſemblies, had the ſame Honour as the Ruler of the *Jews* had in their Synagogues. The Superiority of the Rulers of the Synagogue, in reſpect of the Prieſts or Elders, conſiſted only in ſome Titles of Honour, as being the Chief amongſt their Brethren: And, therefore, they are all comprehended under the Name of Prieſts or Elders, in the 107th *Pſalm*, where we have theſe Words: *Let them alſo exalt him in the Congregation of the People, and praiſe him in the Aſſembly of the Elders*, which was the Place of their Meetings. So we find in the *New Teſtament*, that the Names of Prieſt and Biſhop are indifferently taken the one for the other, and that Aſſembly or Council of the Elders, which was called the *Presbytery*, conſiſted of the Biſhop, and the Prieſts or Elders. The Biſhop or Preſident, as the ancient Fathers call him, had indeed the chief Direction or Superintendency, from whence he was in *Greek* call'd Ἐπισκοπος; and this Word is found in the *Greek* Septuagint: But he made up but one Body with the Elders or Prieſts, who in Quality of Judges had their Juriſdiction jointly. And hereunto St. *Peter* alludes in the 5th Chapter of his firſt Epiſtle, which is undoubtedly a genuine Epiſtle, ſaying, *The Elders which are among you I exhort, who am alſo an* Elder, or (as the *Greek* has it) a Fellow Presbyter * or Elder with you. And then he goes on, *Feed the Flock of God which is among you, taking the overſight thereof* †; where he joins himſelf as an Elder with the reſt of the Elders in this *Overſight* or *Superintendency*; tho' by his Prerogative of exhorting them, he appears to be a Perſon of ſomewhat

* Συμπρεσβυτερος.

† Ἐπισκοπουντες.

what more Honour and Authority in the Aſſembly or Church than the reſt of the Elders. And from hence I infer, that in the Beginning of the Church, the management of Affairs, and the Juriſdiction, which is now called Epiſcopal, did not depend on the chief Elder or Biſhop alone, no more than the diſtribution of the Offerings; but on the whole Senate or Aſſembly of the Prieſts. And this continu'd as long as there was but one Church in every City, one Altar, and one Conſiſtory of Prieſts join'd to their Chief Prieſt, afterwards call'd a Biſhop. But when it was neceſſary to increaſe the number of Churches, there was cauſe to fear, leſt thoſe who govern'd the new Churches, ſhould aſcribe to themſelves the Quality of Biſhops, finding themſelves of a particular Church: Whereupon the chief Elders began to take to themſelves Epiſcopal Authority over them, for which it was neceſſary to appoint, that there ſhould be one Biſhop in every City, on whom the Elders or Prieſts ſhould depend for their Ordinations, and other Affairs in the new erected Churches, which were called *Titles*. St. *Jerom* ſtrongly maintains this Opinion in his Comment on St. *Paul*'s Epiſtle to *Titus*, where he affirms, that before this Diviſion, each Church was govern'd by the common Council of the Prieſts: But for avoiding all occaſion of Schiſm, one of theſe Prieſts or Elders was choſen to be the Chief, and to take upon him the Care and Government of the whole Church. He pretends that the Names of Prieſt and Biſhop did not at all differ in the Beginning, and that St. *Paul* therefore made uſe of them indifferently: And then he ſubjoins, that 'tis only Cuſtom which has made Biſhops greater than Prieſts. *Epiſcopi noverint ſe magis conſuetudine, quam diſpoſitionis Dominicæ veritate, presbyteris eſſe Majores* *. And this may be confirm'd by the Authority of St. *Paul*, who, writing to the Churches under the Name of Elders, comprehends both Biſhop and Prieſts. But to return to the Buſineſs of Orders and Ordination.

* Hieron com. in Epiſt. ad Tit.

The exterior Act of Ordination, is in *Latin* ſtiled *Signaculum*, and the interior Act hereof is called a *Power* given thereby; and the Execution of this Power is term'd an *Office*. The Orders in the *Romiſh* Church, according to the Opinion of moſt of their Divines, are ſeven in Number, *viz.* That of the *Door-keeper*, the *Exorciſt*, the *Reader*, the *Acolythiſt*, the *Sub-deacon*, the *Deacon*, and the *Presbyter*; their Divines do not reckon the *Pſalmodiſt* and the *Tonſura* to be an Order, but only a preparatory Diſpoſition to other Orders: Nor is *Epiſcopacy* itſelf an Order with them, but only a Dignity in the Church. The *Canoniſts* make nine Orders in the Church, reckoning the *Pſalmodiſt* and the *Tonſura* into the Number; but ſtill they exclude Epiſcopacy as ſtrictly call'd an Order †. For (ſay they) the word *Order* is uſed in ſeveral Senſes, *viz.* ſometimes for a *Dignity*, and then Epiſcopacy is an Order with them; ſometimes it denotes the Name of an Office, and then the *Pſalmodiſt* is an Order in their Books; and ſometimes it points out a ſpiritual Power among them, and then that of a Deacon, *&c.* is called an Order: And in this laſt Acceptation it is underſtood, when an Order is call'd a Sacrament in that Church. So that, according to this laſt Senſe of the Word, that of a *Pſalmodiſt* is no Order, but only a certain kind of Office annex'd to that of a *Reader* or *Lecturer*: For as a *Lecturer* by Reading excites the Underſtanding of the People, ſo does the *Pſalmodiſt* by Singing ſtir up the Devotion of their Minds. But *Joh. de Ananias* maintains nine Orders in the *Romiſh* Church, among which he reckons that of a Biſhop and of the *Pſalmodiſt* to be two. But Orders, ſtrictly taken, even in that Church, are only three in Number, *viz.* that of a Sub-deacon, Deacon, and Presbyter ‖; tho' ſome Perſons of nice Diſtinctions, will reckon

† 21 Diſt. 1.

‖ 32 Diſt. 11.

reckon that of a Biſhop among them: But, in a large Senſe of the Word, allOrders, even the loweſt in the Church, are ſtiled ſacred Orders. And hence it was in the Times of *Popery* among us here in *England*, according to the Common Law of the *Romiſh* Church, that if a Perſon was ordain'd by a Biſhop, that was not his Dioceſan, whether it were in reſpect of the greater or leſſer Orders, he did incur the Puniſhment of the Provincial Conſtitution, *viz.* a Suſpenſion of the Orders thus taken, till ſuch time as he obtain'd the Favour of a Diſpenſation ‖; which was all that Conſtitution pointed at. But now this Law is alter'd, and the Biſhop ſhall be puniſh'd by his Superior, who ordains a Perſon not belonging to his Dioceſs without Letters *Dimiſſory*. And the Diſtinction of the higher and lower Orders in the Church is alſo loſt by the Reformation of Religion, as not grounded on any Scriptural or Apoſtolical Authority.

‖ vi. 1. 9. 1.

Holy Orders ought not to be given to any Perſon without a Title, that is to ſay, without a Benefice *, or having a Patrimonial Eſtate to live on: And heretofore, if an Ordination was otherwiſe made, it was ſaid to be void. But becauſe Biſhops thought this to be no Puniſhment, a Proviſion was made thereupon againſt ſuch an Ordination, which may be ſeen in the *Decretals*, under the Title of *Prebends* †. Nor ought the Perſon, that is to be ordain'd, to make any Promiſe or Engagement to the Perſon that ordains him, or preſents him to ſuch Ordination, in order to indemnify him againſt the Force of the Canon; for if any ſuch Promiſe or Engagement be formally made, it is a *Species* of Simony on both ſides, according to the Papal Law *; and (I think) by the Law of our Church ‡. But a Biſhop may ordain any one with Impunity on the Title of a Patrimonial Eſtate alone ‖, and ſhall not be oblig'd to maintain or provide for ſuch Perſon, tho' he ſhould be moleſted hereunto, as in the other Caſe he is. But if a Clerk ordain'd, ſhall aver himſelf to have a Patrimonal Eſtate ſufficient for his Support and Maintenance, when in reality he has none, or (at leaſt) but an inſufficient one, he ſhall, *ipſo Jure*, according to the *Canon* Law, be interdicted the Execution of his Orders, becauſe he has herein deceiv'd his Biſhop; and herein (I think) the ancient *Canon* Law ſtands uncorrected: But if the Perſon adminiſtring ſuch Ordination ſhall be in fault, then the modern Laws ſhall obtain their due Force, *viz.* That the Biſhop ordaining ſuch Perſon, ſhall be bound to maintain him.

* 70 Diſt. cap. 2.

† X. 3. 5. 2. 4. & 16.

* X. 5. 3. 45.

‡ 31 Eliz. c. 6.

‖ X. 3. 5. 4. Gloſs. in hoc verb.

As he is ſaid by the *Civil* Law to be guilty of a Fault, who commits any Cure, Order, or Office to an unqualify'd Perſon: So, according to the *Canoniſts* *, if a Biſhop, knowingly, ordains any unworthy Perſon, in the *Romiſh* Church, he is ſaid to be guilty of a mortal Sin; and ſo heinous a Crime is this in a Biſhop, by that Law, that he who commits the Miniſtry of the Goſpel to an unworthy Perſon, in detriment to the Church, and to the diſhonour of God, who is ſaid to be glorify'd by good Miniſters, ſhall be look'd upon and deem'd as an Infidel. And he who thus thruſts himſelf into Orders, and forces himſelf (as it were) upon the Church, the *Canon* Law rather accounts an Hireling than a Paſtor. For a Perſon legally ordain'd, ought to live as it becomes a good Steward to do, and not only to diſpenſe the Sacraments, but even the Goods of the Church with Frugality, and likewiſe to conſerve the ſame with Prudence; ſo a Perſon unworthily ordain'd (ſays that Law) does hereby become a Robber, and from a Paſtor, is turn'd into a rapacious Wolf, contrary to all Law and Equity: And as ſuch a Perſon abuſes the Name of a Paſtor, ſo he ought to go without the Fruits and Profits of his Calling. And, further, 'tis of dangerous Conſequence to ſuch as are ſubject to his Cure, and to whom he ought to adminiſter the Sacraments; for he ſeveral

* Guid. in c. 43. 1 Q. 1.

ways infects their Morals by his bad Example, and blinds their Understanding thro' his want of Knowledge: And, therefore, if the Blind leads the Blind, they both of them fall into the Ditch *.

* Matt. cap. 12.

Wherefore, such Persons, as desire to be promoted to Holy Orders, ought, before their Ordination, to subject themselves to an Examination (*of common Right*) to be made by the Archdeacon ‖, who, after he has examin'd and approv'd of their Sufficiency in point of Learning, ought to present them to the Bishop for his Ordination: But with us, this is commonly done by the Bishop's Chaplains. And this Examination made by the Archdeacon or Bishop, is not only an enquiry into the Learning, but also into the Life, Morals, Faith, and Education, of the Person that desires Orders †. And the Person who confers Orders, ought to be the proper Bishop or Diocesan of the Person to be ordain'd, or (at least) the Person to receive Orders, ought to come with the Leave of his own Diocesan for so doing ‖; which Licence we sometimes stile *Letters Dimissory*, and sometimes *Letters Commendatory* †, or Letters of Recommendation in plain *English*. But Persons inferior to Bishops Officials cannot grant these *Dimissory* Letters, unless the Bishop shall, by special Commission, have given this Power to his Vicar-General; or unless such Bishop be at a great distance from his Dioceſs, in which Case his Vicar-General, in Spirituals, may grant these Letters *Dimissory*; as the Chapter of a Cathedral Church may likewise do, *sede Vacante:* or, lastly, when the Bishop is taken Prisoner by the Enemy; for then the Chapter exercises the same Rights and Powers, as if the Bishop were naturally dead. But, in the *Romish* Church, other Persons besides Bishops may confer the lesser Orders on Men; as *Abbots* and the like, if the Question be touching such Monks as are subject to them. If a Bishop, in conferring Orders, shall so far approve of a Man of insufficient Learning, unlawful Age, or a dishonest and criminous Life, as to ordain him, he shall be suspended from receiving the Profits of his Bishoprick, till such time as he shall merit his Pardon, with us by making a due submission and acknowledgment of his Fault to his Superior; but in the *Romish* Church, by a Purchase of his Pardon from the Pope. Though, regularly speaking, no one ought to be promoted to Holy Orders without due Examination had of his Learning; yet a Person that is well known, and eminent for his Proficiency therein, may be ordain'd without any Examination, as having the Testimony of the whole Parish on his side *.

‖ X. 1. 29.

† X. 1. 12. c. unic.

‖ vi. 1. 9. 2.

† vi. 1. 9. 3. 72. Dist. per tot.

* 24 Dist. 2. X. 2. 28. 45.

No Person can have Deacons and Priests Orders both conferr'd on him in one and the same Day ‖; and the Reason given by the Papal Law, is, because a Bishop cannot say more than one Mass in one and the same Day *: And the Person that acts contrary hereunto, shall be suspended from the Power of Ordaining, tho' he does this by the Leave or Order of the Metropolitan †. And tho' the Person that receives more Orders than one in the same Day shall be suspended, yet he may be dispens'd with on doing Pennance. See the 32d Canon of the Church of *England*. 'Tis moreover to be observ'd, That, by the Laws of the Church, there are certain Times and Seasons of the Year specially appointed for Ordination ‖, and that Persons that ordain out of these Times and Seasons proper for Ordination, ought to be depriv'd of the Power of Ordaining, according to the *Canon* Law *; but this is not regarded with us here in *England:* And again, tho' by the Papal Law, a Person that is ordain'd at an unseasonable Time, receives the Character of his Orders; yet by that Law he does not receive the Execution thereof, but ought to be depos'd for his Contempt of the Laws of the Church †. This Part of the *Canon* Law is also with us grown obsolete and out of use.

‖ X. 1. 11. 13.

* X. 3. 41. 3.

† X. 1. 11. 15.

‖ 63. Dist. 14. 75 & 76. Dist. per tot.

* X. 1. 11. 8.

† X. 1. 11. 16.

There

There are ſeveral Impediments to the Suſception of Orders, according to the *Canon* Law, ſome of which I ſhall here ſet down. As *firſt*, That no Perſon maim'd in his Limbs, or defective in his Members, ſhall be admitted to Holy Orders: But a Perſon may, in ſome Caſes, receive Ordination though he has loſt his *Genitals* *; ſince a Perſon that has caus'd his *Virilia* to be cut off upon a juſt Account, may exerciſe his Sacerdotal Office as before †. But why Caſtration, in the *Romiſh* Church, ſhould be a Hindrance to Orders, I am at a loſs to know, ſince that Church has prohibited Marriage to their Clergy; unleſs that Church would have its Prieſts, by debauching Mens Wives and Daughters, get themſelves into the Secrets of Families, and govern the Maſter thereof. *2dly*, According to the Council of *Toledo* ‖, no Bondman can be admitted to Orders, unleſs he has been firſt manumis'd: nor can any infamous Perſon be admitted thereunto, till ſuch time as he has purg'd his Infamy *. By an infamous Perſon here, I mean ſuch a one as labours under any criminal Accuſation. *3dly*, Bigamy is another Impediment to Orders in the *Romiſh* Church ‖, becauſe a *Bigamiſt* (ſays the *Canon* Law) is preſum'd to be an incontinent Perſon; for that he cannot contain, though he has had one Wife already: For *Bigamy*, in the Senſe of that Law, is a paſſing to a ſecond Marriage, after the Death of a former Wife, by marrying another Woman; and 'tis ſo highly condemn'd in that Church, that 'tis a kind of *Irregularity* in a Clergyman ſo to act. There are many more Impediments unto Orders by the Papal Law; but as they are altogether as ridiculous as theſe abovemention'd, I ſhall forbear to recite them, as being not allow'd of by our Church.

* X. 2. 20. 4.

† X. 1. 20. 5.

‖ X. 1. 18. 1.

* X. 2. 20. 56.

‖ X. 1. 21. 1.

If a Perſon, that has not been ordain'd, ſhall take upon himſelf the Office of the Miniſtry, he ſhall never be ordain'd, but be thrown out of the Church with Diſgrace †: And a Perſon that has been in remote Parts, ought to prove his Ordination, by the Seal of the Biſhop that ordain'd him ‖.

† X. 5. 28. 2.

‖ X. 2. 29. 1.

It has been ſaid, that it is not lawful for a Biſhop to ordain any one without a *Title*. Now this Canon was made not only to prevent a multitude of Clergy, which renders their Orders, or (at leaſt) their Perſons very contemptible; but likewiſe to hinder Perſons in Orders from becoming Beggars, to the great diſparagement of the Prieſthood: But a Perſon may be promoted to Orders without any certain Title, if he has a ſufficient Patrimony to live on and maintain himſelf; and ſuch a Perſon is ſaid to be ordain'd *in titulum ſui Patrimonii*. Nay, if he has a ſufficient Eſtate to ſubſiſt on, he may be ordain'd though his Eſtate be not expreſly aſſign'd and given *in modum Tituli* *. The Word *Title* is, in our Law-Books, taken ſeveral ways; ſometimes 'tis put for the Motive or Conſideration, on which account Dominion or Property is transferr'd; ſometimes a *Title* is ſtiled by the Name of *Neceſſity*; and ſometimes 'tis called a *Token* or *Sign* of a Thing: Sometimes Eccleſiaſtical Orders, or any Church Dignity or Preheminence are call'd a *Title*; and, laſtly, a Benefice itſelf is ſometimes call'd a *Title*; in which Senſe I uſe it here. The Archdeacon ſays, that a *Canonical Title*, is a ſpiritual Motive or Conſideration, on which Account, a Perſon has a Right or Power given him of diſpenſing Matters relating to the Church: And ſuch a *Title* is only agreeable to a Clergyman. But a *Title to Orders*, and a *Title to an Eccleſiaſtical Preferment*, are different Things: For a *Title* to an Eccleſiaſtical Preferment accrues ſeveral ways, as by Collation, Preſentation, Nomination, Election, and by other ways and means of introducing a *Title* unto an Eccleſiaſtical Benefice, whereby the Perſon claims Inſtitution, Confirmation, *&c.* but a *Title* to Orders, only ariſes from the

* Abb. in c. 23. X. 3. 5. N. 1. 2. 3, *&c.*

the Act of obtaining ſome Eccleſiaſtical Benefice, or having a Grant thereof (at leaſt) whereby he may claim Ordination. There is alſo another *Title*, which we call a *Title to the Profits* ; and this is a ſpiritual Right, accruing to a Man from having Inſtitution given him to ſome Living.

Of a Pariſh, Pariſh-Rights, Perambulation and Bounds of Pariſhes, &c.

A *Pariſh*, in *Latin*, called *Parochia*, is a Place or Diſtrict circumſcribed by certain Bounds and Limits, wherein the People live that do belong to ſome certain Church : and it is ſo call'd from the *Greek* Word παρέχω, importing the ſame as *Præbeo* in the *Latin* ; which ſignifies the doing of ſome Service for the Publick, or rather the giving of ſomething to the Publick, becauſe the Prieſt makes a diſtribution of the Sacraments to every one belonging to ſuch Diſtrict *. But the *Latin* Word *Parochia*, which in *Engliſh* ſignifies a *Pariſh* in the aforeſaid Senſe thereof, is oftentimes, in the Books of the *Canon* Law, put to denote a *Dioceſs* : And hence it is, that every Perſon that dwells within the Dioceſs, is ſaid to be the Biſhop's Pariſhioner †.

* 16 Q. 1. 54.

† Arch. in c. 3. Diſt. v. *Parochia.*

'Tis ſaid, that Pope *Evariſtus*, otherwiſe call'd *Anacletus Græcus*, was, about the Year 110, the firſt that began the Work of diſtinguiſhing Pariſhes, and dividing and alloting the Revenues of the Church to ſeveral Miniſters. But the Infancy of the Church being under Perſecution, this Work of the Diſtinction of Pariſhes ceas'd till the Year 260; and then it was undertaken again by Pope *Dionyſius*, through a favourable Act of *Gallienus* the Emperor, though it was not perfected till *Conſtantine*'s Time. But whatever the *Papiſts* may boaſt of the pretended Goodneſs and Power of ſeveral Popes, the firſt Diviſion of Pariſhes was made by the Conſent of the People, when a certain number of Inhabitants, that had receiv'd the true Chriſtian Faith, built a Temple for the Exerciſe of their Religion, hired a Prieſt, and conſtituted a Church ; which, by the Neighbours, was called a *Pariſh-Church*. And when the number increas'd, if one Church and Prieſt was not ſufficient, ſuch as were moſt remote, built another, and fitted themſelves according to their Conveniency. In proceſs of time, for the ſake of Peace and good Order, this, by Cuſtom, began to have the Biſhop's Conſent: But afterwards, the Court of *Rome*, by Reſervations, aſſum'd the Collation of Benefices, and conferr'd them on ſuch Perſons as receiv'd their Proviſion of them from that Court. But when the Diviſion of great Pariſhes began, and conſequently a Diminution of their Gain was dreaded, the Clergy, by the Pope's Favour, oppos'd themſelves thereunto ; ſo that nothing could be done herein without going to *Rome*. And this gave the riſe to that Fancy, that the Pope was the Founder of Pariſhes.

'Tis very well known to all, who conſult Hiſtory in theſe Matters ; that, in the firſt Settlement of this Church of *England*, the Biſhops of the ſeveral Dioceſſes had the Churches under their own immediate Care ; and had a Clergy living in community with themſelves, whom they ſent abroad to ſeveral Parts of their Dioceſſes, as they ſaw occaſion to employ them :

them: But that by degrees, they ſaw a Neceſſity of fixing Presbyters within ſuch a Compaſs, to attend on the Service of God, among the People that were the Inhabitants; and thus came Pariſhes among us. But theſe Precincts, ſince called *Pariſhes*, were at firſt much larger than at preſent, being caſt into ſuch Diviſions in each Dioceſs, as probably make up the ſeveral *Deaneries* now. In the *New Teſtament*, the Charge is general, *to feed the Flock of God*, and *to do it willingly, not for filthy Lucre, but of a ready mind, and to be examples to the Flock**. I do not mention this Text to reflect on the Avarice, Idleneſs, and Immorality of our Clergy, ſince we have many good Men among them; but to ſhew that St. *Peter*, who gives this Advice, does not determine who belong *to the Flock*; nor within what Bounds it is to be limited: and there were many Flocks in the *Jewiſh* Diſperſion, and many Elders ſcatter'd up and down among them in *Pontus*, *Aſia*, *Galatia*, *Cappadocia*, and *Bithynia*. So that we have here only general and excellent Advice for ſuch who had the Care of the ſeveral Flocks, to carry themſelves towards them with great Humility and Tenderneſs, with Charity and Goodneſs, as it becomes good Shepherds to do: And it were much to be wiſh'd that all Clergymen, for the ſake of a holy and undefiled Religion, would follow this wholeſome Inſtruction of the Apoſtle; that they wou'd content themſelves with the Fleece, and not with Cruelty and Rapine flea the Backs and Bellies of their Sheep, as too many of them in the *Romiſh* Church are apt to do; for (I hope) we have none among us of that greedy Temper. St. *Paul*, in his Charge to thoſe *Prieſts* or *Elders* whom he ſent for to *Miletus*, tells them, That they *muſt take heed to themſelves, and to all the Flock, over which the Holy Ghoſt hath made them Overſeers, to feed the Church of God, which he hath purchas'd with his own Blood* †. 'Tis poſſible here might be a particular Deſignation of the Flock they were to *overſee* by the Direction of the Holy Ghoſt; but yet the Charge is general to take heed to *themſelves* and to the *Flock*, and to promote the Good of the Church of God which he had purchas'd by the Blood of his own Son. We meet with many other Texts of Scripture, whereby the Prieſts are exhorted *to watch for the Souls of their Flocks, as they that muſt give an Account* ‖; but no where with the Bounds and Limits of this Care in reſpect to Place: So that theſe Diviſions of Pariſhes are not founded on Holy Writ. Nor were they ſo ancient as Chriſtianity itſelf, but were afterwards, upon a general embracing of Chriſtianity, eſtabliſh'd to prevent an *Itinerant* Clergy, and an occaſional going from Place to Place as very inconvenient, by reaſon of the conſtant Offices that were to be adminiſtred; and becauſe the People ought to know, unto whom they ſhould reſort for ſpiritual Offices and Aſſiſtance. And hereupon the Bounds of Parochial Cures were found neceſſary to be ſettled in *England*, by ſuch Biſhops who were the great Inſtruments of converting the Nation from *Saxon* Idolatry. But ſuch a Work could not be done all at once, as by a kind of *Agrarian* Law; and, therefore, this was done by ſeveral Steps, in order to eſtabliſh theſe Diviſions as we have them now.

* 1 Pet. Ep. 1. c. 5. v. 2.

† Acts c. 20. v. 28.

‖ Heb. c. 13. v. 17.

In the latter end of the *Saxon* Times, if we may believe thoſe called the *Confeſſors Laws*, after all the *Daniſh* Devaſtations, *there were three or four Churches where there had been but one before*. By which it appears, that the *Parochial Clergy* were numerous before the Conqueſt: And within the Dioceſs of *Worceſter*, in two Deaneries of it, there were to be found in *Doomſday-Book*, above twenty Pariſh Churches; in the Deanery of *Warwick* ten, and in the Deanery of *Kington* fifteen *. *Bede* tells us †, That at firſt the *Saxon* Chriſtians made uſe of any old *Britiſh* Churches they found

* Stillingf. Caſes, pt. 1. Pref. p. 12.

† Lib. 1. cap. 26.

found ſtanding; and thus *Auſtin* at firſt made uſe of St. *Martin's* neat *Canterbury* †; and afterwards repair'd Chriſt-Church, which were both *Britiſh* Churches *. But *Ethelbert* gave all Encouragement both to repair *old Churches*, and build *new*. However the Work went on ſlowly; *Auſtin* conſecrated but two Biſhops, which were ſettled at *London* and *Rocheſter*, where *Ethelbert* built and endow'd two Churches for the Biſhops and their Clergy to live together †. *Wilfred* converted the *South-Saxons*, and ſettled Presbyters in the Iſle of *Wight*, but they were but two ||. In the *Weſtern* Parts, *Birinus* built ſeveral Churches about *Dorcheſter* where his See was fix'd *. In the Kingdom of *Mercia* there were five Dioceſſes made in *Theodore's* Time; and *Putta*, Biſhop of *Rocheſter*, being driven from his See, he obtain'd from *Saxulphus*, a *Mercian* Biſhop, a Church with a ſmall *Glebe*, and there he ended his Days †. In the *Northern* Parts we read of two Churches built by two Noblemen (*Puch* and *Addi*) on their own Mannors ||: And the ſame might be done elſewhere; but *Bede* would never have mention'd theſe, if the Thing had been common. But in his Letter to *Egbert* Archbiſhop of *York*, a little before his Death, he intimates the great want of Presbyters, and Parochial Settlements; and, therefore, earneſtly perſuades him to procure more *. In the Council of *Cloveſhoe*, we read of *Presbyters placed up and down by the Biſhops in the Mannors of the Laity, and in ſeveral Parts diſtinct from the Epiſcopal See* †: All which Accounts plainly ſhew the Antiquity of Pariſhes among us, even before the Conqueſt. In the Laws of *Canutus*, we find a fourfold Diſtinction of Churches, *viz.* *Firſt*, The *Head* or *Mother-Church*, otherwiſe called the Biſhop's See. *2dly*, Churches *ſecundæ Claſſis*, which had a Right of *Sepulture*, *Baptiſm*, and *Tithes*. *3dly*, Churches that had Right of *Sepulture*, but not frequented. And, *4thly*, *Field-Churches*, or *Oratories*, which had no Right of *Burial*. The ſecond ſort ſeem to be the original *Parochial* Churches which had the Endowment of Tithes, and were ſo large, that ſeveral other Churches were taken out of them by the Lords of Mannors; and thus Pariſhes came to be multiply'd in ſuch a manner with us, that in the Laws of *Edward the Confeſſor*, 'tis ſaid *, *That there were then three or four Churches, where there had been but one before.* Some will have it, that this Diviſion of Pariſhes was owing to the Cunning of the Clergy, for the more eaſy collecting of Tithes and other Church-dues: But with them I cannot agree, becauſe 'tis certain, there was this Diviſion ſettled before Tithes were eſtabliſh'd here by any Law. Which leads me next to ſpeak of *Parochial* Rights.

† Bed. lib. 1. c. 33.
* Cap. 33.
† Lib. 2. c. 3.
|| Lib. 4. c. 13. 16.
* Lib. 3. c. 7.
† Lib. 4. c. 12.
|| Lib. 5. c. 4. 5.
* Bed. Ep. ad Egb. p. 64.
† Conc. Angl. vol. 1. p. 248.
* Cap. 9.

Now a *Parochial* Right, according to the *Canon* Law, conſiſts in ſeveral Things ||, *viz.* That the Pariſhioners ought on Sundays and Holidays to hear divine Service, or Maſs (as the *Papiſts* call it) in their own Pariſh Church, and not elſewhere. *2dly*, It conſiſts alſo (according to that Law) in Burials, Pennances, Benedictions, in Offerings of Marriage, and Payment of Tithes †. And thus a *Parochial* Right is the Power of adminiſtring the Sacraments, of celebrating Divine Service, and of diſtributing Holy Offices unto all People deputed and aſſign'd to one and the ſame Church, and alſo a Power of receiving yearly Profits and Oblations belonging to ſuch Church. For a *Parochial* Right conſiſts not only in the Right of Burying, Tithing, and receiving Firſt-Fruits, but alſo in the Right of receiving Oblations, and all other Profits whatſoever, and whereſoever due ||. And, according to the *Canon* Law, a *Parochial* Right is founded either on the Pope's Power; or elſe on ſome Law or Cuſtom; or, laſtly, on the Will of the Biſhop, and the Conſent of the Chapter, the Biſhop's Authority being join'd thereunto: For as they may con-

|| Hoſtienſ. §. in quibus. X. 3. 29.
† X. 3. 29. 2.
|| X. 3. 29. 2.

conſtitute Pariſhes (ſays that Law) by a determination of certain Limits, ſo they may alſo grant *Parochial* Rights unto the Rectors and Vicars of them, tho' thoſe Rights ſeem to be granted even *ipſo Jure*, from this Maxim in Law, *viz. Qui vult Antecedens, velle etiam videtur Conſequens.* Therefore, by erecting of Pariſhes, *Parochial* Rights ſeem to be conſtituted. The Right of Burying, is a *Species* or kind of *Parochial* Right which is granted to the Rectors of Pariſhes.

The Object of a *Parochial* Right, is the Cure of Souls committed to the Pariſh-Prieſt, and the Pariſh-Prieſt is bound to render an Account thereof unto God, if they periſh and are loſt through his Default *; and this Cure of Souls conſiſts in the Celebration of divine Service, in teaching and inſtructing the People of his Pariſh, and in the Adminiſtration of the Sacraments, *&c.* The Form of Eſtabliſhing a Pariſh, according to the Rules of the *Canon* Law, is, that ſome Precinct or Place limited with certain Boundaries, within which the People dwell, ſhould be allotted to ſome certain Church, by the Conſent of the Biſhop, or ſome other ſuperior Prelate; and that there ſhould be a Rector or Parſon to take care of the Souls of the People therein placed, by all wholeſome Inſtruction, Adminiſtration of the Sacraments, and by a due Celebration of divine Service: And no foreign Pariſhioner ought to be admitted to divine Service or Burial in ſuch Pariſh, without the Leave of the Parſon, or Rector of ſuch Pariſh-Church; eſpecially, if ſuch Perſon comes thither to hear divine Service out of contempt of his own Pariſh Prieſt †. And thus a Man is ſaid to be a Pariſhioner in reſpect of his Dwelling or Habitation, and not in reſpect of Lands which he has in ſuch a Pariſh: And hence it is, that if any one transfers his Dwelling or Reſidence, he ſhall be ſaid to be a Pariſhioner of that Church, to which he transfers his Abode ‖; but if a Man ſhall live in divers Places alike, he ſhall be deem'd a Pariſhioner of each Church*. But the Queſtion is touching Scholars, or Non-reſident Clerks, that travel on the ſcore of Learning, unto what Pariſh they belong? And herein the *Canon* Law determines, that if they travel or go to a Place for the ſake of Study, with the Leave of their Rector or Governor, they become Pariſhioners unto that Biſhop, and are ſubject to him unto whoſe Church they reſort †: But by the *Civil* Law, they do not ſeem to be ſubject to ſuch Juriſdiction, unleſs they have been commorant there for ten Years ‖.

* X. 3. 26. 15. X. 1. 23. 1. 16 Q. 1.

† X. 3. 29. 2.

‖ X. 3. 29. 5.

* D. 50. 1. 6.

† X. 3. 4. 4.

‖ C. 10. 39. 2.

Having already obſerv'd, that a *Pariſh* is a Cure of Souls limited as to Perſons and Place within a certain Diſtrict or Precinct, I ſhall next diſcourſe of the juſt Bounds and Limits of ſuch Parochial Cures, which are now certainly known by long Uſage and Cuſtom, and ought ſtill to be preſerv'd with great Care, ſince Duties due to, and from Parochial Churches, are equally expected on both ſides, (for otherwiſe Confuſion and Diſputes will ariſe between ſeveral Miniſters, and ſeveral Pariſhes with each other:) and this is beſt done by annual Perambulations. For *Rebuffus* ſays *; *That to prove a Church to be Parochial, it is firſt of all neceſſary, that it ſhould have a certain Precinct or Boundary eſtabliſh'd within which the People allotted to ſuch a Church do live.* But ſome are againſt bounding of *Miniſterial* Duties by diſtinct Pariſhes, who think themſelves at Liberty to exerciſe their Gifts where-ever they are called; and that it were much better to have theſe Parochial Incloſures thrown open, and all left at Pleaſure to chuſe ſuch Miniſters whom they liked beſt, and under whom they can improve moſt. Theſe Things ſeem to look plauſibly at firſt Appearance, and to come neareſt to the firſt gathering of Churches, before any ſuch thing as Pariſhes were known. But to me, this Arguing looks like Perſons now going about to overthrow

* Rebuff. ad concord. de Collat. Sect. Stat. N. 2.

all

all Dominion and Property in Lands and Eſtates, becauſe it ſeems not ſo agreeable with the firſt natural freedom of Mankind; who, according to the original Right of Nature, might chuſe what ſerv'd moſt to their own Conveniency. But tho' this was the firſt State of Things, yet the great Inconveniencies that follow'd it, on the Increaſe of Mankind, made Diviſion and Property neceſſary; and tho' we have no expreſs Command of God for it, yet being thought ſo neceſſary for the Good of Mankind, it was not only every where continu'd, but thoſe Perſons were thought fit to be puniſh'd by ſevere Laws, who invaded the Rights and Properties of others, either by open Rapine and Violence, or elſe by ſecret Stealth and Purloining. But I ſhall not here determine, whether the Conſtitution of a *Parochial Clergy* is more reaſonable than that of an unſettled Clergy by Law, but I refer the Reader to *Stillingfleet*'s Eccleſiaſtical Caſes.

As to the Cognizance of the Bounds of Pariſhes, we are told in a ſmall Treatiſe, printed by *Tho. Godfrey* in *Henry* the VIIIth's Reign ‖, that it was the Opinion of Men in Times paſt, *&c.* "That the Diviſion and Diſtinction of one Pariſh from another, was a Thing ſo *meerly* Spiritual, "that no Man might do it but the Clergy". And tho' he diſavows this Aſſertion, if the Clergy claim it *by any immediate Power given them by God*; yet (he ſays) that, doubtleſs, in times paſt they held Plea of theſe and of divers other Things, rather by Cuſtom and the Sufferance of Princes, than by any *meer* ſpiritual Right they had, or *that they* of the Clergy *had Authority ſo to do by any immediate Power from the Law of God*. So that he allows the Diviſion and Diſtinction of Pariſhes to have been antiently of Eccleſiaſtical Cognizance, according to the *Canon* Law *; tho' to be deriv'd from the *Royal Prerogative*. And thus it appears by a Provincial Conſtitution † made in a Synod held at *Lambeth*, under *Boniface* the Archbiſhop of *Canterbury* ‖, that the Clergy then, undoubtedly, held Plea touching the Bounds of Pariſhes, and that they *meerly* belong'd to the Cognizance of the Eccleſiaſtical Court. And *Lindwood*, living about 200 Years afterwards, in his Commentaries or Gloſſes thereon, makes no Queſtion of it, but only quotes the *Canon* Law for it. But now the Cognizance touching the Bounds of Pariſhes is not allow'd, by our common Lawyers to belong to the Juriſdiction of the ſpiritual Court: For, at preſent, if a Suit be there commenc'd touching the ſame or any the like Matter, a Prohibition will lie from the Temporal Courts. See *Fiſher* and *Chamberlain*'s Caſe *. But tho' the Bounds of a Pariſh are not now tryable in the *Court Chriſtian*; yet the Bounds of a Vill in the ſame Pariſh are tryable there, and no Prohibition will lie †. In ſome Places, Pariſhes ſeem to interfere with each other, when ſome Place in the middle of another Pariſh, belongs to one that is diſtant; but that has generally happen'd by an Unity of Poſſeſſion, when the Lord of a Mannor was at the Charge of erecting a new Church, and making a diſtinct Pariſh of his own Demeſns; ſome of which lay in the Verge of another Pariſh. But now Care is taken by annual Perambulations to preſerve thoſe Bounds of Pariſhes, which have been long ſettled by Cuſtom: But no Eccleſiaſtical Preſcription is current or good againſt the Bounds and Confines of any Dioceſs, Biſhoprick, Province, Pariſh, *&c.* and Things incident thereunto, which cannot be loſt but by length of Time beyond the Memory of Man ‖, when there is no legal *Conſtat* touching ſuch Bounds and Confines, as aforeſaid. But, according to the *Abbot*, the Bounds of Pariſhes may be prov'd by *enunciative* Words expreſs'd, in a Deed or Inſtrument made to ſome other End and Purpoſe.

‖ An. 26. H. 8.

* X. 3. 29. 4.

† Lindw. lib. 5. Tit. 15. c. 1.

‖ A. D. 1260.

* Mich. 14. Jac. B. R.

† Levin. Rep. pt. 1. p. 78.

‖ Abb. in c. 4. X. 3. 29.

But as the Number of Pariſhes increas'd, and new Churches were erected, the Extent and Value thereof came to be different; tho' the Obligation,

gation, which the Law puts on the Parochial Miniſter, was the ſame; only where the Maintenance was greater, the Pariſh Prieſts might have the more Aſſiſtants: And therefore, from hence came the Difference among the Parochial Clergy; for thoſe whoſe Pariſhes were better endow'd, cou'd maintain inferior Clerks under them, who might be uſeful to them in the publick Service, and aſſiſt them in the Adminiſtration of the Sacraments. And this was the true Original of thoſe we now call *Pariſh Clerks*; but were at firſt intended as Clerks-Aſſiſtant to him that had the Cure; and, therefore, he had the Nomination of them, as appears by the Eccleſiaſtical Law both here and abroad. And *Lindwood* ſays *, that every Vicar was to have enough to ſerve him, and one Clerk or more; and by the *Canon* Law, no Church could be founded, where there was not a Maintenance for *Aſſiſting-Clerks* †. In the Synod of *Worceſter*, under *Walter Cantelupe*, in *Henry* the IIId's Time, they are call'd *Capellani Parochiales*, and the Rectors of Pariſhes were requir'd to have ſuch with them †. And the *Canon* Law allows a Rector to give a *Title* to another, to receive Orders as an Aſſiſtant to him; and this without any Prejudice to the Patron's Right, becauſe only one can have a Legal Title to the Cure. But *Lindwood* obſerves very well, that thoſe who give Titles to others as their Aſſiſtants or Curates, are bound to maintain them if they want: But this (I think) cannot be underſtood of Pariſh-Clerks, but of Parochial Vicars, or Stipendiary Prieſts; of which hereafter. For the ſame Perſon in his Gloſs on the Provincial Conſtitutions tells us ||, That a Pariſh-Clerk is in *Latin* ſtiled *Aquæ-bajulus*; and that his Office, which is Eccleſiaſtical, is called *Aquæ-bajulatus*, from carrying the Holy Water in the *Romiſh* Church: which Office is vile and mean even in that Church; and, therefore, it can have no Analogy with a Parochial Vicar, or Stipendiary Prieſt. And in this reſpect he might be a Layman, who is not in holy Orders, tho' otherwiſe he ought to be a Perſon of competent Learning *: Which is another Reaſon, why this cannot be underſtood of Parochial Vicars or Stipendiary Prieſts. *Lindwood* likewiſe informs us †, That the *Parſon* and *Vicar* have the Nomination and Appointment of the Pariſh Clerk: who being ſo appointed, was to have the Cuſtomary Fees of the Pariſhioners for his Service, or he might ſue for them in the Eccleſiaſtical Court, and compel the Pariſhioners to the Payment hereof, and this was enacted at a Provincial Synod in the 44th Year of King *Edward* III. by a Canon then made ||. But neither this, nor the 91ſt of King *James*'s Canons, can take away a Cuſtom, where the Pariſhioners or Church-wardens have been uſed to the Appointment of a Pariſh Clerk; becauſe that is a Temporal Law, which cannot be alter'd by a Canon, eſpecially where ſuch a Cuſtom is not particularly mention'd in the Canon, and provided againſt thereby. By a Book of Canons in Queen *Elizabeth*'s Reign *, Pariſh-Clerks are in *Latin* term'd *Æditui*; and are to be choſen according to the Pariſh Cuſtom, by the Votes of the Pariſhioners, and the Miniſter of the Pariſh; and their Office then was to laſt no longer than one Year, unleſs they were re-elected; and were once every Year to render a juſt Account of all Moneys coming to their Hands. But now, what was then the Duty of the Pariſh Clerk, in ſome reſpect, is the Office of the Church-wardens. The Provincial Conſtitution calls theſe Clerks Fees, by the Name of *Eleemoſynas conſuetas* †; and (I think) they may be comprehended under the Words *largitiones Charitativæ* ||, for which the Regiſter has a Conſultation, as being of Eccleſiaſtical Cognizance. If the Church-wardens of a Pariſh have uſed, Time out of Mind, *&c.* to chuſe the Pariſh Clerk, and a Suit be commenc'd in the Spiritual Court to remove ſuch Clerk, and to put in one of the

* Joh. de' Ath. in Tit. Ottob. 9.

† X. 3. 38. 30.

† Lindw. lib. Tit. 6. c. 2.

|| Lib. 3. Tit. 7. c. 2. v. *a noſtris Majoribus.*

* 12 Q. 1. 7. X. 1. 14. 11.

† Lib. 3. Tit. 7. c. 2. v. *a noſtris Majoribus.*

|| Lindw. ut ſupr.

* A.D. 1571.

† Lindw. ut ſupr.

|| Reg. fol. 52. b.

Parſon's Choice, a Prohibition will lie; as in *Walpole*'s Caſe *: But there the Prohibition was granted by conſent of Parties to try the Cuſtom. The like Prohibition was granted between *Brown* and *Grawſhaw* for *White-Chapel* Pariſh †; and the like was granted between *Beaumont* and *Weſtley* for the Pariſh of St. *Cuthbert's* in *Wells*.

* 22 Jac. B. R.

† 19 Jac. B. R.

Of Patrons, Right of Patronage, Preſentation, &c.

WE read in the Books of the *Canon* Law *, that in antient Times, the Right of diſpoſing of vacant Benefices depended abſolutely on the Biſhop of the Dioceſs, wherein ſuch Benefices lay; who, after the People had (for the ſake of Peace and Unity among themſelves) transferr'd and given up the Right of electing their own Miniſter to their Dioceſan, might confer ſuch Benefices on whom he pleas'd, without any reſtriction whatſoever; provided the Perſons were duly qualify'd for the Cure of Souls: For 'tis certain, That this Right did not originally belong to the Biſhop, but was the Donation of the People to him, when Heats and Animoſities grew frequent and high among them in their Elections thereunto, after Churches came to be richly endow'd; and when the Clergy contended more for the Profits and Revenues thereof, than for the Cure of Souls themſelves. And thus was the Biſhop for a while univerſal Patron of all the Churches in his Dioceſs; 'till in Proceſs of Time, for the ſake of building and endowing a ſufficient Number of Churches, the Biſhops thought fit to part with ſomewhat of this Right to ſuch Perſons as were willing to found, erect, and endow new Churches on their Eſtates, when they admitted theſe Perſons to a Nomination and Preſentation of their own Clerks thereunto, as they did on the Authority of the 9th Council of *Toledo* †; but ſtill reſerving the Approbation of ſuch Clerks in point of Fitneſs unto themſelves: And this is what we now call a *Right* of *Patronage*. For *Gratian*, who quotes the Canons of the firſt Council of *Orleans*, others ſay the Council of *Rheims*, to prove that all the Churches of every Dioceſs were in the Power of the Biſhop ||, makes in the ſame Place ſeveral Reſtrictions in favour of thoſe that have founded Churches: And, amongſt others, he aſſerts this Right of Nomination to be founded on a Decree * of the aforeſaid Council of *Toledo*. Now this Right of Nomination or Preſentation, which is the chief Advantage of Patronage, was granted long before the eſtabliſhment of the *new* Law, and of Benefices, to ſuch as founded Churches, and maintain'd the Miniſters thereof: for we have it expreſly mention'd in the *Novels* † by *Juſtinian* himſelf; That Biſhops ordain'd for the ſame Churches, ſuch as were recommended to them by their Founders; and the antient Canons of the Church mention the very ſame Thing. And as they are ſtiled Patrons of a Church, who have either founded, built, or endow'd the ſame; ſo there may be ſeveral Patrons of one and the ſame Church, by reaſon of different Benefits accruing from them, and for that the Church is oblig'd to ſeveral Perſons, whether for having built it ||, or for having beſtow'd Ground whereon it is founded *, or for having allotted Lands and Poſſeſſions for the

* 16 Q. 7. 10.

† 16 Q. 7. 32.

|| 16 Q. 7. 32.

* Can. 2.

† Nov. 126. cap. 18.

|| 16 Q. 7. 33.

* 18 Q. 2. 4.

the Maintenance of ſuch Miniſters as ſerve the Cure thereof*. All theſe things (I ſay) acquire to the Benefactors a Right of Nomination or Preſentation, which is term'd a *Right* of *Patronage*: and though it does not clearly appear by the Deed of Foundation, that they have reſerv'd to themſelves that Right; yet ſtill they ſhall have it of *Common Right*, provided they have not renounced the ſame. Therefore,

* 16 Q. 7. 31.

This Right of Patronage is a Power of preſenting ſome fit and proper Perſon to the Biſhop or Ordinary for Inſtitution into a *ſimple* vacant Benefice in the Church †: And if the Perſon preſented be qualify'd for the Cure, the Biſhop or Ordinary cannot refuſe him; but is obliged to give ſuch Preſentee Inſtitution upon a Tender of his Letters of Preſentation; wherefore Biſhops look upon this as a kind of Servitude annex'd to Benefices, which they would now get rid of, if poſſible. Indeed the Right of Patronage may be taken in ſeveral Senſes; as *firſt*, by the *Civil* Law for that Right, which is acquired by the Manumiſſion of any one's Bondman or Servant; and *2dly*, An Advocate is often call'd a *Patron* in the Cauſe he undertakes to plead, and wherein he exhibits his Patronage or Defence ‖: But I ſhall here uſe it in the Senſe abovemention'd, *viz.* *For the Right of preſenting a fit Perſon to the Biſhop for Inſtitution into ſome Eccleſiaſtical Benefice.* And in this Senſe 'tis defin'd to be *Jus Honorificum, oneroſum & utile*, accruing to the Perſon himſelf, and to the Heirs of him who has founded, built, or endow'd a Church by the Biſhop's Conſent †: For though theſe three Things, or either of them, do contribute to make a Man the Patron of a Church, yet he cannot preſent a Clerk thereunto, unleſs ſuch Church be founded and built with the Conſent of the Dioceſan, according to a Form preſcrib'd by the *Canon* Law *. 'Tis in *Latin* call'd *Jus Honorificum*; *firſt*, becauſe the Patron has the Honour of preſenting a Clerk thereunto whenever it becomes void, either by Death, Ceſſion, Reſignation, Deprivation, and the like: For no Biſhop or Prelate can inſtitute a Rector or Parſon thereinto, without the Patron's Preſentation †. *2dly*, 'Tis ſo called, becauſe the Patron ought in Preference to all others to have Honours done him in ſuch *patronag'd* Church, as the beſt Seat therein, and the like *. 'Tis alſo in *Latin* ſaid to be *Jus oneroſum*; becauſe, by the *Canon* Law, the Patron is bound to maintain and defend the Rights of ſuch Church, leſt that the Goods and Eſtate thereof ſhould be unduly waſted and dilapidated ‖. And, laſtly, This Right is term'd *Jus utile*; becauſe the Patron obtains ſeveral Advantages from his Patronage, and this in particular, *viz.* That if he ſhould come to Poverty, the Church is bound to maintain him out of ſuch Revenues of the Church as exceed the Neceſſities thereof, in a much better manner than it is oblig'd to maintain other Poor †. As three Patrons may concur in the Patronage of the ſame Church, *viz.* becauſe one endow'd it, another caus'd it to be built, and a third gave Ground for erecting the ſame thereon; ſo ſeveral Perſons may concur in the Endowment of a Church, *&c.* For if they all contribute towards the Endowment thereof at the ſame Time, they ſhall all of them (according to *Innocentius* *) be deem'd Patrons, though one of them ſhould beſtow leſs on it than another.

† Hoſtienſ. ¶ in §. quid ſit X. 3. 38.

‖ D. 3. 1.

† Joh. Andran. in Rubr. X. 338.

* Con. 1. Diſt. c. 9.

† 16 Q. 7. 32. X. 3. 38. 14.

* X. 3. 38. 25.

‖ 16 Q. 7. 31.

† 16 Q. 7. 30.

* Gloſs. in 63 Diſt. in ſum.

A Patron, at his firſt Founding of a Church or Benefice, may, by the Biſhop's Conſent, not only reſerve to himſelf the Right of Patronage, but even a perpetual Eſtate or Penſion out of the Endowment of ſuch Church, becauſe he may aſſign ſuch Eſtate or Penſion unto another Church, or to himſelf and his Family. And he may likewiſe, by the Biſhop's Conſent, reſerve to himſelf the Fruits and Profits of a vacant Church, which he has founded and endow'd during the Time ſuch

Church

Church remains void; and the ſame ſhall go to himſelf and his Family. But a Patron cannot, at the Time of Founding and Endowing a Church, reſerve to himſelf the Right and Power of giving Inſtitution thereunto; because this is prohibited by the *Canon* Law *: and, it being a Right accruing entirely to the Biſhop, the Patron cannot appropriate it to himſelf: Nor can the Patron plead a Preſcription of ſuch Right of granting Inſtitution; becauſe 'tis an Epiſcopal Right, which cannot be preſcrib'd unto by any inferior Perſons, as endowing Patrons are: For ſuch a Preſcription requires a Title from the Superior; and not only ſo, but a *Bona Fides* too, and the ſpace of Forty Years likewiſe in order to eſtabliſh it. And both theſe Caſes are true, whether the Patron be a Layman or an Eccleſiaſtick †, or whether the Benefice be a *ſimple* Benefice, or a Benefice with Cure of Souls: For as the Inſtitution to a Living does not of *common Right* belong to the Patron, but only the Preſentation thereunto; ſo a Preſcription contrary to the Law, in this Caſe, is not valid. And as he cannot reſerve this Right of giving Inſtitution to himſelf, ſo much leſs can he aſſign it to another, particularly in Prejudice to the Biſhop's Right. And this holds true as well in Lay-Patrons as Spiritual; becauſe a Patron can only preſent a Perſon to the Biſhop for his Inſtitution, and not give Inſtitution to a Benefice by Right of Patronage, as juſt now hinted. And though a Patron can receive no other Advantage or Emolument from this Right of Patronage, but what he has reſerv'd to himſelf, by the Biſhop's Conſent, on firſt Founding the Church ‖; yet ſeveral Honours, Privileges, and Advantages are due to him of *common Right*, as Defence, Preference, Maintenance, and the like, as already related: all which Things accrue to him from the Nature of a *Jus-Patronatus*.

* X. 3. 38. 10.

† X. 3. 38. 15.

‖ X. 3. 38. 4. 16 & 17.

As a Patron cannot in his own Perſon preſent himſelf to a Benefice in his Gift *, ſo neither can he preſent himſelf by a Proctor, or by any other Perſon, to ſuch a Living, unleſs he has the Right of Patronage in common with others, and a Proxy be made by ſeveral Perſons to this end; for then he may do this in common and among the reſt †: For as one Patron may preſent another, ſo may a Proctor thus conſtituted preſent one of the Patrons; and ſuch Preſentation ſhall be valid. Thus, though a Father and a Son be, in ſome meaſure, one and the ſame Perſon, and the Father, as Patron cannot preſent himſelf; yet he may preſent his Son, notwithſtanding, becauſe they are only one and the ſame Perſon by a Fiction of Law. In *England*, though a Patron cannot preſent himſelf to a Living *; yet he may pray the Biſhop or Ordinary to admit him thereunto, and it ſhall be good; tho' ſome have doubted hereof, becauſe there is no Preſentation of a Clerk: But if he preſents himſelf, tho' by a ſtrange Name, he may be put out †. But the common Practice in this Caſe, is, that the Patron ſhould aſſign over the next Preſentation to another in Truſt by reſerving the Right of Nomination to himſelf; and thus the Patron is not at the Biſhop's Beck, whether he will admit him or not, as in the former Caſe.

* X. 3. 38. 15. & 26.

† Gloſs. in c. 15. X. 3. 38.

* 14 H. 8. 3. a.

† 35 H. 6. 59.

If two Perſons ſhall be preſented to one and the ſame Church by different Patrons, and each of thoſe Patrons do pretend to the ſole Right of Patronage, the Cure of the Church ſhall be committed to neither of the Preſentees, *pendente lite* *: But the Right of collating to ſuch Church did, by the Council of *Lateran*, devolve or lapſe to the Biſhop during ſuch Suit, if the Patrons could not agree about the Right of Patronage within ſix Months from the Voidance of the Church, who might collate either of the Preſentees, or a third Perſon ‖, provided that neither of the Patrons were prejudiced in their Right of Patronage or Preſentation by the Biſhop collating thereunto, in caſe one of them did, in the Suit

* Lindw. lib. 3. Tit. 21. c. 1.

‖ X. 3. 8. 2.

or

or Controverſy between them recover or evince a Right of Patronage *. But now by a Provincial Conſtitution 'tis ordain'd, That the Biſhop ſhall confer ſuch Church on neither of the Clerks at that Time preſented, unleſs it be by the Conſent of both Patrons, leſt he ſhould injure one of the Patrons claimant on a future Recovery of the Right of the Patronage †. And the uſual way at preſent, is for the Biſhop in ſuch a Caſe to award a Proceſs, and ſummon each Patron before him, in order to enquire into the Right of Patronage before he grants Inſtitution, leſt otherwiſe he ſhould be made a Diſturber thereby: And this is called an *Inquiſition* touching the Right of Patronage. By the Cuſtom of *England*, a Cauſe touching the Right of Patronage, is heard and try'd in the King's Courts, according to the Common Law, tho' by the Canon Law ‖, the ſame belongs to the Cognizance of the Eccleſiaſtical Court; and upon an Eviction or Recovery of the Right of Patronage againſt any one in the King's Court, the King ought to write to the Biſhop, or him to whom Inſtitution belongs, commanding him to admit the Perſon preſented by ſuch Patron as has got the better in the Suit, if ſuch Benefice be ſtill vacant, whether it be *de Jure*, or *de Facto* ſo, leſt an Injury be done to the Patron *; and the Preſentee ought to be freely admitted without making any enquiry touching the Right of Patronage, becauſe the King does, by his Writ or Letters, aſſure the Biſhop, that the Patron has obtain'd this Right in his Court †. But if a Benefice of this kind be not vacant, the Biſhop or Ordinary ought, in order to excuſe himſelf from any Contempt, to certify to the King or his Judges, before whom the Patron obtain'd his Suit, either in his own Perſon, or elſe by a Special Meſſenger, or Letters Miſſive, that ſuch Benefice is not void; and, therefore, he cannot comply with or yield Obedience to the Royal Mandate. But the Patron may preſent again, if he pleaſes, the Perſon now in Poſſeſſion and inſtituted by the Biſhop's Authority, tho' the Perſon was thus inſtituted or collated by the Biſhop thereunto, by a Right of Devolution accruing to him ‖; ſo that, by ſuch Preſentation of the Patron recovering his Right of Patronage, the Patron's Right of Patronage may be declar'd to belong to him for the future. See *Lindwood* hereupon *.

* X. 3. 38. 12 & 27.

† Lindw. lib. 3. Tit. 21. c. 1.

‖ X. 2. 1. 3.

* Lindw. ut ſup. cap. 2.

† Dd. in c. 9. X. 2. 22.

‖ X. 3. 38. 12.

* Lib. 3. Tit. 21. c. 2.

A Diſpute ſometimes happens not about the Right of Patronage, but about the Perſon to be preſented; and then he ought to be preferr'd who has the Voices of the greater number of Patrons †, where there are ſeveral Patrons, provided he be a qualify'd Perſon; and if this may be done without Scandal and Offence to them: and this is true, where there are more Patrons than two. But if there are only two Patrons contending not about the Right of Patronage, but about the Perſon to be preſented, and one of them preſents one Perſon, and the other preſents another, the Biſhop may, in ſuch a Caſe, gratify which of them he pleaſes, or himſelf, according to *Joh. de Ananias* ‖; but *Anchoranus* oppoſes this Doctrine, becauſe tho' there be room for Gratification when one Patron preſents ſeveral Clerks; yet this ought not to be (ſays he) when two Clerks are preſented by two Patrons, becauſe where one Patron preſents two, the Will of the Perſon, who is ſole Patron, concurs in both; but where there are two Clerks preſented by two Patrons, neither of the Preſentees has the Preſentation *in ſolidum*, but only in part, *viz.* the Voice or Suffrage of one of the Patrons, which is not ſufficient according to him. And hence it is, that even in this Caſe, if they do not agree within the Time limited for a Preſentation, the Biſhop ſhall collate according to the Form of the *Canon* Law *.

† X. 3. 38. 3.

‖ In c. 24. X. 3. 38.

* X. 3. 38. 2.

If there be two Perſons preſented by one and the ſame Patron, and the Patron preſenting be a Clergyman, who cannot vary or change his Pre-

ſentation, the firſt Preſentee ſhall be Preferr'd, if qualify'd : But if the Perſon thus preſenting be a Layman, who may vary his Preſentation, the Biſhop may then, by way of Gratification to himſelf, admit which of them he pleaſes *. For 'tis a found Concluſion of Law among the *Canoniſts*; That a Lay Patron, though he has preſented one, may (notwithſtanding) preſent another afterwards, and thus vary his Preſentation †. And the Reaſon given for this, is, becauſe that no Title and Property, which are the Effect of a Preſentation, is conferr'd by a Lay Preſentation, if the Biſhop does not thereupon give an Admiſſion. And, therefore, before the Conſummation of the Effect, there is room for Repentance ‖. But it had been otherwiſe, if the Patron's Will and Election had drawn its Effect along with it, becauſe a Variation would not then be admitted and allow'd of. An Example hereof appears in a Biſhop collating to a Benefice. Moreover, 'tis to be obſerv'd, that a Lay Patron may preſent ſeveral Perſons to a Benefice ſucceſſively, and the firſt ſhall not be remov'd by the Preſentation of the ſecond, but the ſecond is an Accumulation to the firſt. Hence 'tis, that if he can preſent ſeveral Perſons ſucceſſively, he may *à fortiori*, do this in the Beginning, to the end that the Biſhop may chuſe one of the ſeveral Preſentees *.

* X. 3. 38. 24.

† Dd. in c. 24. X. 3. 38.

‖ Arg. D. 2. 1. 18. & D. 24. 3. 22. 5.

* Joh. de An. in c. 24. X. 3. 38.

There are ſeveral Diſtinctions and Differences in the *Canon* Law between Eccleſiaſtical and Lay Patrons, many of which are little or in no wiſe regarded with us here in *England*. For firſt, as I have already obſerv'd, the ſpace of ſix Months is allow'd to an Eccleſiaſtical Patron to preſent in to a Benefice : But a Lay Patron, according to that Law, has only four Months Time given him †. And the Reaſon, why Eccleſiaſticks have a longer time indulg'd them to preſent in than Laicks have, ſeems to be founded on this Bottom, *viz.* Becauſe as ſoon as Eccleſiaſticks have made a Preſentation, 'tis in no wiſe proper and convenient for them to vary their Choice of the Perſon preſented, as being preſum'd to underſtand his Merits and Qualifications: But 'tis decreed otherwiſe in reſpect of Laicks, who are not preſum'd to know the Learning and Proficiency of their Preſentee, but to leave that Matter to the Biſhop; and tho' they may not vary by a foregoing of the firſt Preſentee, yet they may preſent another by way of Accumulation, that the Biſhop may have his Choice. 2*dly*, A Legate *de latere*, may collate to a Benefice, where the Papal Power domineers, in Prejudice to an Eccleſiaſtical Patron *, which he cannot do in Prejudice to a Lay Patron. And 3*dly*, The Temporalties, during the Vacancy of the Church, ought to be given to an Eccleſiaſtical Patron : But 'tis otherwiſe in reſpect of a Lay Patron; unleſs he has reſerv'd the ſame to himſelf at the Time of Founding, Building, and Endowing the Church.

† X. 3. 38. 22 & 27.

* X. 1. 30. 6.

The Right of Patronage is in the Books of the *Canon* Law called an *Eccleſiaſtical* Right, becauſe 'tis annex'd (ſay the *Canoniſts*) to a Thing Sacred or Spiritual ‖, as thoſe Things are deem'd to be *Religious*, which belong to *Religious* Places : But yet this is not an Eccleſiaſtical Right in its own Nature *. And hence 'tis, that it may accrue unto Laymen, who are otherwiſe forbidden to meddle with Things ſacred or ſpiritual. And as ſomething ſpiritual is annex'd hereunto; ſo Epiſcopal Inſtitution is neceſſary to compleat the ſame. For no one may receive a Church, or the ſpiritual Government thereof from a Layman, according to the *Canon* Law; no, not even from the Patron who has built and founded the Church at his own Charge †. And as a Spiritualty is annex'd hereunto, it happens, That by the Papal Law, the Right of Patronage cannot be ſold thro' the imminent danger of Simony; and likewiſe, for that Things ſacred do not in their own Nature admit of any valuable Conſideration ‖; for Bargain and Sale is eſtabliſh'd by an equality

‖ Arch. in c. 26. 16 Q. 7.

* Lindw. lib. 2. Tit. 6. c. 1. v. *pœnam.*

† X. 3. 38. 10. 15 & 23.

‖ X. 3. 38. 16.

equality of Price, according to the Value and Eſtimation of the Thing bought and ſold. Nor ought the Perſon, who confers or preſents to a Church *Jure proprio*, retain any of the Profits ariſing from thence unto himſelf in conſideration of ſuch Preſentation, becauſe this would be a kind of Simony: For the Profits of a vacant Church ought to be apply'd either to the Advantage of the Church, or elſe reſerv'd for the next Succeſſor thereunto; unleſs there be a Cuſtom or Privilege to the contrary †. † vi. 16. 9.

This Right of Patronage, in a Layman, however crude and undigeſted it may ſit on the Biſhop's Stomach, is founded upon Equity itſelf: For ſince the Patron has either built the Church from the Foundation, or endow'd the ſame which was not endow'd before, or repair'd the ſame on its falling into Decay; it is but reaſonable, That he ſhould have this Right of Patronage or Preſenting a Clerk, as it were, by way of Remuneration; and that Inſtitution ſhould be granted to his Clerk on his Preſentation of him, without any Lett or Hindrance, provided he preſents a fit Perſon. And in reſpect of this Fitneſs or Qualification of a Perſon to be promoted to a Benefice with Cure of Souls (among other Things) we ought to conſider firſt the Age of the Perſon to be thus promoted, who ought to be twenty four Years of Age compleat, or twenty five *anno currente**. 2*dly*, He ought to be well recommended for his Knowledge, Learning and Morals. And 3*dly*, He ought to be ſuch a one, as either is or may be promoted to Prieſts Orders within a Year †. And 4*thly*, By the Papal Law, he ought to be in ſome Clerical Orders at the Time of his Preſentation ‖. But a Perſon to be admitted to a Vicaridge, ought to be a Deacon (at leaſt) at his Admiſſion; ſo that he may be promoted to Prieſts Orders at the next Ordination. With us here in *England*, the Perſon ought to be in Orders at the Time of tendring his Letters of Preſentation to the Biſhop *. Now a *Preſentation*, in Propriety of Speech, is the Act of the Patron, when, by Letters Miſſive, he offers his Clerk to the Biſhop for Inſtitution into ſome Benefice, which is in his Gift as Patron, and the Form thereof we have in *Lindwood* ‖, as well as in the *Original Regiſter*. The *Preſentee* is the Clerk, that is thus preſented by the Patron. In a Statute of *Richard* II. mention is made of the King's *Preſentee*, *viz.* the Perſon whom the King preſents to a Church. And a Perſon, that has the Right of preſenting, may make his Preſentation by Letters to the Biſhop, tho' the Perſon preſented is bound to exhibit himſelf *perſonally* before him †: And the Patron may preſent ſeveral Perſons to the Biſhop, though he can only give Inſtitution to one, as he ſhall think qualify'd. When a Preſentation belongs to many Perſons, as being Individuals, 'tis not neceſſary that all ſhould agree to the Act of Preſentation, but they may preſent *ſeparately* ‖: But a Preſentation, which belongs to a College, or an aggregate Corporation, cannot be made by the Head of ſuch College or Corporation alone, without the Conſent of the greater part of the College, Chapter, or Common Council *. The Perſon preſenting, and the Perſon preſented, may by the Common, as well as the *Canon* Law †, have an Action to remove him, whom the Biſhop has inſtituted in contempt of the Patron's Preſentation.

* X. 1. 6. 7. 3.

† vi. 1. 6. 14.

‖ X. 3. 7. 2.

* Lindw. lib. 3. Tit. 21. c. 3. v. *Clericum ſuum.*

‖ Lindw. ut ſupr. Fol. 322.

† Abb. in c. 1. Cl. 5. 6. N. 14.

‖ Abb. Conſ. 76. N. 1. fol. 103.

* X. 3. 10. 6.

† Abb. in c. 1. Cl. 5. 6.

In the Practice of admitting a Preſentation, it is enough to ſay, That we receive ſuch Preſentation, or in *Latin* thus, *Talem præſentatum recipimus* ‖. Tho' this Right of Preſentation belongs to the Patron in virtue of his Right of Patronage *, eſpecially when Admiſſion and Inſtitution belongs to another Perſon; yet ſuch Preſentation is, by the *Canon* Law, ſaid to be a ſpiritual kind of Right, ſince the Power and Authority of preſenting in reſpect of the Thing itſelf, to which the Preſentation is made, is in ſome meaſure Spiritual, tho' ſtrictly and properly ſpeaking,

‖ X. 1. 30. 6.

* X. 3. 38. 31. X. 2. 27. 18.

ing, neither the Right of Patronage, nor a Preſentation is a ſpiritual Thing: But as this Power and Authority is not the principal Thing, but only a Preparatory Act to the Principal, which is Inſtitution or Inveſtiture, and is extrinſically added to the Principal, as being previous thereunto, it may in this manner be ſaid to be annex'd to a ſpiritual Thing. A Preſentation gives a Man *Jus ad rem*; but 'tis the Inſtitution of the Biſhop or Ordinary, that gives him *Jus in re*: And thus the Grant of the Biſhop or Ordinary induces what we call *pinguius Jus* *. A Preſentation made to any other than to a vacant Church, is not valid; nor ſhall the Preſentee have any Benefit from thence †; but a Perſon preſented to a vacant Church by the Patron, acquires a Right to ſuch Church, tho' the Patron may afterwards vary in his Preſentation; and the Perſon preſented ought to ſue for Diſpatch of Inſtitution with all Humility, leſt that another Perſon ſhould in the mean while be preſented by that or ſome other Patron, pretending a Right thereunto; for ſince a Lay Patron may vary his Preſentation, all Delays are dangerous.

* X. 1. 30. 6.

† X. 3. 8. 2 & 5.

By a Provincial Conſtitution in *Lindwood* ‖, every Dean of a Cathedral or Collegiate Church, and all other Deans, to whom it does by Cuſtom, Privilege, or otherwiſe, belong to grant Inſtitution to Eccleſiaſtical Benefices, are forbidden to make any enquiry touching the Buſineſs of any Preſentation to ſuch Benefice, unleſs it be in a full Chapter on a Legal Citation of him to whom the Poſſeſſion of the Church belongs, till ſuch time as he may, by prudent Advice, juſtify himſelf herein; and by a ſufficient Remedy provide for his own Defence: And whatever future Attempt ſhall be made againſt this Canon, ſhall be deem'd invalid. And ſuch Dean or Prelate thus proceeding in his enquiry in a Clandeſtine manner out of a full Chapter, and without a Summons, ſhall be bound to make the Poſſeſſor Satisfaction, and ſuffer three Years Suſpenſion *ab Officio*. But the Biſhop's Power and Authority is not hereby limited and reſtrain'd.

‖ Lib. 3. Tit. 21. c. 3.

If a Biſhop being ſeized of the Right of Patronage in virtue of his Biſhoprick, dies, and the Temporalties of the Biſhoprick are ſeiz'd into the King's hands, in Right of his Prerogative, the Vacancy of a Church, in ſuch Biſhop's Gift, ſhall not, by his Death, go to his Executors, as it does on the Death of a Common Perſon: For the King being thus ſeiz'd of the Temporalties, ſhall not only preſent to ſuch Benefices as become void during the Seizure *, and as were void after the Biſhop's Death, and before the Seizure †; but alſo of all ſuch as were void when the Biſhop died ‖; and likewiſe to ſuch to which the Biſhop had at any Time preſented or collated, if his Clerks had not taken Induction, as well as Inſtitution or Collation, before the Biſhop's Death, becauſe nothing but Induction fills the Church againſt the King *; and much more to ſuch to which the Biſhop had only preſented, and to which his Clerk was not inſtituted †. In antient Times, as well as at preſent, all Biſhopricks in *England* were of the King's Gift; and tho' he afterwards gave leave to the Chapters to elect their Biſhops, yet the Patronage did (notwithſtanding) remain in the King ‖, and ſo does the Nomination of the Perſon to be elected now.

* 18 E. 3. 51. b. 21 E. 3. 5. 5. 8. 29. 8. 30. 8. 24 E. 3. 26.

† 12 E. 3. 5.

‖ 50 E. 3. 6. 9 H. 6. 10. b. 24 E. 3. 26.

* 24 E. 3. 30.

† 44 E. 3. 3.

‖ 17 E. 2. 40.

But tho' Preſentation and Nomination are oftentimes, in Law, uſed for one and the ſame Thing, yet they may be ſo diſtinguiſh'd, that one may have the Preſentation, and another the Nomination unto ſuch Preſentation veſted in him, as two diſtinct Eſtates *. And this may come to paſs, by the Grant of him that is ſeiz'd of the Advowſon or Right of Patronage: For if he that is ſo ſeiz'd, grants unto another and his Heirs, That the Grantee and his Heirs, every time the Church becomes void, ſhall nominate to the Grantor, and his Heirs, a Clerk, to be preſented to the

* 14 H. 4. 22.

the ſame, and that the Grantor and his Heirs ſhall preſent the Clerk ſo nominated to the Ordinary of the Place to be admitted and inſtituted accordingly into the Church; and this is a good Grant. And he who has the Right of Nomination, is the only Patron of the Church, and may maintain a *Quare impedit* in his own Name; and he that is to preſent ſuch Perſon ſo nominated, in preſenting, ſhall be but as an Agent or Servant to him that has the Nomination *. And thus, tho' the Right of Patronage, and a Nomination unto the Benefice, do vary in Name; yet in Nature, they are, as it were, the ſame, ſo that the Grant of the Nomination to the Patron's Preſentation, is, in ſubſtance, a Grant of the Right of Patronage in reſpect to the Clerk preſented; for the Profit and Commodity of a Right of Patronage chiefly reſts in the Nomination, or Diſpoſition of the Benefice. But a Nomination, according to the *Canon* Law, is a Recommendation of two or three fit Perſons, made for the ſake of an Election unto ſome Benefice †: And this is done either by their Chriſtian or Surnames, or by ſome Means which may certainly demonſtrate and point out the Perſons thus put in Nomination ‖. I ſay *two or three or more*; becauſe if only one Perſon be put in Nomination, as it ſometimes happens, it is rather an Election than a Nomination; and hence the Perſon nominated acquires ſome kind of Right unto the Benefice to which he is thus named *. Thus at this day, the *French* King, by ſeveral *Concordats* and Agreements made between him and the Pope, ought to name one grave Maſter or Licentiate in Divinity, or Doctor of Laws, or of one of the Laws, being of Lawful Age, unto all Prelacies and Elective Benefices in the Church; and to recommend him then to the Pope for his Confirmation.

* 24 E. 3. 69. b. 14 H. 4. 11. a. 1 H. 5. 1, 2, & 16. 5 E. 4. 123. a.

† 85 Diſt. 1. Arch. in c. 8. vi. 1. 6.

‖ D. 28. 2. 1 & 2.

* X. 2. 27. 12. Gloſs. in c. 10. Diſt. 63.

There are ſeveral Ways, by the *Canon* Law, by which the Right of Patronage is loſt. As by Ceſſion, when the Patron confers his Right on the Church itſelf. 2*dly*, *Patientiâ reformatæ Eccleſiæ*, as when the Patron ſuffers the Church, without a Reſervation of the Right accruing to him, to become a Collegiate Church. 3*dly*, By a total Ruin of the Church, either by an Earthquake or by Fire, or any otherwiſe. 4*thly*, When ſuch Church ſhall be ſeiz'd by Infidels. 5*thly*, If the Patron ſhall commit any notorious Crime, for which, as a Puniſhment he ſhall forfeit the Right of Patronage, as Hereſy †, and the like: For Hereticks forfeit all their Goods and Eſtates, among which we may reckon the Right of Patronage. Upon an Outlawry here in *England*, the King preſents to a Living in Right of the Patron; if the Patron be outlaw'd. But the Right of Patronage may be transferr'd by Succeſſion, Donation, Permutation, and Sale too, if the ſame be ſold by a Lay Patron, who has the Biſhop's Conſent hereunto: But if a Clergyman purchaſes the Right of Patronage, or next Preſentation, he ſhall be depriv'd of it *ipſo Jure* ‖. And thus much of the Right of Patronage.

† X. 5. 7. 13 & 15.

‖ X. 3. 38. 6.

Of Peculiars, or exempt Juriſdictions, &c.

HAVING already treated of Juriſdiction in general, and at large, I ſhall here ſay ſomething of *Peculiars* or exempt Juriſdictions, becauſe we have many of them here in *England*, to the great Inconvenience and Hardſhip of the Subject: But theſe are not called *exempt Juriſdictions*,

riſdictions, becauſe they are under no *Ordinary*, but becauſe they are not under the *Ordinary* of the Dioceſs, but have one of their own. They were firſt founded upon *Papal* Uſurpations, when Appropriations were made to Religious Houſes, in order to diminiſh the Power of Biſhops over the Secular Clergy: And of theſe *Peculiars*, or *exempt Juriſdictions*, there are now ſeveral Sorts, *viz.* Firſt, *Royal Peculiars*, which are the King's *Free Chapels*; and theſe are exempt from any Juriſdiction but the King's: And, therefore, ſuch may be *reſign'd* into the King's Hands as their proper *Ordinary*, either by *ancient* Privilege or *inherent* Right *. But how far Reſignations may be made into the King's Hands as ſupreme Ordinary, as in *Goodman*'s Caſe, 'tis not here a Place to examine. *2dly*, Archbiſhops had and have ſtill their *Peculiars*; which are not only in the Neigbouring Dioceſſes, but diſpers'd up and down in remoter Places: For it appears by *Eadmerus* †, That *wherever the Archbiſhop had an Eſtate belonging to him, he had the ſole Juriſdiction as Ordinary*. *3dly*, Deans and Chapters had likewiſe their *Peculiars*; which are Places, wherein by *ancient Compoſition*, the Biſhops have parted with their Juriſdiction as *Ordinaries* to thoſe Societies; whoſe Right was not *Original*, but deriv'd from the Biſhop; and where the Compoſition is loſt, it depends upon Preſcription ‖; as in the Deans and Chapters of St. *Paul*'s and *Litchfield*, which are mention'd in the Year-Books *. And, laſtly, Monaſteries had alſo their *Peculiars* belonging to them. For the richer Monaſteries were very uneaſy, till they had obtain'd either from the Biſhops or from the Popes (which prov'd the moſt effectual, tho' more chargeable way) an Exemption from ordinary Juriſdiction: And thoſe Churches which the Monaſteries had procur'd to be annex'd to their Houſes, were called *Appropriations*; as I have remembred under that Title ‖. But theſe *Peculiars* belonging to Monaſteries, *&c.* were not wholly exempted from the Biſhop's Juriſdiction; for he gave Inſtitution upon any Avoidances; and in the old Appropriations, therewas always a *ſalvo Jure Epiſcopali*. 'Tis true, no Appropriation could be made without the Biſhop or Pope's Confirmation: For ſuch as were poor, and could not be at the Charge of a Papal Confirmation, had always Recourſe to the Biſhop, and he might expreſs his Conſent in different Forms: For if he only confirm'd the Grant of the Lay Patron, in ſuch Caſe he retain'd his proper Juriſdiction; and nothing paſſed by ſuch a Confirmation but the Right of Patronage. But if he was made a Party and join'd in the Grant, then he gave up all his Right to the Church: But when an Appropriation was confirm'd by the Pope, then it carry'd along with it a total Exemption from the Ordinary Juriſdiction.

* Lindw. lib. 2. Tit. 1. c. 1. Gloſs. ibi.

† Hiſt. in Anſelm. p. 22.

‖ Rolls Abr. pt. 2. p. 357.

* 11 H. 4. 9.

‖ Vid. p. 86, &c.

I have ſaid before, that Deans and Chapters have their Peculiars by antient Compoſition from the Biſhops, as Ordinaries to thoſe Bodies of Men: But where theſe Compoſitions are loſt, and there has been a conſtant Uſage Time out of mind for theſe Societies to grant Inſtitutions, they may in ſuch Caſes maintain their Right by Preſcription †, and this is done by the *Dean and Chapter of St.* Paul's *in* London, and by the *Deans and Chapters of* York *and* Litchfield. But yet if the Archbiſhop, in whoſe Province ſuch a *Peculiar* is, ſhould grant Inſtitution, it is not void, but voidable: For he has two concurrent Juriſdictions, one as ſuperior Ordinary to every Dioceſan Biſhop, the other, as Superintendant over all Eccleſiaſtical Things within his Province; and, therefore, it ſhall be intended that he granted Inſtitution upon the Failure of the Dean and Chapter to do it; and thus it will be good, till avoided by Law. In reſpect of *Royal Peculiars*, as at *Weſtminſter*, the King may, upon a vacancy of any Prebend there, preſent a Perſon by his Letters Patents, and

† 2 Roll. Abr. p. 357.

and by virtue thereof he ſhall be intitled to the Poſſeſſion *, without Inſtitution or Induction, and he cannot be depriv'd by any Eccleſiaſtial Authority, but by the Lord Chancellor or thoſe bearing that Office †.

* 2 Roll. Abr. p. 356.

† Dyer's Rep. 294.

All ſuch Pariſhes and Places which we call *Peculiars*, are exempted from the Juriſdiction of the proper Ordinary of the Dioceſs where they lie, not only in reſpect to the Probate of Wills, and granting of Letters of Adminiſtration, which are Matters of *voluntary* Juriſdiction, and the like; but alſo exempt from the Cognizance of all Matters of *Contentious* Juriſdiction: and whenever they have Reaſon to appeal a Cauſe from their own Ordinary, it is to the King in his high Court of *Chancery*, and not to the Biſhop of the Dioceſs, or the Provincial Archbiſhop.

Though a Church and the Clergy thereof be exempt from the Juriſdiction and Viſitation of the Biſhop; yet the People or Pariſhioners belonging to ſuch a Church, are not thereby exempt according to the *Canon Law* ‖: But Cuſtom and Preſcription may extend itſelf to ſome Things unto which a Privilege does not extend itſelf; and, therefore, it is by Cuſtom and Preſcription, that ſome whole Pariſhes are exempt from the Biſhop's Juriſdiction and Viſitation, and not by virtue of a Papal Privilege, tho' (perhaps) ſuch Cuſtom was founded thereon at firſt. For, though a Perſon who is a Subject, cannot preſcribe not to be viſited, or not to pay Procurations annex'd to a Viſitation, which is founded on a Preſcription *; yet an Abbot exempt may preſcribe to a Viſitation, and to have Procurations paid him by all the People, that are ſubject to his Church or Chapel not exempt; becauſe Perſons that are exempt, may preſcribe unto Epiſcopal Rights †. But though a Perſon of an exempt Juriſdiction cannot be called out from thence to anſwer in a Cauſe before the Biſhop, yet he may be compell'd by the Ordinary to give his Teſtimony or Evidence in a Matrimonial or any other Cauſe, wherein the Truth of ſome Matter of Fact is depending, and cannot be diſcover'd by other Means: For 'tis a great Sin for any Man (at leaſt) in a Court of Judicature, to conceal the Truth; and, therefore, no Privilege or Exemption can excuſe his Crime of not attending the Court, if requeſted thereunto; no, not even the Command of the Prince or Law itſelf, nor even any Pretext of Piety whatever. But there is this Difference to be obſerv'd betwixt Perſons privileg'd and not privileg'd, *viz.* That if Perſons not privileg'd are nam'd as Witneſſes, and have their Coſts and Charges tender'd them, though Evidence may be otherwiſe had; yet they ſhall be compell'd to become Witneſſes, if they refuſe to appear as ſuch upon a Monition or Citation to them: But Perſons privileg'd or exempt ſhall not be compell'd to be Witneſſes, unleſs their Malice and Diſingenuity appears to be manifeſt, and the Truth cannot be made known by any other Perſons. But it has been a Queſtion, Whether a Biſhop can correct and puniſh Perſons of an exempt Juriſdiction committing an Offence within his Territory or Dioceſs? Some of the *Canoniſts* ſay, that he may do this (at leaſt) in Crimes notorious and exorbitant, though it ſeems contrary to a *Decretal* ‖: And the Reaſon they give for it is, becauſe the Pope does not privilege ſuch Perſons in their Offences; and, therefore, in this reſpect they ſtill remain under the Power of the Ordinary. But (I think) in this Caſe the Ordinary ought to catch them by a Summons in his own Diſtrict, ſince he cannot ſend a Citation into a foreign or exempt Juriſdiction, unleſs it be in the Buſineſs of Hereſy: For the Cognizance and Puniſhment of Hereſy belongs to the Biſhop of the Dioceſs, where ſuch Hereticks dwell, tho' they live in Places exempt: but then this Juriſdiction is delegated to them by the Pope *.

‖ vi. 5. 7. 9. X. 5. 33. 16.

* X. 2. 26. 16.

† X. 2. 26. 18.

‖ vi. 5. 7. 1.

* vi. 5. 2. 11 & 17.

Of

Of publick Pennance, and Commutation of Pennance.

AMONG ſuch Puniſhments as relate to Eccleſiaſtical Crimes, we may reckon *Pennance*, which is enjoin'd in ſeveral Caſes by way of Puniſhment for the Correction and Purgation of ſome Offence or Crime committed*. Therefore, we may define *Pennance* to be a certain Act of Puniſhment or Vengeance, whereby the Party offending is puniſh'd for ſome Crime committed by him in the Eccleſiaſtical Court; or repenting thereof, afflicts and puniſhes himſelf: And it is in *Latin* called *Pœnitentia*, as it were from the two *Latin* Words *Pœnam tenere*, according to ſome Perſons; becauſe *pœnam tenet, qui ſemper vindicat, quod commiſiſſe dolet* †. Now *Pennance*, as it is an Eccleſiaſtical Cenſure, and a private Sorrow of Mind inflicted by the Senſe of Sin committed, is twofold, *viz.* *External* and *Internal*; for ſo the *Romaniſts* and the *Canon* Law diſtinguiſh it. *External* Pennance, they define to be that which ſhews itſelf by external Signs, as by Confeſſion, Tears, Faſting, and other outward Means; and an *Internal* Pennance, they ſay, is only a ſimple Converſion of the Mind from Sin, as it conſiſts in theſe three Acts of the Penitent, *viz.* in a Contrition of the Heart, a Confeſſion of the Mouth, and a Satisfaction of Works made for Sin. And this laſt kind of *Pennance* they acknowledge to be no Sacrament. For 'tis the firſt, which they make a Sacrament, for the Intereſt and Advantage of the Prieſthood, as it conſiſts in the Abſolution of the Prieſt; which is made by a judicial Act, and on the Sentence of the Judge, the Prieſt hereupon declaring a Remiſſion of Sins to the Penitent. But we *Proteſtants*, who deny *Pennance* to be a Sacrament, ſay, That a true and ſalutary *Pennance* conſiſts *firſt*, in theſe Acts, *viz.* In a Contrition or Sadneſs of Heart, as it ariſes from a filial Fear of God, and as it only reſpects him, from the Love we ought to bear to Virtue, and his Deteſtation to Sin. *2dly*, In ſuch a Confeſſion as is made to God *in Foro conſcientiæ*; not only conſiſting in an Accuſation of ourſelves, but even in a Condemnation too, and in a Deprecation of Puniſhment. *3dly*, In a Purpoſe and Reſolution of Amendment, and in a Deſire of leading a new Life: or in brief, in a Confeſſing of our Sins to God in Prayer, in doing Acts of Charity, Faſting for Humiliation-ſake, and making Reſtitution to ſuch as we have injur'd or oppreſs'd; and the Effects of ſuch a Pennance are a ſincere Reformation of our Lives. And of this kind of *Pennance* St. *Auſtin* ſpeaks, when he ſays, *Every one, that is made a Judge of his own Will, cannot begin a new Life without repenting himſelf of the old.* And St. *Ambroſe* ſpeaks of it in his Comment on St. *Paul*'s Epiſtle to the *Romans*, ſaying, *The Grace of God in Baptiſm does not require Sighs and Groans, nor any other Work but a Contrition of Heart alone, which pardons all Things*, gratis, *viz.* without giving Money to the Prieſt. For whatever Things are ſaid of doing Pennance, ought not to be referr'd to *external*, but to *internal* Pennance; namely, a Contrition of Heart, without which no one can be reconcil'd to God.

* X. 5. 38. 1. Pœn. 3. Diſt. 1.

† Pœn. 3. Diſt. 1.

But

But this would not ſerve the Purpoſes of ſome Men: And, therefore, *external* Pennance was enjoin'd by the Church, and made a Sacrament too as well as a Puniſhment, which they might redeem with Money to the Prieſt. For beſides the general Cenſures already mention'd under that Title †, which reſpect Eccleſiaſtical Diſcipline, and Communion, there is another Cenſure whereby the Body is affected, *viz.* Corporal Pennance, when any one is compell'd to confeſs and lament his Crime in a publick manner, that he, who has given Scandal and Offence by his Sinning, may give an Inſtance of his Amendment by performing Pennance ‖: And this kind of Pennance is perform'd by putting on, with us, a certain Garment, and making an open Acknowledgment of his Fault in the Church; and ſometimes for greater Crimes a more ſolemn Pennance is enjoin'd him by the Biſhop. But if the Fault be of a private Nature, then he ſhall only undergo a private Pennance. So that there are three *Species* of external Pennance, *viz. ſolemn*, *publick* and *private*. Solemn Pennance is inflicted *in capite Quadrageſimæ*, with great ſolemnity, as deſcrib'd in the firſt Part of the *Decretum* *: which ſays, that in ſolemn Pennance, all the Penitents, that undergo publick Pennance, ought to appear before the Church-doors bare-footed, and cloath'd in Sack-Cloth; and thus, with Looks fix'd on the Ground, to repreſent themſelves to their Biſhop, praying his Forgiveneſs. And at this ſolemn Pennance, there ought to be preſent rural Deans, or Parochial Arch-Prieſts (as they are called) and likewiſe all the Presbyters belonging to theſe Penitents, who are to make a diligent Inſpection of their Converſation, and to enjoin them Pennance by certain degrees, according to the Meaſure of their Sins or Crimes committed. After which the Biſhop is to introduce them into the Church, and lying proſtrate, he ought, with Tears for their Abſolution, to ſing or read the ſeven Penitential Pſalms. Then riſing from the Ground, according to the Direction of the Canons, he ought to lay his Hand on them, and ſprinkle them with Holy Water before he throws the Aſhes on them. Then covering their Heads with Silk, he ought with frequent Sighs and Groans to declare to them, *That as* Adam *was caſt out of Paradiſe, ſo are they for their Sin caſt out of the Church.* After which he orders the Miniſters to expel and ſhut them out from thence. Then the Clergy pronounce the following Sentence againſt them, *viz.* In *the Sweat of thy Brow thou ſhalt eat thy Bread, &c.* which the Reader may ſee in the *Diſtinctions* †.

† Vid. p. 155.

‖ Lind. lib. 5. Tit. 16. c. 12. v. *Solemnis.*

* 50 Diſt. 64.

† 50 Diſt. 64.

The ordinary corporal Pennance, if the Party Delinquent to whom it is enjoin'd deſires it of the Judge, may be changed into a pecuniary Penalty or Fine ‖; and this was ſeldom or never deny'd the Perſon, if he was a Freedman and could pay the Money: But then, according to the Opinion of ſome Men, the Biſhop or Ordinary was not to receive the ſame to his own proper Behoof, but it ought to be apply'd to the Advantage of the Church *, as Fines in Caſes of civil Puniſhment are converted to the Uſe of the Publick †. For we read in the Books of the *Canon* Law, that there are five kinds of corporal Pennance enjoin'd for Sin. The firſt is Faſting or Abſtinence for a proper Seaſon, in order to macerate and ſubdue the Fleſh ‖. The ſecond is Confiſcation of all a Man's Eſtate *. The third is Baniſhment †. The fourth is Servitude ‖. And the fifth is Whipping *. But as Perſons of Quality and Diſtinction were not willing to undergo any of theſe kinds of Pennance, they were wont to redeem them by paying a Sum of Money; and hence came *Commutation* of *Pennance* into the Church about the end of the eighth Century, which has brought great Profit to the *Romiſh* Clergy ever ſince: And then, inſtead of Faſting, Prayers, *Pater Noſters* and *Maſſes* were enjoin'd the Penitents; and ſuch as had Money might, by Com-

‖ 9 E. 2. c. 2. 3 & 4. Lindw. lib. 3. Tit. 28. c. 4. v. *Redemptiones.*

* Gloſs. in cap. 2. X. 5. 37.

† C. 1. 54. 1.

‖ 90 Diſt. 10.

* 63 Diſt. 22.

† 63 Diſt. 23.

‖ 36 Q. 1. 3.

* 23 Q. 5. 1.

mutation, ſave their Pennance; and this was receiv'd by the Prieſt under the innocent Name of Alms-giving. Some Endeavours were uſed at the Beginning of the Reformation to retain the antient Diſcipline of Pennance; but, the People having been diſuſed ſo long to open and publick Cenſures, this could not be effected without the Concurrence of the Civil Power, which not being obtain'd, they let private Confeſſion drop, there being no Command for it in Scripture; and inſtead thereof, the Reformers order'd a general Confeſſion to be made in the Church.

By an Eccleſiaſtical Conſtitution made and agreed upon by the Convo-
*A.D. 1597. cation of the Province of *Canterbury**, and afterwards confirm'd by Royal Approbation under the Great Seal of *England*, it was ordain'd, That for the future there ſhould be no Commutation of ſolemn Pennance, unleſs it were in Cauſes of a great and important Nature, and that very ſeldom too; and only when it appear'd to the Biſhop himſelf, that this was the ſafer and more wholeſom Method of reforming and reconciling the guilty Perſon to the Church. 2*dly*, That the pecuniary Mulct, which was given by way of Commutation, ſhould either be laid out for the Relief of the Poor of the ſame Pariſh, or elſe apply'd to other Pious Uſes, and that the ſame ſhould be ſolemnly notify'd to the Church, and approv'd of by the ſame. But if the Crime was publick and notorious, then the Perſon ought himſelf in his own Perſon to make Satisfaction to the Church offended thereat, by profeſſing a ſincere and hearty Repentance thereof; or elſe that the Miniſter of the Church ſhall, in the Defendant's Preſence, in a publick manner from his Pew, denounce his Submiſſion, and the Performance of his Pennance, before his Ordinary; and likewiſe declare what Sum of Money he has given to be laid out in Pious Uſes, as a Teſtimony of his Sorrow and Repentance. And whoever ſhall commute Pennance without the Knowledge of his Dioceſan, or convert any Sum of Money paid by way of Commutation to any other Uſes than that, as aforeſaid; or ſhall any otherwiſe violate this Conſtitution, he ſhall be ſuſpended from the Execution of his Office by his Dioceſan for the Space of three whole Months.

Of Plurality of Benefices, &c.

† Luke cap. 16. v. 13. SINCE *no Man can ſerve two Maſters* (as the Scripture obſerves) *but that he will love the one, and deſpiſe or hate the other* †; the *Canon* Law has, therefore, forbidden a Beneficiary to hold two Livings with Cure of Souls, out of a Preſumption that he will prefer the one and neglect the other: And as this Law very often mentions Plurality of Benefices with great Abhorrence and Deteſtation, I ſhall here open the Vein, which that Law has tapped, a little wider; and conſider what Eccleſiaſtical Benefices thoſe are, which may be lawfully held together at one and the ſame time; and *firſt*, diſtinguiſh between ſuch as are term'd *ſupreme* or *ſuperior* Benefices, as Biſhopricks and the like are; and ſuch as are ſtiled *inferior ſecular* Benefices, which are twofold, *viz.* *Dignities* and *Benefices with Cure of Souls*, which are manag'd by Curates or Rectors. As to the ſuperior Benefices, no one can hold more than one at the ſame Time (ſays

(ſays the *Canon* Law) without the Pope's Diſpenſation †; becauſe it is a ſpiritual Matrimony, and no one can have two Wives together at the ſame time: And a Pluraliſt in this Caſe is by the *Canoniſts* called an infamous Thief, and an Adulterer, who ought not to be choſen to any Preferment in the Church; and ſo odious is ſuch a Perſon even in the Underſtanding of the *Canon* Law, that if he ſhall purchaſe to himſelf ſeveral Benefices at the ſame Time without a Diſpenſation, his Collation to the ſecond ſhall be of no validity at all, unleſs he freely and voluntarily reſigns the firſt ‖. But if we ſpeak of *ſimple* Benefices, *viz.* of ſuch as have not the Cure of Souls annex'd to them, or of one *ſimple* Benefice, and another in our Books called *Duplex Beneficium*, then we ought, *2dly*, To diſtinguiſh: Becauſe if a Perſon deſired to have one with a Title, and another without a Title, as a Prebend with its Corpſe or Penſions thereunto belonging is, which does not give a Title by Canonical Inſtitution *, he may lawfully retain ſeveral Benefices of this kind together ‖. Or if we ſpeak of two Benefices with Titles, then if the Queſtion be *de fructibus eorum lucrandis*, he cannot retain the ſame, according to the Opinion of all the Doctors on the *Canon* Law; unleſs he reſides either by himſelf or another on each Benefice *. And thus was this excellent Law, which requires perſonal Reſidence, diſtinguiſh'd away by the Sophiſtry of the *Canoniſts*.

† X. 1. 7. 2 X. 5. 31. 8.

‖ vi. 1. 16. 3.

* 16 Q. 1. 61.

‖ vi. 1. 3. 7.

* Arg. X. 1. 2. 6.

For by the *Canon* Law, antiently, all benefic'd Perſons were ſtrictly bound to Reſidence, how ſmall ſoever their Benefices were, under pain of Deprivation †, as I ſhall obſerve hereafter under the Title of *Reſidence*; and were oblig'd, in their own Perſons, to execute the great Truſt and Charge required by their Office, in the Place where their Benefices were, becauſe a Benefice is given on the account of the Office and Duty that attends it: wherefore if the Office cannot be perform'd without Reſidence, it follows from hence, that the Beneficiary is bound thereunto; for according to a Maxim of eternal Truth, *qui tenetur ad finem, tenetur etiam ad media*. And hence 'tis, that Perſons having Pariſh Churches, or even Canonries in Cathedral or Collegiate Churches were bound formerly to *local* Reſidence, where their Preferment lay, tho' there ſhould have been an evil Cuſtom introduc'd contrary to the Canon: All which (I think) ſufficiently deſtroys the Notion of Pluralities.

† X. 3. 4. 6.

But *Lindwood* obſerves *, that the Eccleſiaſtical Law had varied in this Matter: And proceeded by theſe Steps, (which are more than *Lindwood* mentions). *Firſt*, It was abſolutely forbidden any one to have two Pariſhes, if there were more than ten Inhabitants in them; *becauſe no Man could do his Duty in both Places* ‖: And if any Biſhop neglected the Execution of it, he was to be excommunicated for two Months, according to the 16th Council of *Toledo* *, and to be reſtor'd only upon a Promiſe to ſee this Canon executed †. So that a Biſhop was highly concern'd to ſuppreſs all Pluralities. And this Rule was allow'd to hold as to Cities, but an Exception made hereunto in reſpect of ſmall and remote Places, where there was a greater ſcarcity of Perſons to ſupply them ‖. Again, if a Perſon had two Benefices, it was left to his Choice which he would keep: But he could not hold them both *. This kind of Option was allow'd by the *Eccleſiaſtical Law*, then in Force. *Thirdly*, If a Man takes a ſecond Benefice, ſuch Inſtitution is void by the third Council of *Lateran* †. *Fourthly*, That by taking a ſecond Benefice, the firſt is void; which is the famous Canon of the fourth *Lateran* Council ‖. *Fifthly*, That if he were not contented with the laſt, but endeavour'd to keep both above a Month, he ſhould be depriv'd of both. And this was the *Eccleſiaſtical* Law as it was declar'd in our *Provincial Conſtitutions*. But the general Practice was to avoid the former, according to the

* Lib. 3. Tit. 5. c. 2. v. *ſit contentus*.

‖ 10 Q. 3. 3.

* Can. 5.

‖ 21 Q. 1. 1.

* X. 3. 5. 7.

† X. 3. 4. 3.

‖ X. 3. 5. 8.

the *Lateran* Council. For *Lindwood* informs us *, That all Benefices with Cure of Souls are, by this *Conſtitution*, declar'd to be void *ipſo Jure*, according to the 29th Canon of the Council of *Lateran*, held under Pope *Innocent* III. which Perſons are, *de facto*, poſſeſs'd of without a Papal Diſpenſation *touching Plurality of Benefices* †, by an Admiſſion to a ſecond Benefice, tho' they are not inducted into either, but have only Inſtitution thereinto ||, if it be by their Means that they have not Induction; and this, whether ſuch Benefices be with or without a Title; for even in this Caſe, according to *Ancharanus* *, the firſt Benefice is void †. But if the ſecond Benefice become litigious without the Privity of the Beneficiary, the firſt Benefice ſhall not be void, provided the Suit was commenc'd before he was in Poſſeſſion of the ſecond Benefice by Inſtitution: But 'tis otherwiſe, if it becomes litigious after ſuch Poſſeſſion, whether he recovers in the Suit or not; for he cannot retain the firſt, but muſt impute it to himſelf, that he made no better enquiry touching this matter ||. But *Joh. de Ananias* ſolves this Difficulty by a Diſtinction *, and adviſes the Parſon to hold the firſt *in commendam*, till the Suit be determin'd touching the ſecond; and ſays, that this is a juſt Cauſe of a *Commenda* †.

* Lib. 3. Tit. 5. c. 2.

† X. 3. 5. 28.

|| Cl. 1. 2. 4.

* In c. 28. X. 3. 5. v. tertio *Nota.*

† vi. 3. 4. 18.

|| X. 1. 3. 32.

* In c. 6. X. 3. 8.

† In c. 12. X. 5. 1.

Theſe were very ſevere Laws and Canons againſt Pluraliſts; but that one Clauſe of the Pope's *Diſpenſing Power* made them to ſignify little, unleſs it were to advance his Revenue and Authority in the Church: For when the Diſpenſing Power came to be own'd, the Law had very little Force; eſpecially, as to Mens Conſciences. For if it were a Law of God, how could any Man diſpenſe with it? unleſs it were as apparent that he had given a Power in ſome Caſes to *Diſpenſe*, as that he had made the Law. Thoſe *Caſuiſts* are very hard put to it, who make *Reſidence Jure Divino*, and yet ſay the Pope may diſpenſe with it; which at laſt comes only to this, That the Pope can *authoritatively* declare the Sufficiency of the Cauſe ||: So that the whole matter depends on the Cauſe, and whether there can be any ſufficient to excuſe a Man from perſonal Reſidence, I have conſider'd hereafter under that Title. 'Tis *the general Opinion of Divines and Lawyers*, ſays *Leſſius* *, *That no Man is ſafe in Conſcience by the Pope's Diſpenſation for Pluralities, unleſs there be a juſt Cauſe for it*: And *Panormitan* ſays †, That *no Man can with a ſafe Conſcience take a Diſpenſation from the Pope for more Benefices than one meerly for his own Advantage*: And from him *Sylveſter* ||, and *Summa Angelica* *, do both copy. A *Diſpenſation*, ſays Cardinal *Tolet* †, *ſecures a Man from the Law; but as to Conſcience, there muſt be a good Cauſe for it; and that is when the Church has more Benefit by it, than it would have without it.* But to heap up Preferments merely for Riches, Luxury, or Ambition, is (doubtleſs) a crying Sin before God, as it is a manifeſt Robbery of ſeveral deſerving Men that want a Subſiſtence. But in ſome Caſes, a Plurality of Benefices may be well enough juſtify'd in point of Conſcience as well as Law, as when the Benefices are ſo poor that a Clergyman cannot live upon either of them ſingly, and they lie near each other in ſuch a Mannor as that he can ſerve them both in Perſon, or elſe by an able and ſufficient Curate. But for Men to put in Curates merely to ſatisfy the Law, without any regard to the Duties of their Function, and the Cure they ſerve, is a horrible Scandal to Religion: And the looſeſt of all the *Popiſh* Caſuiſts look upon this as a very great Sin, even thoſe who attribute to the Pope the higheſt *diſpenſing* Power in this Caſe.

|| Vid. p. 466.

* Lib. 1. c. 34. Dub. 27.

† In c. 54. X. 1. 6.

|| De Ben. 4.

* De Ben. 35.

† Sum Caſ. 5. c. 8.

But when the great Liberty of *Diſpenſing* had made the Eccleſiaſtical Laws in a great meaſure uſeleſs, then our Law-Makers thought fit to reſtrain and limit it by a Statute made in *Henry* the VIIIth's Reign ||, where-

|| 21 H. 8. c. 13.

in

in it is enacted, *That if any Perſon or Perſons having one Benefice with Cure of Souls, being of the yearly value of eight Pounds or above, accept, or take any other with Cure of Souls, and be inſtituted,* and inducted into Poſſeſſion of the ſame, *that then and immediately after ſuch Poſſeſſion had thereof; the Benefice ſhall be adjuged to be void. And all Licences and Diſpenſations to the contrary are declar'd to be void and of none Effect.* *Hobart* calls this Statute a Religious and moſt Politick Law of the Church, and almoſt a Redintegration of thoſe antient Canons which had ſlept ſo long, and a Reſtoration of the Church ruin'd by the Popes *Tot Quots*, Unions, Diſpenſations, and Tolerations *. The Scope of this Law was to appropriate to every Flock his own proper Paſtor, both in Body and Mind. *In Body*, That he ſhould be the Husband of one Wife, *una Eccleſia unius Rectoris. In Mind*, that having but one Benefice (ſaving in ſome ſpecial Caſes of Favour and Conſideration) he ſhould not farm, graze, nor mingle himſelf with ſecular Affairs, which might diſtract and draw his Mind from his Cure of Souls. The Policy of this Law may be ſeen in this, *viz.* That the time when this Parliament was held, inclining againſt the Pope (for it continu'd to the 25th of *Henry* VIII.) they did not yet immediately take away from the Pope the Power of diſpenſing with Pluralities (which was one of the greateſt Enormities of his Power, and the *Pellis Introitus* of his Revenue) but they provided, that his Diſpenſation ſhould not be ſufficient of itſelf, but ſhould only ſecond a Qualification, which muſt come from Lords and Great-Men, whereby the King drew the Nobility to his ſide from the Pope, by dividing his Power in this among them. This Law, one would have thought, had been an effectual Remedy againſt all ſuch *Pluralities and Diſpenſations* to obtain them; and, ſo doubtleſs, it had, if there had not follow'd ſo many *Proviſo*'s of qualify'd Men to get Diſpenſations, as take off a great deal of the Force and Effect of the Law: And, therefore, I ſhall in the next Place conſider, who theſe qualify'd Perſons are. And,

* Hob. Rep. p. 157.

Firſt, 'Tis provided, that every ſpiritual Perſon of the King's Council may purchaſe a Licence or Diſpenſation to keep three Benefices with Cure; and the Chaplains of the King, Queen, the King's Children, Brethren, Siſters, Uncles or Aunts, may ſo keep each of them two. *2dly*, An Archbiſhop and Duke may each of them have ſix Chaplains; a Marqueſs and Earl five; a Viſcount, and other Biſhops, four; the Chancellor, every Baron, and Knight of the Garter three; every Ducheſs, Marchioneſs, Counteſs and Baroneſs, being Widows, two; the Treaſurer and Comptroller of the King's Houſe, the King's Secretary, and Dean of his Chapel, the King's Almoner and Maſter of the Rolls, each of them two; and the Chief Juſtice of the King's Bench, and Warden of the *Cinque* Ports, each of them one: And each of the aforeſaid Chaplains may purchaſe a Licence or Diſpenſation to keep two Benefices. *3dly*, The Brethren and Sons of Temporal Lords (born in Wedlock) may purchaſe ſuch Licence or Diſpenſation to keep as many Benefices with Cure as the Chaplains of a Duke or Archbiſhop: And the Brethren or Sons (born in Wedlock) of every Knight may keep two. Provided, that every of the aforeſaid Chaplains ſhall exhibit (where need ſhall be) Letters under the Sign or Seal of the King, or other their Lord and Maſter, teſtifying whoſe Chaplains they be, or elſe not to enjoy ſuch Plurality of Benefices. *4thly*, All Doctors and Batchelors of Divinity, Doctors of Law, and *Batchelors of the Canon Law*, admitted to their Degrees by either of the Univerſities of this Realm, and not *by Grace only*, may purchaſe ſuch Licence to keep two Benefices with Cure: But by this Law, the Degree of a Maſter of Arts or Batchelor of the

Civil Law *ſimply* is no Qualification for ſuch Diſpenſation (though it has been often uſed for ſuch on the Strength of the Canon †, and through a miſtaken Notion, that ſuch Perſon is a Batchelor of *both Laws*, which is not true in Fact, becauſe no Degree in the *Canon* Law, has been taken ſince the Reformation). And, therefore the Patron may, in ſuch Caſe (I conceive) preſent another Clerk to the Biſhop, if the Beneficiary ſhall think to qualify himſelf for a Licence, by ſuch Degrees *ſimply* taken, whatever Conſtruction or Weight the Canons may have with the Biſhops: And, conſequently, if the Biſhop ſhall refuſe to admit ſuch Clerk preſented to him, it ſeems to me, that a Proceſs at Law will lie againſt the Biſhop for ſuch Refuſal; but this Matter I leave to the learned Judges, who are the Expounders of the Statute Law. And, laſtly, becauſe Archbiſhops muſt uſe (at the Conſecration of Biſhops) eight Chaplains, and Biſhops (at giving of Orders and Conſecration of Churches) ſix; every one of them may have two Chaplains over and above the number limited: But then Biſhops can qualify no more than four for a Licence or Diſpenſation.

† Can. Jac. 41.

It has been receiv'd in *Holland*'s * and likewiſe in *Digby*'s Caſe, and often before and ſince the Council of *Lateran*, That a Man who has a Benefice with Cure of Souls, of whatever value it be, and is admitted and inſtituted into another Benefice with Cure of Souls of what Value ſoever, having no Diſpenſation, the firſt Benefice is *ipſo Jure* ſo void, that the Patron may preſent another to it, if he pleaſes, without waiting for the Incumbent's Induction into his ſecond Benefice; for that may be delay'd (peradventure) through Fraud, and he is Parſon before Induction, and the Church full againſt all common Perſons ‖. So that tho' the Statute mentions *Induction*, yet the Judges, for wiſe Reaſons, have expounded that Word out of the Act, as being contrary to the primary Deſign of the Legiſlators themſelves, which was to hinder *Pluralities* and Non-Reſidence. But if the Patron will not preſent, then if under the Value of eight Pounds *per Ann.* in the King's Books, no Lapſe ſhall incur till Deprivation of the firſt Benefice, and Notice given to the Patron by the Ordinary: But if it be of the yearly Value of eight Pounds or above, the Patron muſt preſent at his Peril within ſix Months *. To ſtrengthen this Law againſt *Pluralities*, there ſeems to be wanting ſome other Penalty to be added, or Encouragement given to the Informer, by reaſon of the frequent Colluſion between the Clerk and his Patron; and ſometimes the Ordinary himſelf falls into it. *Note*, That a Diſpenſation for a *Plurality of Benefices*, which comes after Admiſſion, and Inſtitution, though before Induction, comes too late; and is not aided by the *Proviſo* of the Statute of *Henry* VIII. For the Words of the Act are, *ſhall have, retain, and take a ſecond Benefice*; and, therefore, Admiſſion and Inſtitution do make him full Incumbent as to the Patron, and to the Parſon himſelf †, as before hinted. This Diſpenſation ought to be entred on the Parchment-Roll in *Chancery*, and not in the Paper-Book: But if it be not, it ſhall not affect the Incumbent in his Right, becauſe the Officer ſuch Caſe is fineable for his Negligence. But this Statute of ‖ *Henry* VIII. is more favourable to the Clergy, than the *Canon* Law was before, in this Particular, *viz.* In declaring, that no *ſimple* Benefices, or *mere* Dignities (as the *Canoniſts* ſtile them) are comprehended under the Name of *Benefices having Cure of Souls*, *viz.* 'No Deanery, Archdeaconry, Chancellorſhip, Treaſurerſhip, Chanterſhip, or Prebend, in 'any Cathedral or Collegiate Church, nor Parſonage, that has a Vicar endow'd, nor any Benefice perpetually appropriate.' But all theſe before were within the Reach of the *Canon* Law; and a Diſpenſation was neceſſary in order to hold them.

* Cok. 4. Rep. fol. 75. fol. 78.

‖ Moor's Rep. p. 434.

* 21 H. 8. c. 13.

† Moor ut ſupr.

‖ 21 H. 8. cap. 13.

Of

Of a Prebend and Prebendaries.

A *Prebend* is in *Latin* ſtiled *Præbenda*, from the Verb *Præbeo*, which ſignifies to *allow*; ſo that a Prebend is that Allowance or Allocation, which a Perſon receives from his Dignity in the Church: And it differs from a *Canonry* ſtrictly ſpeaking. For a *Canonry* is a ſpiritual Right which a Perſon obtains in the Church by being admitted into the Society or Brotherhood, and having a Stall aſſign'd him in the Choir, and a Place in the Chapter *, as already noted under that Title: But a *Prebend* in our Books is a Spiritual Right of receiving certain Profits, which do accrue to the Perſon receiving them, according to his Merits, on the Account of attending and performing divine Service in ſome Cathedral or Collegiate Church, and is born from the *Canonry* as a Daughter is from the Mother †. And, therefore, a *Prebend* is only a Term of Law, according to the *Canoniſts*, which is not created or conſtituted from the Poſſeſſions alone, but likewiſe from the Right of the *Canonry* to which it is annex'd, which cannot be created without a Revenue belonging to it, becauſe by this means there would be no Allowance to the Prebendary ‖. But we here in *England* do not obſerve this Diſtinction; and only diſtinguiſh a *Canonry* from a Prebend, as it belongs either to the old or new Foundation of the Church. A Prebend is not an Eccleſiaſtical Benefice, according to the *Canoniſts*, becauſe a Layman, according to them, is capable of a Prebend: For *Calderinus* ſays, that the Aſſignation of a Prebend may be made to a Profeſſor of Divinity, or to the Sacriſt of a Church, whether in Orders or not, if it be not given *in Titulum Beneficii*; and then 'tis no Benefice. But in my Opinion, a Prebend, as it is annex'd to ſome ſacred Office or Employment, is a Spiritual Thing: But when it only reſpects the Commodity of the Fruits and Profits thereof; and ſuch Commodity is temporal, then (I ſay) it is a temporal Thing; as the Prebend belonging to the Profeſſor of the *Civil* Law at *Oxford*. For if a Prebend be granted to a Perſon not capable of Spiritualties, as to a Layman; it is then neceſſarily underſtood *de merâ commoditate temporali*; but if it be granted to a Clerk, then 'tis otherwiſe. *Zabarella*, by way of Diſtinction will have a Prebend *properly* to be a ſpiritual Thing, but *improperly* taken to be a temporal Eſtate, and ſomething of a profane Nature. *Firſt*, ſays he, 'tis a ſpiritual Thing, when 'tis annex'd to a Title or a ſpiritual Office. *2dly*, 'Tis a temporal Thing, when only the Commodity of the Fruits attend it; and a Layman is capable of it: And, therefore, when a Prebend is ſued for, a Spiritual Right is not always deſired, but only Temporals in ſome Caſes; becauſe a Canon ſuing for a Spiritual Prebend, retains that ſame Prebend which he firſt acquired, though the Temporalties of his other Prebend be united to his Spiritual Prebend, and the Eſtate which he had before his Option be added to the other Prebend, which he ſued for. But if the Queſtion be about conferring a Title, we always underſtand a Spiritual Right, as aforeſaid, under the Appellation of a Prebend. Hence 'tis, that when the Pope declares a Prebend vacant, and collates to it, 'tis always meant of a Spiritual Prebend: wherefore, I think, according to the *Canon* Law, and

* Will. in Clem. 3. 2. N. 6.

† Will. ut ſupr. v. *Præbendam.*

‖ 1 Q. 3. 7.

and the proper Eſſence of a Prebend, it is a Spiritual Right not accruing to a Layman. But,

Tho' the Eſtates and Revenues of Cathedral or Collegiate Churches were divided heretofore by Prebends; yet the Canons or Prebendaries of ſuch Church, cannot poſſeſs theſe Eſtates as their own Properties, but only as *Uſufructuaries*, and as a certain Proviſion ariſing out of ſuch Eſtates for the neceſſary Maintenance of the Canons, *&c.* and the Surpluſage ſhall be laid out on the common Wants of the Church: But tho' the Canons or Prebendaries have not a Property in ſuch Eſtates, yet as they have a *ſimple Uſufruct* in their Prebends, and not a *nude* Uſe alone, they may, in that reſpect, bring an Action*. Canons or Prebendaries cannot regularly litigate or go to Law with one another about their Prebends, becauſe they are not the Prebends of the Clergy, but of the Church only. But it ſometimes happens in Collegiate Churches, that tho' the Eſtates therein are in common, yet, for the avoiding of Complaints, and other Diſſatisfactions, each Perſon has a ſeparate Maintenance or Portion allow'd; and in this Caſe, they may ſue for their Allocation. Prebends, which are newly ſettled in a Church, ought not to be of leſſer Value than the antient Prebends: For all Prebends, according to the *Canon* Law, ought to be of equal Value, as well the Prebends of Canons newly founded, as thoſe on the old Foundation.

* Arg. D. 10. 1. 4.

Of *common Right*, a Perſon cannot have two Churches or Prebends in the ſame or in different Biſhopricks, unleſs it be in ſuch Caſes as are expreſly allow'd by Law †: And in reſpect of a Church with Cure of Souls, theſe Caſes are ſix in number, *viz. Firſt*, When the Churches have but ſmall Revenues belonging to them. *Secondly*, When one Church depends on another as its Mother-Church ‖. *Thirdly*, When the Parſon holds one Church *in Titulum*, and another *in Commendam* *. *Fourthly*, When the Biſhop diſpenſes with his Pluralities †. *Fifthly*, When there are but a few Inhabitants in his Pariſh, or a paucity of Clergy to ſerve the Cure of Souls: And this is the ſame, whether this paucity be in or out of a City; ſince in ſuch a Caſe, all the Benefices may be conferr'd on one good Clergyman ‖. And, *Sixthly*, When one Church is annex'd unto another. And 'tis the ſame thing in reſpect of a Prebend: For if a Perſon having a Prebend, receives another Prebend or Dignity either in that, or in any other Church, the firſt Dignity or Prebend ſhall become void *, even tho' the ſame ſhould be confirm'd to him by his Superior †: And this I hold to be good Law with us in *England*, tho' Modern Practice be againſt me, which has been introduc'd by the Avarice of the Dignitary, and the Connivance of the Biſhop, to whom of *common Right* the Collation belongs; as this part of the *Canon* Law is in no wiſe repugnant either to the Statute Law of the Realm, or the Royal Prerogative, and was once receiv'd here by our Church. But tho' one Perſon may not be admitted to two Prebends; yet two Perſons may be admitted to one Prebend when 'tis void, if it be ſufficient for the Maintenance of both of them ‖, but not otherwiſe; tho' I think, this Concluſion to be contrary to another Text of the Law *, which ſays, That a Prebend ſhall not be divided into two. Though a Prebend ought not to be promis'd before it becomes void; yet when it becomes void, it may well enough be promis'd without any Inconvenience to the Church; and then it ought to be fill'd up and collated to within ſix Months †. A Perſon may have the Profit of a Prebend by the Papal Law, tho' he be not a Canon of the Church, as a Pariſh Prieſt and the like ‖; and theſe were called *Parochial* Prebends: But then ſuch Perſons having a Pariſh Church annex'd to their Prebends, ought to put in a Vicar, and reſide at the greater Church himſelf *.

† 21 Q. 1. 1. 2. 3 & 4.

‖ 70 Diſt. 2.

* 21 Q. 1. 3.

† 70 Diſt. 2.

‖ Hoſt. in c. 29. X. 3. 5.

* 70 Diſt. 2.

† X. 3. 8. 9.

‖ X. 3. 5. 20 & 26.

* X. 3. 5. 8.

† X. 3. 8. 2.

‖ X. 5. 5. 4.

* X. 3. 5. 30.

Of

Of a Proctor and his Office, &c.

A *Proctor* is a Name of a large and general Signification, including all ſuch Perſons as have the Concern of other Mens Affairs committed to their Care and Direction: Wherefore, under this Title I ſhall not only treat of ſuch as have the Management of Buſineſs *Extra-judicially*, but even of ſuch Proctors to whoſe Direction the Care of *Judicial* Cauſes is committed. And, *Firſt*, Of *Judicial* Proctors, as they ſupply the Place of other Men in the Buſineſs of Law-Suits, and Judicial Pleadings: And of the others I ſhall diſcourſe hereafter in their proper Place. Now a Proctor conſtituted in Judicial Matters is ſometimes known by one Name, and ſometimes by another, according to the Diverſity of Affairs entruſted to him; and likewiſe in reſpect of the ſeveral Perſons that employ him: For if one Perſon ſends another to the Court to excuſe his Abſence only, he is in *Latin* ſtiled an *Excuſator*; and ſuch a Perſon being ſent without a Commiſſion or Proxy, does not differ from a Meſſenger, tho' otherwiſe there is a wide Difference between a Proctor and a Meſſenger. But if any one undertakes the Judicial Defence of another without a Proxy or Mandate, or not being requeſted thereunto, he is then ſtiled a *voluntary Defenſor*: And ſometimes an Advocate himſelf is called a *Defenſor*.

A *Judicial* Proctor then is he, that has the Managem nt of another Man's Buſineſs committed to him in Law-Concerns by the Warrant and Authority of his Client or Principal *, which we in *Engliſh* call a *Proxy*, and is the ſame as a Warrant or Letter of Attorney. I ſay *another Man's Buſineſs*, becauſe he who tranſacts his own Buſineſs is no Proctor, tho' he does it by the Perſwaſion and Advice of another: And I ſay by the Warrant and Authority of his Client, becauſe a Proctor that has not a *Mandatum* or Warrant, is not admitted in the Plaintiff's Name †, if the Defendant diſſents thereunto, unleſs ſuch Proctor appears *pro conjunctâ Perſonâ*, as I ſhall ſhew by and by. So that a Proctor may be a *true* or a *falſe* Proctor: The latter being he, that has no Proxy or Mandate to act by, or (at leaſt) a very inſufficient one. Now Proctors are ſuch either by the Judge's Order at the Requeſt of the Parties themſelves‡, or elſe become ſuch by the Act and Ratification of private Men ‖; and every one, that is not prohibited as a Pupil or Minor is, may conſtitute a Proctor. But if a Pupil or Minor have no *Guardian* or *Curator* aſſign'd them, they may conſtitute a Proctor in Reſpect of *Extra-judicial* *, tho' not in Reſpect of *Judicial* Matters. But a *Syndick* of a Corporation cannot conſtitute a Proctor before Conteſtation of Suit or Iſſue joyn'd †, nor can a *Guardian* or *Curator* do it till that Time; becauſe they are till then made Principals in the Suit ‡: But they may conſtitute a Perſon called an *Actor* or Agent for themſelves‖.

Heretofore it was not lawful in all Cauſes to ſue and act by a Proctor, but only in ſome certain Caſes. But afterwards the *Imperial* Law decreed *, for the Advantage of Litigants, that all Men might in Civil

* D. 3. 3. 1.

† X. 1. 37. 1.

‡ Gloſſ. & Dd. in l. 1. D. 3. 1. 1.

‖ Gloſſ. & Dd. l. 9. C. 2. 19. * D. 3. 3. 43. 3.

† C. 2. 13. 8. & 22. D. 3. 3. 74.

‡ C. 2. 13. 11. in fin.

‖ D. 50. 17. 123. * C. 2. 13. 28.

or Pecuniary Cauſes litigate by their Proctors; to the end that a Perſon who could not attend his own Cauſe thro' Age, Sickneſs, Travelling, Unskilfulneſs in Law-Matters, and the like, might have his Abſence ſupply'd and reliev'd by another Perſon: And the *Civil-Law* compels all Perſons of high Birth and Station in the World to conſtitute a Proctor, looking upon it as a very indecent Thing for Men of high Rank and Dignity to be preſent at the noiſy Brawlings of Lawyers in Courts of
*C. 2. 13. 25. Judicature, and to manage their Suits in their own Perſons *. So that the uſe of Proctors was firſt introduc'd *in Obſequium Judicii* to the end aforeſaid. And in order to have a Proctor *ad lites* admitted and heard as ſuch, he ought in the firſt Place to exhibit his Proxy and prove the ſame; and if there be any doubt about it, he ought to give Caution
† D. 3. 3. 40. 2. *de Rato* †, unleſs he be the Son of him in whoſe Name he appears in Judgment, or be his near Relation, in which caſe he ſhall be admitted *ſine Mandato*. If there be more Plaintiffs than one in a Cauſe they may all of them (if they pleaſe) conſtitute one and the ſame Proctor.

But tho' Pupils and Minors under Twenty five Years of Age cannot
‡ C. 2. 13. 11. by the *Civil-Law* conſtitute a Proctor *ad lites* ‡; yet they may do this well enough even by that Law, if they have their *Guardian* or *Curator*'s Conſent to this end. But if a Proctor appointed by a Minor ſhall obtain a Sentence in the Suit in Favour of him, ſuch Sentence ſhall ſubſiſt, notwithſtanding ſuch Prohibition; becauſe, in Matters managed with Succeſs, want of Age ſhall not prejudice a Minor, leſt that which was
† D. 1. 3. 25. introduc'd for his Advantage ſhould redound to his Diſadvantage †. But, according to ſome, a Sentence thus given in Favour of a Madman without his Curator's Appointment of a Proctor, is not valid. For tho' Pupils and Minors are in ſome Reſpects compar'd unto Madmen, yet there is a vaſt Difference between them: For Minors have ſome Judgment and Underſtanding; but Madmen have none, being entirely depriv'd of their Senſes during the Courſe of their Madneſs. So 'tis no Wonder, that if they cannot make a Contract or ſtand in Judgment, they ſhould
‡ D. 42. 1. 9. have a Sentence in Favour of them revers'd as invalid ‡.

A Proctor or Syndick after Conteſtation of Suit may ſubſtitute another Proctor or Syndick in their Stead, but cannot do it before Iſſue join'd in the Cauſe; unleſs the Client has in a ſpecial manner by the
*VI. 1. 19. 1. 2 Proxy given them Power of ſo doing *: Becauſe before that time a Proctor is not *Dominus litis*; and without ſuch a ſpecial Proxy the Action cannot be try'd. But 'tis otherwiſe in a Proctor conſtituted *in Rem ſuam*, and not *ad lites*; ſince he may appoint a Proctor before Conteſtation
†VI. 1. 19. 1. 3. of Suit †. A Proctor *in Rem ſuam* is he, to whom another Perſon aſ-
‖ D. 3. 3. 25. ſigns a Right of Action to ſue in his Name ‖. And 'tis the ſame Thing of a Proctor in *Extra-judicial* Matters, who may freely ſubſtitute ano-
VI. 1. 19. 1. 3. ther to do his Buſineſs, without a ſpecial Mandate. It has been a Doubt, Whether a Perſon ſubſtituted by a Proctor after Iſſue join'd be *Dominus litis*? And the better Opinion is in the Negative; becauſe by his not joining Iſſue he has not contracted with his Client. But ſome think, that if a Proctor, to whom a Power of ſubſtituting is given, ſhall before Iſſue join'd ſubſtitute another, and no Exception be made againſt the Perſon ſubſtitued before joining Iſſue in the Cauſe, ſuch Subſtitution is ſo valid, that the Perſon thus ſubſtituted cannot afterwards be ſet aſide: But I
‖ C. 2. 13. 24. am of another Opinion. For the Text ſays ‖, That an Enquiry ought to be made in the Beginning of the Suit, whether the Perſon has a Proxy or not. For if he be a falſe Proctor, no *Judicial* Proceeding can ſubſiſt: And he is equally deem'd a falſe Proctor, who wants a Proxy,

as

as much as he is who receives a Proxy from him who has no Power of giving it.

I proceed in the next Place to conſider, what Perſon may be conſtituted and made a Proctor *ad litem*, and who not. And here I muſt obſerve, that all Perſons may be thus conſtituted that are not particularly forbidden in Law ‡; the Law touching Proctors being a Prohibitory Law. Therefore, *Firſt*, 'tis ſaid, That all Perſons in high Stations of Power are forbidden to give Patronage or Protection to *Litigants*, in Fraud or Oppreſſion of the Adverſe Party. *Secondly*, Women are forbidden to execute a Proctor or Defenſor's Office; becauſe as this is the Office of a Man, it is contrary to the Modeſty of the Female Sex, or (at leaſt) not very ſuitable thereunto *: But a Woman may be a Proctor *in Rem ſuam*, and act as ſuch in her own Cauſe †. *Thirdly*, Soldiers cannot diſcharge a Proctor's Office even *pro Conjunctis Perſonis*; becauſe ſuch Attendance would be an Avocation to them from their Military Exerciſes and Employments ‡: But they may be Proctors *in Rem ſuam*, and act in the Name of their Cohort; or when they ceaſe to be Soldiers, as growing *Veterans*, and the like. *Fourthly*, A Perſon impeach'd or found Guilty of a Crime, cannot be a Proctor, ſo as to manage a Cauſe, till he has purg'd his Innocence ‖: Nor can a Perſon be a Proctor, that purchaſes the Intereſt of Law-Suits, in *Latin* called *Litium Redemptor*; becauſe 'tis contrary to good Manners to bargain for any part of the Intereſt ſubject to a Law-Suit †. And, *Laſtly*, No Madman can be a *Judicial* Proctor thro' a Defect of Mind, and a vicious Underſtanding; nor a Proctor to any other Purpoſes *. But a deaf and a dumb Man may be aſſign'd a Proctor *ad adminiſtrandum*, but not *ad agendum*, for the Management and Adminiſtration of ordinary Buſineſs, but not to ſue and bring Actions at Law †. But a Son under the Power of the Father might be a Proctor both for the Plaintiff and Defendant, as Occaſion ſerv'd; and might conſtitute a Proctor in all Cauſes and Matters, which he could try without his Father's Concurrence ‡.

‡ D. 3. 3. 43. 1.

* C. 2. 13. 18.
† C. 2. 13. 4.

‡ C. 2. 13. 7. & 9.

‖ C. 2. 13. 16.

† C. 2. 13. 15.

* D. 3. 3. 2.

† D. 3. 3. 73.

‡ D. 3. 3. 8.

Some fancy, that a Minor under Twenty five Years of Age cannot be made a Proctor; grounding this Opinion both on the *Civil* and *Canon-Law*. By the *Canon-Law* 'tis certain that he cannot ‖, but by the *Civil-Law* 'tis otherwiſe; tho' this was the Opinion of the old Lawyers, founded on the *Digeſts* *: Where 'tis ſaid, that ſuch a Perſon was not ſo qualified, becauſe he could not be reſtor'd *in integrum* to the Prejudice of the Adverſe Party; and thus the *Judicial* Proceſs would be render'd Eluſory. But the modern is the beſt Opinion, *viz.* That a Perſon under that Age may be a *Proctor ad lites*; provided he be full Seventeen Years of Age. For our Anceſtors thought this Age, which is is ſtiled *full Puberty*, ought to be ſo order'd and ſettled, that a Perſon might then proceed in publick Buſineſs of an inferiour Nature †. Nor is the Law in the Margin ‡ any Bar to it; where 'tis ſaid, that a Son who has not compleated his lawful Age as yet, may for this Reaſon be repell'd by the Judge from the Office of a Proctor: For here the Words *Ætas legitima*, are not taken for the Twenty fifth Year of his Age, but (according to the ſubject Matter of the Law) for the Seventeenth Year compleat, or (as *Cujas* ‖ ſays) for the Eighteenth Year begun. Nor is the Opinion of the Ancients repugnant hereunto; namely, "That "*Judicial* Proceedings may not be render'd Eluſory by the Reſtitu- "tion of a Minor, *&c.*" For that is true, when a Minor pleads his own Cauſe in Judgment, or defends the Cauſes of other Men without a Proxy: But when a Minor manages the Cauſes of other Men by a previous

‖ VI. 1. 19. 5.

* D. 3. 3. 51.

† D. 3. 1. 1. 3.
‡ C. 2. 13. 12.

‖ Lib. 22. Obſ. cap. 16.

previous Warrant or Proxy, his Clients ought to impute it to themſelves if they have committed their Buſineſs to a Proctor, who thro' his Minority is not capable of managing the ſame as it ought to be; nor can they be reſtored *in integrum* on the Score of this Miſmanagement
* D.4.4.23. of ſo young and raw a Proctor *. Therefore, tho' a Minor may be aſſign'd a Proctor, notwithſtanding he has not *Legitimam Perſonam ſtandi in judicio*; yet no Perſon can be compell'd to take on himſelf another's Buſineſs againſt his own Inclination, or to undergo the Defence of an
† C. 2.13.17. abſent Perſon †. And 'tis ſufficient for the Plaintiff to have an Action
‡ D.3.3.45.2. D. 3. 3. 45. *ex Stipulatu Judicati* to compel a Proctor to make good his Damage, if the Proctor ſhall refuſe to defend his Cauſe after a Retainer ‡. But if a Client has given Caution or Security for his Proctor in his Preſence and Privity thereunto, for the payment of the Sum or Matter adjudg'd, the Proctor is ſtrictly bound to undertake the Suit, to defend the Cauſe, and not to deſert it after he has undertaken it. For if he acts contrary
‖ C. 2. 13. 5. hereunto, he ſhall not only loſe the Benefit of the Action ‖, but ſhall even be remov'd from his Procuratorial Office, as a Tutor from his Guardianſhip, who neglects to defend his Pupil or refuſes to give an Anſwer to a *Judicial* Plea.

A Proctor may be appointed to all Cauſes in general, or to one in par-
* C. 2.13.26. ticular alone; provided, ſuch Cauſes be of a *Civil* or *Pecuniary* Nature*: Nor is there any need of the Judge's Leave or Permiſſion hereunto, becauſe the Law it ſelf impowers the *Litigants* on both ſides in Civil Cauſes
† C. 2. 13. 2. to act by their Proctors †, unleſs (perchance) the Quality of the Cauſe will not ſuffer the ſame to be manag'd by a Proctor, requiring the *Litigants* to be preſent, and anſwer perſonally. And in ſuch a Caſe the Judge, being certify'd of the Cauſe thereof, ſhall compel their Pre-
‡ C.2.13.26. in fin. ſence in every part of the Suit ‡. If ſeveral Proctors are aſſign'd or retain'd even without this Clauſe, *viz. Quòd unus ſine altero agere poteſt*, one Proctor may act alone: For when ſeveral Perſons are *ſimply* conſtituted, each of them ſeems to be conſtituted *in ſolidum*. But ſome will have the contrary to be the better Opinion, *viz.* That when ſeveral Proctors are conſtituted, one cannot execute his Proxy without the other. But 'tis otherwiſe (ſay they) if a Man conſtitutes more Proctors than one under this Form, *viz. I conſtitute* Titius *and* Seius, *& utrumque eorum*; for tho' he does not ſay *in ſolidum*, yet theſe Words *& utrumque, &c.* do admit this Interpretation; and each of them is underſtood to be conſtituted *in ſolidum*. A Proctor ought to be cited after Conteſtation of Suit, and not the Client himſelf.

‖ D. 48. 1. 13. In the Proſecution of a publick Crime, *Papinian* ſays‖, the Intervention of a Proctor is fruitleſs; becauſe in Criminal Pleas and Controverſies regularly no Proctor is admitted: And the *Canon-Law* maintains the ſame Doctrine. And this is true, according to each Law, when the Proſecution is commenc'd after a *Criminal* Manner; but 'tis otherwiſe, if the Crime is proſecuted *Civili Modo* in order to inflict a Fine or a pecuniary Penalty. For then nothing hinders, but that the Defendant may anſwer by a Proctor, ſince the Reaſon to the contrary ceaſes; namely, That the Judge's Sentence might not be render'd Eluſory: For, *Ceſſante ratione legis, ceſſat ipſa lex.* For an abſent Perſon may ſuffer a Fine or pecuniary Puniſhment in his Goods, but in his Ab-
* Fachin. lib. 1. Controv. c. 24. &c. ſence he cannot ſuffer a corporal Pain *.

I come in the next Place to conſider what Exceptions will lye againſt Proctors. Now it muſt be obſerv'd, that Procuratorial Exceptions do ariſe as well from the Perſon that conſtitutes a Proctor, as from the Perſon conſtituted, *viz.* That either he has conſtituted a Proctor, who cannot

not make ſuch a Conſtitution, or that ſuch a one has been aſſign'd who ought not: And Exceptions of this kind ought to be made in the beginning of the Suit *; for if they are not then made, they ought not to be propounded after Iſſue join'd †: Which is true (I think) if ſuch Exception does not render the Proceſs, which went before, null and void, as every Exception does that ariſes from a Diſability by reaſon of ſome intrinſick Quality adhering to a Thing. In which Caſe a Pupil, who cannot ſo much as ſtand in Judgment for himſelf, may not be a Proctor: For if he ſhould bring an Action, his Plea would not be valid, tho' this Exception were not propounded. And 'tis the ſame Thing, if a falſe Proctor intervenes, meaning him who has no Warrant or Proxy for his Appearance, or if his Proxy be found inſufficient in Reſpect of the Cauſe or Matter in Controverſy; or, *laſtly*, if his Proxy has been revok'd ‡.

* I. 4. 13. 11.
† C. 2. 13. 13.
‡ C. 2. 13. 24.

Now this Exception *of a falſe Proctor* may be made even after Sentence, becauſe Judgment ought to conſiſt of three Perſons, *viz.* the Judge, Plaintiff and Defendant: For if there be no Plaintiff or Defendant, and no lawful Proctor made in his Stead, the whole paſt Proceeding is null and void. And, conſequently, neither Conteſtation of Suit, nor a Concluſion made in the Cauſe is of any Force to eſtabliſh and confirm the Proceſs ‖. Therefore, if ſuch an Exception be made after Sentence, it is deem'd to have been made in the beginning of the Cauſe, and before Conteſtation of Suit. Hence this Queſtion ariſes, *viz.* Whether Acts done by a *falſe Proctor* may be ratified by a Client after Sentence? Some hold the Affirmative, whether the Sentence be in Favour or againſt the Client, whether the Client be a *Major* or a *Minor*, and whether it be within or after ten Days, it matters not, ſay they. For when any Thing is null and void from a want of Conſent alone, 'tis render'd valid again by a ſupervening Conſent. And, conſequently, this is then the ſame Thing as if the Proxy had been had *ab initio*. So that an Action *ex Mandato* hereby lies as well for a *falſe Proctor*, if he has been at any Expence, as it does for the Client to bring him to an Adminiſtration *. On the contary, others ſay, That this only holds good when the Client ratifies his Proxy before Sentence, and when no Exception of a *falſe Proctor* has been made in the *Interim*: For after a Sentence pronounc'd, or an Exception made, the Client may ratify what has been done to his own Prejudice, tho' not to the prejudice of the adverſe Party, who has purchas'd a Right by a Nullity of Sentence; and the Client of a *falſe Proctor* cannot take this Right from him by his Ratihabition; ſince 'tis not in a private Man to make a Sentence, which is null, to be valid and conſiſtent. Nor can any Streſs or Force be placed in the Defendant's Silence, ſince a Nullity does not prejudice him, becauſe he might make the Exception at any time †,

‖ C. 2. 13. 24.
* Gail. lib. 1. Obſ. 47.
† Fachin. lib. 8. Contr. c. 61.

There is another Exception ſtiled an Exception of *not giving Satisdation* or Security. For if it be a Doubt, whether the Plaintiff has committed his Cauſe or not to ſuch a Proctor, he ſhall be ſet aſide, till he gives Caution by Sureties for his Client's ratifying what he ſhall do in his Behalf in ſuch Cauſe ‡. I ſay, *if there be a Doubt*; becauſe if the Proctor ſwears to the Truth of his Proxy, he is not bound to give this Caution for the Ratification thereof, ſince his Client has ſufficiently declar'd the ſame in his Procuratorial Mandate, *viz. That he will ratify, whatever his Proctor ſhall do for him.* And on the contrary it appears, that if the Proctor has no Proxy given him, he ſhall not be heard as a Proctor, tho' he be willing to give Caution for the ſaid Ratification; unleſs he be what the *Civilians* ſtile *Conjuncta Perſona*, who may try a

‡ C. 2. 13. 8.

Cauſe without a Proxy or Mandate. Formerly all ſuch were term'd
* D. 3. 3. 35. *Conjunctæ Perſonæ* as are enumerated in the Law quoted in the Margin *. But now it depends on the various Cuſtoms of each Country, who ſhall
† Coſtal. in l. be ſo ſtiled †. But a Husband is ſurely *Conjunctiſſima Perſona*, and in
35. D. 3. 3. a *Prejudicial* Proſecution of his Wife's Affairs he may be a Proctor without a Proxy; becauſe 'tis *tacitly* underſtood to be given to him: And this he may do in all Matters for his Wife, unleſs he has once receiv'd a Proxy from her in ſome Suit or other; for, by ſuch an *expreſs Proxy*, his *tacit Proxy* ſeems to be taken from him in all other Suits
‡ C. 2. 13. 21. and Matters whatever ‡. Yet in this Caſe, wherein a Husband tries a Cauſe for his Wife without a Proxy, he muſt give Caution that his Wife ſhall ratify the Matter; or if his Wife be ſummon'd, he ought to
‖ C. 2. 13. 2. & 21. give Security for his Wife's ſatisfying the Judgment ‖, unleſs (perchance) the Suit be on the Score of her *Paraphernalia*, or Dower. For in this Caſe the Wife ſhall be admitted without Security, ſince he has the Adminiſtration of Things veſted in him as being in a Civil Senſe the Pro-
* C. 5. 12. 3. prietor thereof *. But here in *England* this Diſtinction of Husband and Wife is not made uſe of; for in all Civil Cauſes here the Husband and Wife are deem'd as one Perſon. Moreover, the Defendant's Proctor, in *Latin* often ſtiled *Defenſor*, is not admitted even with a Proxy, unleſs he gives Caution by Sureties *de Judicato ſolvendo*; for no one can be a
† C. 2. 13. 12. Defender of another's Cauſe without ſuch a Caution †: But yet the Defendant's Proctor is not bound to ſwear to the Truth of his Proxy; and herein the Defendant's Proctor differs from the Plaintiff's.

Both the Plaintiff's and Defendant's Proctor ought ſtrictly to obſerve
‡ C. 2. 13. 10. the Limits and Bounds of their Authority ‡, and if either of them ſhall do otherwiſe than in their Commiſſion warranted and directed to do, their reſpective Clients ſhall not be oblig'd to ratify and confirm the ſame. But if a Proctor ſhall only act according to the Inſtruction of his Proxy, the Client is bound to ratify the ſame; and a Sentence pronounc'd againſt a Proctor ſhall bind his Client, as being valid. But the Client may have an Action *ex Mandato* againſt his Proctor, if he acts
‖ D. 3. 3. 10 & 42. 1. fraudulently or deceitfully by him ‖. A Proctor *ad lites* may commence and propound an Action, exhibit a Libel, give in *Exceptive* Matter, conclude in the Cauſe, hear Sentence, appeal from it, *&c.* But he cannot enter into Pacts, References and executive Contracts, nor pray Reſtitution *in integrum*, nor give or receive an Oath, *&c.* becauſe in theſe and the like Caſes, beſides his general Warrant, he ought to have
* D. 3. 3. 60. a ſpecial Proxy *. Therefore, if he acts in ſuch Affairs as theſe, he ſhall be ſaid to exceed the Bounds of his Commiſſion; and, conſequently, his Client is not bound to ratify his Proceedings herein. Nor ought a Proctor *ad Negotia* to ſell or alienate the Effects of his Client by a
‡ C. 2. 13. 16. general Proxy *omnium bonorum* ‡, unleſs they are ſuch Fruits or Effects
‖ D. 3. 3. 63. as may eaſily be ſpoil'd by keeping ‖. But he who has a ſpecial Proxy or general Commiſſion with *free Adminiſtration*, may ſell his Clients Goods or Eſtate, provided he does it *animo adminiſtrandi*, and not *donandi Cauſâ*. He may alſo make Pacts and Agreements, *&c.* provided it be without any Diminution of the Patrimony; and give an Oath, make a Demand, barter one Thing for another, pay Money, and (in general) do all Things which his Client or Principal may do *. And
* D. 3. 3. 54. & 63. tho' the Proctor ſhould not have a Commiſſion for ſo doing; yet what he does ſhall be valid from his Client's Ratification of it: For ſuch
† C. 2. 13. 19. Ratification is Equivalent to a Proxy †. And much more, if a Man be a Proctor *in Rem ſuam*. And an Action lies for him, becauſe he is here in the Place of his Principal, and may lawfully tranſact and do all Things

Things as his Principal may do *: And herein he differs from a Proctor not made *in Rem ſuam*, becauſe he cannot recover the Expences which he has been at in obtaining his own Right, according to *Faber* †.

* D. 3. 3. 61.

† Cod. h. t. Defin. 20.

But ſome Things ought neceſſarily to be expreſs'd in ſome Kinds of Proxies, as to contract Marriage, take the Oath of Calumny, demand a Debt, to pray Execution of a Sentence, Taxation of Expences, Reſtitution *in integrum*, &c. otherwiſe the Proctor cannot act, if ſuch Reſtitution be *principally* and not *incidently* pray'd ‡. A Proxy may be revok'd before Conteſtation of Suit, without any reaſonable Cauſe aſſign'd: For the Client may attend the Cauſe himſelf, eſpecially if he be jealous of any fraudulent Dealing in his Proctor ‖. But if a Proctor has by his Proxy a Power to ſubſtitute another Proctor, he cannot revoke a Subſtitution made by him, after the Perſon ſubſtituted has taken the Subſtitution on himſelf, tho' he does not make uſe of the ſame, unleſs he has alſo a Power granted him of revoking ſuch Subſtitution. But if a Perſon be made a Proctor in ſeveral Cauſes, and in one of theſe Cauſes makes a Subſtitution, he does (notwithſtanding) remain a good Proctor in all the other Cauſes ‖.

‡ Mynſ. cent. 2 Obſ. 26.

‖ VI. 1. 19. 2.

‖ VI. 1. 19. 3.

As ſoon as a Proctor has finiſh'd his Office or Buſineſs, an Action *ex Mandato* lies according to the *Civil-Law* *, in order to compel a Reſtitution of whatever he has received from or out of the Suit, tho' received thro' a Miſtake, or by the Iniquity of the Judge. He ſhall likewiſe hereby be compelled to reſtore all ſuch Writings and Inſtruments as he had concerning the Cauſe; and be obliged to make good whatever Damage his Client has ſuſtain'd by his Neglect or Deceit †. And by a croſs Action of the ſame Kind, a Proctor may recover his lawful and honeſt Charges ſpent in the Suit *bonâ fide* ‡; or if he has paid any Money, or engag'd himſelf in any Bond on his Client's Account, he may do the ſame. But if he ſuffers any Penalty hereby thro' his own Default, he ſhall not recover that ‖, nor the Coſts he has been at as a Proctor *in Rem ſuam* *.

* D. 3. 3. 42. 1.

† C. 2. 13. 10.

‡ D. 3. 3. 42. 2.

‖ D. 3. 3. 46. 4. 5 & 6.

* D. 3. 3. 42. 2.

If a Proctor commits any Iniquity in his Office, his Client is no otherwiſe anſwerable for the ſame than as he particularly ratify'd or commiſſion'd the Fact †: But a *Curator*, *Guardian* or *Proctor in Rem ſuam* obtaining an unjuſt Demand do bind themſelves in their own Perſons. Thus if I ſell to *Titius* an Eſtate of Inheritance given me; and making him my Proctor do aſſign over to him all my Actions (for Incorporeal Rights cannot otherwiſe be transferr'd) to the end that he ſhould ſue in my Name, and pay all Charges tho' to his own Behoof, and not to my Damage, ſuch Perſon is ſaid to be a Proctor *in Rem ſuam*. A Proctor *ſimply* conſtituted ſhall not prejudice his Client by virtue of ſuch *ſimple* Proxy, tho' he ſhould ſue an unjuſt Demand in his Client's Name: And this is true (I think) not only in a *ſimple*, but alſo in a general Proxy *cum liberâ poteſtate*. But tho' a Proctor be fully made with a free Power of doing all Things without Controul; yet he ought not to ſue an unjuſt Demand on his Client's Behalf, as being not bound thereby: Becauſe, in a Proxy how general ſoever it be, only ſuch Powers are deem'd to be granted as relate to the Management of his Concern. Nor can a Proctor with a general Proxy do ſuch Things as require a ſpecial Warrant, unleſs he be a Proctor with a free Power: But if a Proctor has a general Power, he may do all Things which his Client might do in his own Perſon; provided there be no Fraud in the Caſe ‡.

† D. 3. 3. 27. C. 2. 13. 3. Salycetus ibi.

‡ D. 3. 3. 35. 2. D 3. 3. 46. 4. X. 2. 16. 1.

As a Proctor has the Management of the Buſineſs of particular Individuals; ſo a *Syndick* manages the Affairs of aggregate Corporations ‖: And

‖ D. 3. 4. 1.

And that there is this Difference between a Proctor and Syndick appears from the Diverſity of Titles in the *Civil* and *Canon-Law*; for if there was no Difference, there would be no Diverſity of Titles. The *Greeks* indeed ſtile thoſe by the Name of *Syndicks*, who undertake any perſonal Employment, as well as thoſe the Litigants make uſe of for the Management of their Cauſes: But in Propriety of Speech, according to the *Civil-Law* *, Syndicks only manage the Affairs of Colleges or Secular Corporations. But this Diſtinction is often confounded, as appears from the Title of a Syndick in *Gregory*'s Decretals here quoted †; where the Word denotes him who manages the Cauſe of a Convent or Eccleſiaſtical Body Politick. And as this Perſon is commonly called a *Syndick* in Secular Corporations; ſo in Eccleſiaſtical ones he is often in *Latin* term'd an *Oeconomus*: For Religious Perſons have their Syndick or *Oeconomus* to manage the Cauſes of their Monaſteries, with an appointed Salary ſettled on him ‡. A Proctor and a Syndick differ from the *Adminiſtrator* of a State or Republick; the one being employ'd in the Adminiſtration, and the other in the Law-Suits thereof: But a Proctor aſſign'd by a Corporation of Townſmen is in *Latin* called *Actor Univerſitatis*; becauſe he intervenes in the Buſineſs of the Publick, and not of particular Men. A Syndick may be aſſign'd to all Buſineſſes, and to all Cauſes, whether they be Civil or Criminal, preſent or future, and the like ‖; but then it ought to be by a ſpecial Authority.

* D. 3. 4. 1.

† X. 1. 39. 1.

‡ X. 1. 39. 1.

‖ D. 3. 4. 10.

A Proctor, Syndick, and the like, ought to be well inſtructed in the Cauſe, and if not, it ought to be imputed to his Client. For if a Proctor or Syndick ſhould upon their Examination ſay, *That they deſired longer Time to conſult their Client*, a Term ſhall not be aſſign'd them without a very juſt Cauſe ſubſiſting *; or if either of them ſhall ſay, *That he is ignorant of thoſe Things, touching which he is interrogated, and that they belong to the principal Matter in the Suit*, he ſhall be condemn'd in the Expences made on this Account †, unleſs it be upon ſome new and emergent Article, or ſomething his Client cannot be charged with, wherein he did not inſtruct his Proctor.

*C. 2. 13. 28.

† Hoſtienſ. & Andr.

As a Proctor is conſtituted by mutual Conſent, ſince no one can be ſuch againſt his Will, unleſs it be in a Caſe of great Neceſſity, when no voluntary Proctor can be found to appear; ſo is his Proxy revok'd by the like Conſent; and his Client may revoke the ſame at pleaſure before Conteſtation of Suit (as before related) without any Cauſe ſhewn ‡, unleſs he be a Proctor *in Rem ſuam*, who ſtands in the place of the Principal to all Events. But 'tis otherwiſe after Conteſtation of Suit; for that the Matter then ceaſes to be *Res integra*: And the Proctor being thereby made *Dominus litis*, his Proxy cannot be revok'd without a juſt Cauſe given ‖. And theſe are ſaid to be juſt Cauſes for ſo doing, *viz.* an unfit Age for the Buſineſs of a Proctor, want of Health in him, evil Suſpicions of his Integrity, other Employments, and the like, as mentioned in the *Digeſts* *. And tho' the Effect of ſuch a Revocation is, that ſuch Proctor ſhall not meddle in the Buſineſs for the future; yet ſuch Things as he did before ſuch Revocation, remain firm and valid. A Proxy may be revok'd *vivâ voce*, tho' it was made in Writing. A Proctor's Mandate or Warrant expires alſo by his own Death, but not by a Client's Death, if Suit has been conteſted, or Iſſue join'd by or with the Proctor †, which the *Civilians* ſtile *an Acceptance of Judgment*. And, *laſtly*, this Proxy ends on a Determintion of the *Inſtance* by a diffinitive Sentence. For a Proctor cannot be compell'd to give his Aſſiſtance in the *ſecond Inſtance*, otherwiſe call'd a Judicial Appeal, having already fulfill'd the Truſt undertaken

‡ D. 3. 3. 31.

‖ C. 2. 13. 22.

* D. 3. 3. 16 & 17.

† C. 2. 13. 23.

dertaken by him ‡. But if the Proctor ſhall be conſtituted *ad integram Cauſam*, and be caſt in the Suit, he ſhall be oblig'd to appeal in his Client's Behalf: For tho' the Judge has diſcharg'd and finiſh'd his Office, by pronouncing Sentence; yet the Proctor is not adjudg'd to be at Liberty by a Sentence pronounc'd, ſince he has not gone thro' the whole Cauſe, to which an Appeal is an *Appendix* *. For the Proctor ought to appeal within ten or fifteen † Days after Sentence, or (at leaſt) to give his Client Notice that Judgment is gone againſt him. But ſuch Proctor is not forc'd to proſecute the Cauſe of Appeal to its Extremity, becauſe the Proſecution thereof has no Dependance on the Appendix, or what is connected to the *firſt Inſtance*.

‡ C. 2. 13. 17.

* C. 2. 13. 27.

† 24 H. 8. c. 12.

Of Procurations, Synodals and Pentecoſtals.

PROCURATIONS, in *Latin* ſtiled *Procurationes*, are certain Sums of Money which Pariſh-Prieſts pay Yearly to the Biſhop or Archdeacon *ratione Viſitationis* ‖: For ſo they were anciently paid, tho' now they are demanded whether the Biſhop or Archdeacon viſits or not in Perſon. Theſe *Procurations* were anciently paid in neceſſary Victuals and Proviſions made for the Reception and Entertainment of the Viſitor and his Retinue, but were afterwards turn'd into Money. *Vallenſis* defines a * *Procuration* to be an exhibiting and providing of all Neceſſaries for an Entertainment, which in reſpect of Viſitation is due from the Church or Monaſtery viſited to him, who (according to his Office) has the Right, Power and Charge incumbent on him of viſiting the ſame, whether he be a Biſhop, Archdeacon, Dean, or even the Pope's Legate. And there is a *Memorandum* in the Year 1290. that the Biſhop of *Worceſter* did on the Feaſt of St. *Luke* the Evangeliſt (being *Wedneſday*) take Procuration in Meat and Drink at *Bordeſly*, and lodge there all Night †. See *Stevens*'s Hiſtorical Diſcourſe of *Procurations* and *Synodals*, printed *Anno* 1661.

‖ X. 3. 39. 25.

* De Conſ. §. 3.

† Ciff. fol. 226.

In *England* the common Uſage was for the Archdeacon to receive for himſelf and Retinue Seven Shillings and Sixpence, *viz.* for his Horſe Eighteen Pence, and for every other Carriage with its Rider Twelve Pence: But a Cuſtom does not limit the Sum of Procurations, ſince we ought herein to have Recourſe to what is laid down in the *Extravagants* ‡. In the Time of *Hubert* Archbiſhop of *Canterbury*, which was about the Beginning of King *John*'s Reign, the Canons of the Church took Care †, "That Biſhops ſhould not be burthenſome to "their Clergy by the Number of their Attendants in their Viſitations, "which were then Parochial, and not from Deanery to Deanery, as at "preſent; and the Number then allow'd being twenty or thirty Horſe, "it was thought too heavy for the Clergy to bear ‖:" And, therefore, by Degrees it was thought fit to turn that Charge into a Certainty, which was the Original of our preſent Procurations. The Council of *Cavaillon* in *France* * fix'd no Sum, but only deſired the Biſhops not to be burthenſome to the Clergy in their Parochial Viſitations. And

‡ Extr. lib. 3. de Cenſ.

† Stilling. Eccl. Caſes, pt. 1.

‖ X. 3. 39. 6.

* A. D. 831.

Lindwood ſays, the ancient Procurations here in *England* were *a Day and a Nights Entertainment*, which became afterwards to be a Cuſtomary Payment in Money*. And by a Provincial Conſtitution in *Lindwood*†, no one ought to receive from any Church, or demand any Procuration to be paid him in reſpect of his Viſitation without a diligent Viſitation thereof, which he ought to make by a Perſonal Enquiry, and by an effectual Inſpection of ſuch Things as ought to be inſpected and enquired into by him: Which plainly ſhews, that Procurations were not due without a perſonal Viſitation †. And then the Conſtitution goes on and ſays, That if any one has a Mind to viſit ſeveral Churches in one Day, he might cauſe all and each of the ſaid Churches thus viſited by him in one Day, ratably to contribute only one Procuration in Money or Victuals for them all; and herewith he ought to be content, according to the *Canon-Law* ‡. And the Reaſon the Gloſs aſſigns for this is, becauſe the Viſitation is the Principal, and the Procuration paid is only an Acceſſory: And, therefore, an entire Procuration due from ſeveral Churches ought not to accede to a Viſitation of them; ſince the Acceſſory ought not to be greater than its Principal ‖. By Money in this Caſe the Conſtitution does not only mean Money in Tale, but it may be underſtood of any certain Meaſure, which conſiſts *in aridis vel liquidis*, according to a Compoſition or Cuſtom preſcrib'd, or in giving any Thing elſe according to a Quantity rated and taxed; or without any Taxation at all; provided the ſame be moderated according to the Text of the *Canon-Law* *.

* Lib. 3. Tit 22. cap. 1. v die Viſitationis jut ſup. cap. 5

† X. 3. 39. 23.

‡ VI. 3. 20. 3. 2

‖ VI. 5. de reg. Jur. 42.

* VI. 2. 20. 3.

† X. 3. 39. 6. We read in the Books of the *Canon-Law* †, that ſome Prelates were become ſo very Burthenſome in their Viſitations by their ſtately and pompous Retinue, that the Pariſhioners were compelled to ſell the Plate and Ornaments of their Churches to maintain the Pride and Grandeur of ſuch as viſited them: And, therefore, the Council of *Lateran* ‡, to limit this Exceſs in Procurations, decreed, That no Archbiſhop in his Provincial Viſitation ſhould carry with him more than forty or fifty Horſe, a due Regard being had to the Diverſity of the Provinces, and the Eſtates of the Churches they viſited; and a Biſhop ſhould not travel with more than twenty or thirty; and Archdeacons with more than five or ſeven. A very wiſe Proviſion according to the Exceſs of thoſe Days.

‡ A.D. 1180.

Indeed, it might have been ſome Eaſe to the Clergy, if the Number of Diſhes had been limited as well as their Retinue; for the Viſitors gaped after *ſumptuous Entertainments*, as the Canon tells you, tho' they were directed only to take a Competency, and that with *Thankfulneſs* too: And ſuch a great Equipage being a heavy Expence to the poor Clergy, (for they might ſtay a Day and a Night as aforeſaid) Pope *Boniface* the Eighth to remedy this Miſchief made a Conſtitution ‖, That the Viſitor might receive Money inſtead of Procurations in Victuals, if the Perſons viſited were willing to pay the ſame, and not otherwiſe. But ſtill the Clergy were oppreſſed by the Exorbitant Demands of the Viſitors; for tho' this Canon made it lawful for them to compound for Money inſtead of Victuals, yet the Sum was not limited. Therefore about ſixteen Years afterwards * a Complaint was made in the Council of *Vienna*, under Pope *Clement* the Fifth, but it was not redreſs'd till about Twenty ſix Years afterwards †, *viz.* by a Decree made by *Benedict* the Twelfth already quoted; whereby the Sum was proportion'd according to the Quality of the Viſitors, and the Circumſtances of the Perſons viſited ‡; but ſtill leaving them at liberty to pay ſo much in Money or Victuals. And this voluntary Payment being continued in many Places, in Time grew into a Cuſtom, by which the *Quantum* is now ſettled and paid at this Day. Indeed there was a Conſtitution made by Pope *Innocent* the

‖ A.D. 1295.

* A.D. 1311.

† A.D. 1337.

‡ X. 3. 39. 25.

The Fourth *, and afterwards ratify'd by a General Council at *Lyons* under Pope *Gregory* the Tenth †, forbidding (under a Malediction) the taking of Money in lieu of Procurations even from ſuch as were willing to pay the ſame: And the ordinary Penalty in this Caſe againſt Viſitors of any Rank inferiour to Patriarchs, Archbiſhops or Biſhops, that ſhould preſume to receive *Procurations* otherwiſe than in *Victuals*, was Suſpenſion *ab Officio & Beneficio*; but Patriarchs, Archbiſhops and Biſhops were obliged within a Month's Time to reſtore Twofold of what they had received in Money to the Church from whence they had taken it, under Pain of an Interdict *ab Ingreſſu Eccleſiæ*. But this Penalty (I think) was only inflicted on them, when they received Money in lieu of Procurations without Viſiting: For if they viſited the Church, they might make the Perſon viſited eaſy by a Compoſition, and ſo the Canon ſeems to imply; that Council well knowing, that if they receiv'd their Procurations in Money, they would take the Money and never viſit the Church.

* VI. 3. 20. 1.

† VI. 3. 20. 2.

It has at times been ſmartly controverted, Whether Procurations are only due *ratione Viſitationis*, or whether the Payment thereof may be legally demanded without the Act of *Viſiting*, and not excluſively to Archdeacons in the Years of Epiſcopal Viſitations? For if ſo, then the aforeſaid Deſcription which *Vallenſis* gives thereof is not adequate enough to the Nature of the Thing: For as theſe Procurations were anciently exhibited in *Victuals* only, they could not be perform'd without the Act of *Viſiting*. But 'tis now ſuppos'd, that they are and may be otherwiſe due than in reſpect of *Viſitation*; and, therefore, Archdeacons may receive Procurations in the Biſhops *Triennials*, and yet not viſit as being inhibited: For at this time Cuſtom ſeems to have ſet aſide a written Law; and a juſt Claim may be laid to this Eccleſiaſtical Payment of Procurations without any Viſitation at all, which has been the Occaſion of much Miſchief to the Church in letting the Manſe and Pariſh Church go to decay. *Lindwood* ſays ‡, That Time was when Archdeacons had a Right of Viſiting every Year, and ſo accordingly did viſit and receiv'd Procurations *eâ ratione:* And ſometimes they viſit not, as in Biſhops *Triennials*; yet by Cuſtom do and may receive their Procurations. But this ought to be underſtood only of ſome, and not of all Archdeacons. Indeed the *Canon-Law* ſays, that the Archdeacon is to go *Perſonally* to the Place to be viſited, and not ſend another for that Purpoſe: For if he does not go himſelf, he ſhall not receive in *Denariis* the Procurations due *ratione Viſitationis* ‖. But, notwithſtanding this, the Perſon whom he commiſſions for that Purpoſe *nomine ſuo*, ſhall receive the Procurations for himſelf and his Attendants in *Victuals* *.

‡ Lib. 1. Tit. 9. cap. 1. v. *Viſitatione.*

‖ X. 3. 39. 23.

* Dd. in c. 1. X. 3. 39. VI. 3. 20. 3.

But now this Payment is become a certain and ſettled Revenue on the Archdeacon, and 'tis in effect his Subſiſtance, and rated to him in the King's Books, for which he pays Tenths: And in ſeveral Grants of impropriate Rectories theſe Procurations are ſtill left as a Charge upon the Impropriator. And tho' ſome Canons have been formerly made in this Kingdom, forbidding Archdeacons to take Procurations without a perſonal Viſitation; and that they ſhould not preſume to receive Fees or Preſents for not viſiting †: Yet Cuſtom has ſo far prevail'd againſt theſe Canons, that an Archdeacon ought not to be depriv'd of this Profit by his ſubmitting to the Biſhop in his *Triennial* Viſitation, ſince this would be to puniſh him for his Obedience to the Inhibition of his Dioceſan. Therefore, theſe Perquiſites having been enjoy'd for ſo long a Time by Archdeacons, and paid by the general Conſent of the People to them, when

† Lindw. lib. 3. Tit. 22. cap. 1. v. *pro Viſitatione.*

when they do not visit in Person, they may be justly due to them at such Times as they are usually paid, whether they visit by themselves or by their Officials. There ought not to be more than one Procuration paid for the Mother-Church and Chapel thereunto belonging, when they are visited, according to *Lindwood* *: But *Joh. Andreas* †, and other *Canonists*, do positively assert, That every Chapel dependant (if Peopled and of Ability) shall pay its proper Procuration at the usual Times of the Ordinary's Visitation; because the Bishop is to have a Respect to every Individual Member of his Dioceſs ‡. But this is only true, when such dependant Chapel has a Curate proper of its own, and distinct from the Curate of the Mother Church: But 'tis otherwise, when the Rector of the Mother-Church is Parson of them both, and serves the Cure of the said Chapel by a Vicar Temporal, and removeable at Pleasure, as I have already remember'd under the Title of *Chapels* ‖.

* Lib. 3. Tit. 22. cap. 5. v. *una Ecclesia.*

† In c. 4. x. 1. 14.

‡ X. 1. 31. 13.

‖ Pag. 165.

I shall next consider how and in what Courts these Procurations are to be recover'd, if refus'd to be paid; and as to this Matter we ought to consider how the Law stood before the Act of *Henry* the Eighth *, and what Alteration has been made since by that Statute, which enacts, *That all Pensions, Portions, Corrodies, Indemnities, Synodies, Proxies, and all other Profits due out of Religious Lands and Houses dissolv'd, shall be paid to Bishops, Archdeacons, and other Ecclesiasticks, by the Occupiers of the said Lands, if such Ecclesiasticks were seiz'd thereof within ten Years before their Dissolution. And if upon Suits in the Ecclesiastical Court for the same the Defendant be convict, the Plaintiff shall recover the Value thereof in Damages, together with his Costs.* So that from hence it appears, that Procurations, which that Statute stiles Proxies, may be sued for in the Ecclesiastical Courts. And before the making of that Statute they were recoverable in the Spiritual Court and not elsewhere; unless where the Plaintiff claim'd them by Prescription; and then they were triable at the Common Law: But it has since been doubted, whether a Bill in the Exchequer might not be proper in such a Case †; but that must be intended where they have been paid within Time of Memory, and this by Virtue of the *Saving* in the Statute of *Henry* the Eighth ‡, whereby the Monasteries are given to the Crown, and the Lands belonging to them were order'd to be under the Government of the Court of *Augmentations*, which Court is now annex'd to the Exchequer. For there is a *Proviso* in the 34*th* of *Henry* the Eighth above cited, *viz. That if the King had demis'd any of these Lands for Life or Years with a Covenant to discharge the Lessee from the Payment of Procurations*, that the Party claiming *them shall sue in the Court of* Augmentations, *and not elsewhere*; so that it must be now in the Exchequer. But this *Proviso* does not extend where any Lands were granted by him in Fee, but only to such Cases where the King had granted any particular Estates thereof. And, therefore, a Prohibition was deny'd to stay an Excommunication for not paying Procurations upon suggesting this Statute, and that the Party ought to be sued in the Exchequer ‖.

* 34 H. 8. c. 19.

† Hard. Rep. 180.

‡ 31 H. 8. c. 13.

‖ Hardr. Rep. p. 388.

Guilder sued the Plaintiff *Kirton* in the Ecclesiastical Court at *York* for Procurations belonging to him as Archdeacon; and in his Libel declar'd, That for 10, 20, 30 and 40 Years last past there has been paid Six Shillings Annually for the said Procurations by the said *Kirton* and his Predecessors Parsons of *D.* Whereupon *Kirton* pray'd a Prohibition, suggesting, that the said Procuration has not been payable, and denying the Prescription; and so the Ecclesiastical Court cannot have Cognizance of the Prescription, it being properly tryable at the Common Law *.

* Rast. Entr. 483. 2. Roll. Rep. 293.

But

But it was ſaid, That Procurations were payable of *Common Right*, as Tithes are: And no Action will lye for the ſame at the Common Law. And a Preſcription in the Eccleſiaſtical Court may have a different Commencement from what it has at the Common Law; and that a Penſion may be ſued for in the Eccleſiaſtical Court *. The Court herein granted a Conſultation as to Procurations demanded generally: But if the Plaintiff had deny'd the *Quantum*, a Prohibition had been awarded †.

* F. N. B. 151. b.

† Raym. Rep. p. 350.

The next Thing, I ſhall here treat of, is of *Synodals*, which is a Pecuniary Tribute paid by the Inferiour Clergy to the Biſhop; and it is ſo called, becauſe it was uſually paid at the Biſhops Synod or Viſitation: And it differs from Procurations, becauſe thoſe were Penſions, but Synodals are a *Cenſus* or Tribute. Indeed the Word *Synodale* ſeems to have three Significations, as we meet with it in our Books: For, *Firſt*, It is taken and uſed for the Meeting or Synod itſelf. See *Gregory*'s third Epiſtle to the Biſhops of *Almany* and *Baiory*, which *Baronius* cites in the eighth Tome of his Annals about the Year 738. And, *Secondly*, In the *Tripartite* Hiſtory it ſeems to denote the Acts done at a Synod, as well as the Synod itſelf, where mention is made of a Synod of Biſhops aſſembled at *Antioch* out of divers Provinces, who ſent the Emperor *Jovinian* a Copy of the *Nicene* Creed, ſaying, *Hunc Libellum* (meaning the ſaid *Creed*) *in Collectione* Synodalium *Sabini conſcriptum invenimus*. In the ſecond Part of the *Appendix* to the third *Lateran* Council, we meet with Pope *Alexander* the Third's Letter to certain Archdeacons and Deans, reproving them for extorting Money from the Clergy in a frudulent Manner, under different Names: *Et hujuſmodi Exactionem* (ſays that Epiſtle) *ut eam liberius videamini exigere, quandoq; conſuetudinem Epiſcopalem, quandoq;* Synodalia, *quandoq; Denarios Paſchales appellantes*. And in this Senſe the Word is here uſed.

But tho' this Duty was only paid to Biſhops, as appears from this Pope's reprimanding Letter; yet afterwards in Proceſs of Time it became due to Archdeacons, not ſo much *de Jure communi Eccleſiaſtico*, as by Compoſition with, or Grant from the Biſhop. And ſince Epiſcopal Synods have been diſcontinu'd and turn'd into meer Viſitations, this Tribute has been uſually claim'd by, and paid unto Archdeacons at their *Eaſter* Viſitations. Some will have it to be a Contribution towards the Archdeacon's Charges in theſe Dioceſan Synods, they being elected by their Deacons as their Repreſentatives at ſuch Aſſemblies: But with them I cannot agree for many Reaſons. But 'tis now become a Church-due; and the Statute of the 34*th H.* 8. *c.* 19. provides for the recovering the ſame, where 'tis deny'd or neglected to be paid, under the Word *Sinodies*; as it does of *Procurations*: And 'tis fit it ſhould be ſo; becauſe it is valu'd in the King's Books, and a Yearly Tenth is taken from thence.

This Synodical Duty was anciently known by two other Names now grown obſolete: The firſt was ſtiled *Cathedraticum* *, probably from the Original Cauſe thereof, being the Sum of two Shillings paid to the Biſhop by the Inferiour Clergy, as a Token of their Subjection to him *& ob honorem Cathedræ Epiſcopalis* †; and the other was term'd *Synodaticum* ‡, from the Time of Payment, it being at the Synod. *Panormitan* ſays, That this *Cathedraticum* was a Penſion paid formerly to the Biſhop from every Church of his Dioceſs, according to the Cuſtom of the Place; and it began when the Revenues of the Church firſt came to be divided and allotted to ſeveral Miniſtries; for then it was that this Payment was firſt made to the Biſhop by the Benefic'd Clergy

* X. 1. 31. 16.

† 10 Q. 3. 10.

‡ X. 1. 31. 16. Gloſſ. in v. *duos ſolidos*.

within his Dioceſs. *Lindwood* informs us *, That tho' the Payment of the *Cathedraticum* and *Synodaticum* were *Onera Eccleſiaſtica*; yet they were not *Onera Innovata*, but *Onera Ordinaria*, and by Impoſition of Law.

* Lib. 1. Tit. 11. cap. 2. v. *Onĕra Eccleſiaſtica.*

Pentecoſtals, otherwiſe called *Whitſon-Farthings*, were Oblations made by the Pariſhioners to the Pariſh-Prieſt at the Feaſt of *Pentecoſt*, commonly ſtiled *Whitſontide*: But becauſe theſe Oblations were firſt made to the Cathedral Church, and not to the Pariſh-Prieſt, it may be brought as a good Reaſon to ſhew why *Deans* and *Prebendaries* in ſome Cathedrals are intitled to receive theſe Offerings; and in ſome Places the *Biſhop* and *Archdeacon*, as at *Glouceſter*. They were paid to the Mother-Church at *Worceſter* before the Diſſolution of it; and when *Henry* the Eighth endow'd that Church after the Diſſolution thereof †, he reſtor'd them their *Pentecoſtals*; as may be ſeen from the ſaid King's Grant now in the Archives of the Church of *Worceſter*, as is ſaid. Some conceive theſe Annual Payments to be nothing elſe but a Continuance or Repetition of an ancient Penſion, iſſuing out of the Oblations brought by the People to their Churches on the Day of founding or dedicating them to ſome Saint, or at ſome other great and ſolemn Time of Divine Worſhip ‡; and that a Moiety or third Part of them being reſerv'd unto the Biſhop by a Contract made between him and the Founder of ſuch Church, the ſame was ſettled upon the Epiſcopal See, and became payable Yearly at or about the Feaſt of *Pentecoſt*: But afterwards when the Biſhop admitted a Prieſt to officiate in a new built Church, he might appoint the Payment of the *Pentecoſtals* to him who had his Maintenance before out of the common Stock or the Treaſury of the Cathedral or Mother-Church: And where this has continu'd for any length of Time, and has been uſually paid, the Parochial Clergy have a Right of receiving the ſame. Some have fancy'd, indeed, that theſe were the ſame as *Peter-pence* here anciently paid; but that cannot be true, becauſe *Peter-pence* were uſually paid either at the Feaſt of St. *Peter* and St. *Paul*, or elſe on *Lammas-Day*. But theſe *Pentecoſtals* ſeem to be paid on or about the Time from whence they have their Denomination, *viz.* at the Feaſt of *Pentecoſt*. At which Feaſt there was in ſeveral Places here in *England* an Oblation *anciently* made by the Inferiour Churches to the Principal or Cathedral Church; and hence ſome Deans and Chapters (as aforeſaid) come to have *Pentecoſtals*. Theſe Offerings by the *Canon-Law* were and are only due to the Clergy, and interdicted to the Laity *ſub diſtrictione Anathematis* ‖.

† 35 H. 8.

‡ Stev. Hiſt. de Proc.

‖ 10 Q. 1. 13. & 14.

Of a Prohibition, where it ſhall lye and where not.

WHEN any Court exceeds its due Bounds, and acts othewiſe than the Law of the Land will authorize it, there lye in ſome Caſes Writs at the Common Law, which are ſtiled Writs of *Prohibition*, or *Indicavit*; and in other Caſes a Writ introduc'd by a Statute, called the *Statute* of *Proviſion* and *Præmunire* *: And tho' a *Prohibition* and a *Præmunire* do lye as well againſt the Temporal

* 27 E. 3. c. 1.

poral as the Eccleſiaſtical Courts, if they tranſgreſs their Juriſdiction; yet I ſhall here confine my ſelf to ſpeak only of ſuch *Prohibition* and *Præmunire* as reſpect the latter. And firſt of a Prohibition. Now a *Prohibition* in this Senſe is a Charge by the King's Writ directed to the Spiritual Court, forbidding them to proceed further in any Cauſe there depending, upon a Suggeſtion that the Cognizance thereof does not belong to the ſame; and likewiſe forbidding them to hold Plea in ſome Point, which a Man is ſuppos'd to deal in beyond his Juriſdiction, or otherwiſe than the Law will warrant him ſo to do ‖: And thus 'tis moſt commonly taken for that Writ which lies for one that is impleaded in the Court Chriſtian for ſome Cauſe belonging to the Temporal Juriſdiction, or the Cognizance of the King's Courts of Common-Law; whereby the Party and his Counſel, as well as the Judge himſelf and the Regiſter, are forbidden to proceed any further in that Cauſe. And every Prohibition is either a Prohibition of Law, that is to ſay, ſuch a Prohibition as is given by the Law it ſelf, or elſe it is a Prohibition of Man, as where the Miniſtry of a competent Judge is requir'd and made uſe of. Every Statute *Prohibitory* is a Prohibition of Law, that is to ſay, it carries a Prohibition along with it; and 'tis a Contempt to commence or manage a Suit contrary thereunto *.

‖ F. N. N.

* 21 E. 3. 29.

In a Prohibition we are to conſider, in what Matter, and at what Time it lies not; where, and when it lies; and how it ceaſes or loſes its Force. For the firſt 'tis provided by the Statute †, and the King there determines thus, *That no Prohibition ſhall go out of* Chancery, *but in ſuch Caſe where he has the Cognizance, and of Right ought to have it.* And, therefore, *Thirning* ſaid ‡, "That when we ſee that the Juriſdiction belongs not to us, we will grant a Conſultation." So that if the Matter be *meerly* Eccleſiaſtical, there lies no Prohibition. *Bracton* ſays ‖, That a Prohibition does not lye after Sentence given in any Cauſe, unleſs it be in ſome particular Caſes: And the Statute ordains, that there ſhall lye no more than one Prohibition in any one Cauſe. As to the ſecond Point, a Prohibition is not to be granted, till by ſight of the Libel there appears ſufficient Cauſe for granting it: For *Henkſtone* held *, That by the Statute *de regiâ Prohibitione, &c.* a Man ſhall not have a Prohibition before Conteſtation of Suit, or Iſſue join'd in the Spiritual Court, *viz.* till a Libel be exhibited, and the Defendant put to anſwer to it, and till this is certify'd to the *Chancery* by a View of the Libel, which *Forteſcue* granted to be true. But this admits of two Exceptions. The firſt is, when a Copy of the Libel is deny'd to the Defendant, contrary to the Statute †: For hereon we find a Prohibition granted ‡, *That the Ordinary ſhould ſurceaſe till a Copy of the Libel was deliver'd according to the Statute* here cited‖. A ſecond Exception is, where a Surmiſe or Suggeſtion is made, That the Suit in Truth is for other Matters than are expreſs'd in the Libel: For a Perſon, acding to *Brooks* *, may have a Prohibition in the King's Bench on ſuch a Surmiſe. As for Example, when a Man ſurmiſes the Suit to be in *Fact* for great *Timber*, tho' the Tithe demanded in the Libel be for Coppice-Wood, or *Sylva Cædua*; yet *Brooks* ſays, 'tis otherwiſe in the Common Pleas.

‖ lib. 5. Tract. 5. c. 3. 4. 5. 6. 7. &c.

* 31 H. 6. 14.

† 2 H. 5. c. 3.
‡ M. 4. E. 4. 17.
‖ 2 H. 5. c. 3.

* Tit. Prohib. n. 17.

A Prohibition may be granted either in reſpect of ſome of the Parties to the Suit, or in regard of the Judge before whom the Suit is, or for the very Matter itſelf in Judgment. In reſpect of the firſt of theſe three Reaſons, it was held †, That if a Parſon of a Church ſues another Parſon's Farmer or Servant for Right of Tithes, being not ſuch as can try the Right, a Prohibition may be granted; as I ſhall further obſerve under

† T. 12. H. 7. fol. 22.

under that Title. In reſpect of the ſecond Reaſon it may be granted either for the Judge's Contempt in not delivering the Copy of a Libel, as aforeſaid; or becauſe he has in Truth no Juriſdiction *. Touching the third Reaſon, a Prohibition will lye, if the Matter be Temporal, that is, if it be ſuch as there lies a Redreſs for by ſome Writ from the Court of *Chancery* †. Yet this has two Exceptions, *viz. Firſt*, Whereever the Spiritual Court holds Plea quite to another end. For when one and the Self-ſame Caſe is debated before Judges Spiritual and Temporal (as for beating of a Clerk) there the Statute is, that (notwithſtanding the Spiritual Judgment) the King's Court alſo ſhall debate it. For both theſe Cognizances may well enough conſiſt together; as the one tends to the making of Amends, and the other to an Excommunication. The ſecond Exception ſeems to be when one Clerk ſues another in the Spiritual Court for the Goods of his Houſe ‡: For in ancient Times one Abbot might thus ſue another, and no Prohibition would lye. But a Prohibition lies, where a Matter that is Originally of Eccleſiaſtaſtical Cognizance at laſt brings a meer Temporal Matter with it into Debate to be determin'd in the Spiritual Court. Therefore, it was held, That as ſoon as it appears, that the Right of Tithes comes in Debate, the Lay-Court ſhall ceaſe, and be ouſted of its Juriſdiction ‖; and the ſame Law is of the Spiritual Court: For if it appears, that the Right of Advowſon may come in Debate, the Spiritual Court muſt ſurceaſe, tho' it did not appear at firſt. This may happen (for Example) when a Suit is commenc'd at firſt for Right of Tithes, and it falls out by Depoſitions or otherwiſe, that the Tithes demanded amount to the fourth Part of the Yearly Profit of the Benefice *: In which Caſe 'tis adjudg'd, that the Temporal Court ſhall have Cognizance, in the ſame manner as if the Right of Patronage was principally in demand.

* M. 2. H. 4. fol. 15.

†Stat. de Conſult. 24 E. 1, Dr. & Stud. lib. 2. c. 24.

‡ Fitzh. Proh.

38 H. 6. fol. 1.

* 13 E. 1.

It has been ſaid, That a Prohibition lies where the Party may have his Redreſs by ſome Writ out of the Court of *Chancery*: But a Prohibition lies not only in ſuch a Caſe, but even in a Cauſe where no Action at all lies in the Temporal Courts, if the Matter be ſuch, as that it never did of Cuſtom belong to the Eccleſiaſtical Court †: As when the Spiritual Court would hold Plea againſt an Executor upon a bare Contract made by his Teſtator; for the Eccleſiaſtical Court cannot have Cognizance of it, tho' no Action lies for it at the Common-Law. Again, a Prohibition lies, when the Suit tends to determine and give Execution in Temporal Matters; as Money, and the like, being otherwiſe due than by Judgment in the Eccleſiaſtical Court. Therefore, if a Compoſition by Indenture be made by an Ordinary between two Eccleſiaſtical Perſons, that the one ſhall have Tithes, and the other an Annuity with a Penalty annex'd for Default of Payment: The Suit for this ſhall be at the Common Law ‡; tho' the Suit for any Thing that ariſeth upon a Judgment given in the Spiritual Court ſhall be there. For tho' Amends be to be made by a certain Sum of Money; yet this is no neceſſary Cauſe for granting a Prohibition, no more than when the Suit is for Tithes, yet the Condemnation is in Money, being the Value of them ‡; nor when a Pennance is redeem'd by the Party for Money, which may be ſued for in the Spiritual Court. Becauſe when an Offence is done to a Man, 'tis fit he ſhould have Amends for it; and as there is no more proper Amends than Money, whereby every Thing may be valu'd: Therefore, it has been held, that Money may be awarded in an Eccleſiaſtical Court for *Diffamation* ‖. *Sed Quære.* 'Tis alſo ſaid, that a Prohibition lies, when the Party in Suit has an Action given him at

† Dr. & Stud. lib. 2. c. 24.

‡ 11 H. 4. fol. 85.

‡ Fitz. H. 7. fol. 22.

‖ Brook. Conſultation. n. 5.

at the Common Law for the *original* and *principal* Matter, whereon the Suit in the Eccleſiaſtical Court did grow. The Caſe was thus, *viz.* A Man reported, that the Abbot of St. *Albans* detain'd his Wife in the ſaid Abbot's Lodging againſt her Will, with a Deſign of making her his Harlot. The Abbot hereon brought his Action of Diffamation in the Spiritual Court; and the Husband his Prohibition. Now becauſe the Husband might have his Action of falſe Impriſonment at the Common-Law againſt the Abbot, it was held, that a Conſultation ſhould not be granted *.

* T. 22. E. 4. fol. 20.

A Prohibition alſo lies, where one Eccleſiaſtical Court intrudes on another's Juriſdiction; as in Dr. *James's* Caſe, which you may ſee in *Hobart's* Reports †; who being Judge of the Audience of the Archbiſhop of *Canterbury*, uſed to keep a Court in *Southwark*, and cited Men thither from the moſt remote Parts of the Dioceſs of *Winchester*, that Dioceſs reaching to the Borough of *Southwark* in *Surrey*. For the Reaſon of granting Prohibitions is not only to preſerve the Right of the King's Courts and Crown, but alſo to eſtabliſh the Eaſe and Quiet of the Subject, it being the Wiſdom of the Law to ſupport both, theſe being beſtpreſerv'd when every Thing runs in its proper Chanel according to the Original Juriſdiction of every Court. So that by the ſame Reaſon one Court might not be allow'd to incroach on another, which can produce nothing but Confuſion and Diſorder in the Adminiſtration of Juſtice.

† Pag. 17.

A Prohibition ceaſes and loſes its Force after a Conſultation is once granted, as appears by the Statute *de Conſultatione* ‡: For the *King's Chancellor or Chief Juſtice upon the Sight of the Libel*, &c. *if they can ſee no Redreſs by Writ*, &c. *ſhall write to the Spiritual Judges*, &c. *to proceed, notwithſtanding the King's Prohibition directed to them before.* But more plainly after: *Where a Conſultation is once duly granted, the Judge may proceed in the Cauſe, notwithſtanding any other Prohibition thereupon to him to be deliver'd, provided the Matter in the Libel be not changed.* In all Writs of Prohibition the Surmiſe or Suggeſtion ought to be made *in Præjudicium Coronæ Regis & Gravamen partis:* And it has been reſolv'd, that the ſix Months, which are allow'd for proving a Surmiſe or Suggeſtion in a Prohibition, ſhall be reckon'd according to the Calendar Months, and not according to Twenty eight Days to the Month *. In the Caſe of *Keech* againſt *Pots* it was the Opinion of Chief Juſtice *Foſter* and *Twiſden*, that the Court ought *ex debito Juſtitiæ* to grant a Prohibition, where it appears to them, that the Court Chriſtian or Admiralty has no Juriſdiction, tho' Sentence has been given there, provided ſuch Sentence has not been actually demanded to Execution, for then a Prohibition ceaſes: Which was agreed unto; and a Prohibition was awarded accordingly, *niſi Cauſa.* And this was in a Caſe, where Sentence had been given eight Years before by Conſent of Parties †. But notwithſtanding what is here ſaid, it is in the Diſcretion of the Court to deny a Prohibition, when it appears to them that the Surmiſe is not true.

‡ 24 E. 1. p. 59

* Hob. Rep. p. 179.

† Keb. Rep. pt. 1. p. 3.

If the Eccleſiaſtical Court proceeds upon a Canon, that is contrary to the Statute or Common-Law of this Realm, or any particular Cuſtom thereof, a Prohibition will lye to ſuch Court: And ſo it will, if a Perſon be there libell'd againſt for theſe Words, *viz. Thou art a Drunkard, and art wont to get Drunk twice a Week* †. And ſo a Prohibition will be granted on a Libel there for Tithe of Conies, if there be no ſpecial Cuſtom for Payment thereof ‖. A Prohibition was pray'd on Articles *ex Officio* in the printed Book of Enquiry, the Oath being to

† March. Rep. p. 6. & 66.

‖ Ibid. p. 56.

preſent all Offences contrary to the Eccleſiaſtical Laws, which the Court granted, ſaying, That by an Agreement in the *Exchequer* with the *Civilians* it was ſtated, That the Oath ſhould only be *to preſent all Things preſentable by the Laws Eccleſiaſtical of this Land.* And a Prohibition will likewiſe lye, if the Eccleſiaſtical Court proceeds to examine a Delinquent upon Oath to excuſs the Truth of ſome Crime from him *, tho the Original Cauſe does belong to them. But no Prohibition lies to the Spiritual Court in any Caſe, unleſs there has been a Suit commenc'd therein and Proceedings had thereupon †. A Prohibition will lye in ſhort (according to *Hobart*) upon every Statute, that has Prohibitory Words therein contain'd, tho' there be a Penalty annex'd thereunto: But 'tis otherwiſe, where there is only a Penalty inflicted.

* Hob. Rep. p. 84.

† Pag. 187.

If the Eccleſiaſtical Court proceeds againſt any Man without a Citation, where they have Juriſdiction, no Prohibition lies: For where the Eccleſiaſtical Court has the Cognizance of a Cauſe, the Remedy is there by way of Appeal, if they proceed Erroneouſly, and not by way of a Prohibition ‡. A Legatee may ſue an Executor in the Eccleſiaſtical Court to aſſent to a Legacy, and no Prohibition ſhall lye, becauſe they have Cognizance of Legacies in the Perſonal Eſtate; and, conſequently, Aſſets or not Aſſets may be try'd by them; and no Prohibition ſhall be awarded ||. The Eccleſiaſtical Court may likewiſe hold Cognizance of an Excuſe for not going to Church, and a Prohibition ſhall not lye: But if the Spiritual Court will not admit of a reaſonable Excuſe, a Prohibition will be granted *. Thus a Man may be compell'd by the Eccleſiaſtical Court to repair a private Way leading to the Church, and no Prohibition ſhall lye: But a Prohibition lye will upon a Libel to repair a Highway tho' leading to the Church ‡. If a Baron and Feme recover Coſts in the Spiritual Court for defaming his Wife, this will not bar the Wife from ſuing there for Expences of Suit, tho' the Husband ſhould releaſe the ſaid Coſts of Suit ||. And 'tis the ſame Thing, where many Perſons ſuing there do recover Coſts, and one of them releaſes, and the other ſues in that Court: This (I ſay) is no Cauſe for a Prohibition *. Two Churchwardens ſued in the Spiritual Court for a Rate or Levy of Money towards the Repairs of their Church, and had a Sentence to recover the ſame with an Aſſeſsment of Coſts made. The one releas'd and the other ſued for the Coſts; and this Releaſe being pleaded and diſallow'd of in that Court, a Prohibition was theupon pray'd, and all this Matter being diſclos'd in the Prohibition, the Defendant demurr'd hereupon in Law: And it was mov'd that this Releaſe by one being in the Perſonalty, ſhould be an entire Diſcharge. But 'twas reſolv'd by the Court to the contrary: For Churchwardens have nothing but to the Uſe of their Pariſh, and, therefore, as the Corporation conſiſts in the Churchwardens, one of them ſolely cannot releaſe nor give away the Goods of the Church; and the Coſts are in the ſame Nature, which one without the other cannot diſcharge †; and all the Court being of this Opinion, it was adjudg'd againſt the Prohibition ‡.

‡ March. Rep. p. 92 & 98.

|| Ibid. p. 96.

* Ibid. p. 93 & 94.

‡ Ibid. p. 45.

|| Ibid. p. 73.

* Ibid. p. 73.

† 11 H. 4. 2. 27. H. 6. 30. 8. F. 4. 6.

A Prohibition was pray'd to the Court of *Arches* on a Libel there for calling a Woman *Whore* and *Bawd*, becauſe theſe are only Words of Heat: And, moreover, the Plaintiff in the Prohibition ſuggeſted, that he was an Inhabitant within the Dioceſs of *London*, and was here cited to the Court of *Arches* contrary to the Statute ||. For the Defendant it was urged, that a Prohibition ſhould not go, and *Gobbet*'s Caſe was cited *, where a Prohibition in ſuch a Caſe was deny'd; becauſe there had been a Compoſition between the Archbiſhop and Biſhop of *London*, for

‡ Crok. 2 Rep. p. 234.

|| 23 H. 8. c. 9.

* Crok. 3 Rep. p. 339.

for ſuch Juriſdiction; and the Archbiſhop viſits not in the Dioceſs of *London* for that Reaſon. As to the Words, the Court refus'd to grant a Prohibition: For tho' formerly there have been divers Opinions touching theſe Words; yet *Twiſden* ſaid, that ever ſince the eighth of King *Charles* the Law has been taken, that they may puniſh ſuch Words for the Reformation of Manners. But to the other Point *Keeling* ſaid, That the Dioceſs of *London* is not within the Juriſdiction of the *Arches*, but the Archbiſhop has a peculiar Juriſdiction there conſiſting of ſeveral Pariſhes, and the Miſchief here was intended to be prevented by the Statute; and ſo is *Croke** and *Hobart* †: And, therefore, a Prohibition lies. *Wyndham*, a Prohibition does not lye, becauſe the *Arches* is within the Dioceſs of *London*; and if there be any Cauſe to remit the Juriſdiction of the Biſhop of *London* to the *Arches*, it ought to be determin'd by the *Civilians* according to the Statute; and the Compoſition in *Gobbet*'s Caſe ‡ amounts to a Licenſe. *Twiſden*, a Prohibition lies; for tho' there was a Compoſition before, yet now the Statute takes it away, and an Agreement between the Ordinaries ſhall not prejudice the People, for whom the Statute was made. As to *Gobbet*'s Caſe, the Reaſon there is not good; for the Biſhop of *London* cannot agree, that the Archbiſhop ſhall not viſit. And, *Thirdly*, the Compoſition ought to be pleaded. Chief Juſtice *Hyde*, a Prohibition does not lye, becauſe 'tis a Writ *ex gratiâ*, and not *ex debito Juſtitiæ*; but *Keeling* and *Twiſden* poſitively deny'd that. And becauſe the Court was divided, the Matter reſted as before ‖.

* *Cadwallader*'s Caſe.

† pag. 185.

‡ Crok. Car. 247.

‖ Raym. Rep. p. 91 & 92.

A Prohibition was pray'd on a Proſecution in the Spiritual Court for Tithes, a Sentence being given there againſt the Defendant: And an Appeal being ſued thereupon, *B.* was thereby made a Promoter of the Suit, without being a Party to it. And herein the firſt Sentence was confirm'd in *November*, 1623. and Coſts were then awarded to *B.* tho' not tax'd till *Hilary* Term, 1623. when a Pardon came, which pardon'd all Offences before *December*, 1623. Whereupon this Offence, and the Coſts tax'd thereon, were alſo pardon'd (as is pretended) tho' they were awarded before this Pardon, in the Spiritual Court. And tho' a Prohibition was pray'd, becauſe they would not allow of ſuch Pardon, yet it was deny'd: For thoſe Coſts, being awarded to the Party before the Pardon, are not taken away by a Pardon, tho' tax'd afterwards*. If there be two Joint Tenants of Tithes, and one ſues in the Spiritual Court without the other †; or if a Feme Covert *ſolely* ſues there for *Diffamation* without joyning her Husband in the Suit, no Prohibition lies; for by the *Canon-Law* a Feme Covert may in ſuch a Caſe ſue without her Husband ‡.

* Crok. 3 Rep. p. 6.

† March. Rep. p. 23.

‡ Ibid 47.

A Prohibition was pray'd, for that the Bounds of two Vills, *viz.* *D.* and *S.* in the Pariſh of *A.* were in Queſtion, *viz.* one claims the Tithes in Queſtion, lying in the Vill of *D.* and another claims them, as lying in the Vill of *S*: But a Prohibition was deny'd by the Court. For tho' the Bounds of a Pariſh are not tryable in the *Court Chriſtian*; yet the Bounds of a Vill in the ſame Pariſh are tryable there ‖. If an Adminiſtration be granted to *A.* whereas it ought not to be ſo granted; and afterwards the Adminiſtration is repeal'd and granted to *B.* as being next of Kin: *B.* may ſue *A.* in the Spiritual Court to account for the Profits of the Chattels of the Deceas'd, during his Time of Adminiſtration, and no Prohibition ſhall be granted; for *B.* cannot have an Action of Treſpaſs againſt him, nor any other Remedy for them at Law; and, conſequently, the above-mention'd Rule may have Place *, *viz.*

‖ Levinz. Rep. pt. 1. p. 78.

* Vid. p. 430

viz, where no Redreſs lies by a Writ from the Court of *Chancery*, &c. A Prohibition was pray'd to the Spiritual Court at *Cheſter* to ſtay Proceedings there on a Libel againſt one *Bayles* for teaching School without a Licence; and itwas deny'd, becauſe that Court had Juriſdiction in the Cauſe*. A Prohibition was likewiſe mov'd for to ſtay Proceedings in the Spiritual Court on a Libel for calling the Plaintiff *Whore:* But upon Argument it was deny'd; becauſe that Court has Juriſdiction in Cauſes of Whoredom and Adultery. It was urg'd, that *Whore* was a Word of Heat and Paſſion; but the Court anſwer'd, That the Eccleſiaſtical Judges were Judges of that Matter †. A Prohibition was alſo mov'd for to the Spiritual Court in the Behalf of *Madox*, Incumbent of a Donative within the Dioceſs of *Peterburgh*, who was cited into the *Court Chriſtian* there for marrying without Banns or Licenſe: But the King's Court deny'd the ſame ‡. A Sentence was pronouc'd in the Spiritual Court on the Account of a Will, againſt which the Defendant appeals. The Appellant dyes. And now the Appellant's Brother comes in, and proſecutes the Appeal in his Brother's Stead. And a Prohibition was ſued, becauſe by the Appellant's Death (ſays he) the Appeal is abated, and the Commiſſion ceaſes: But a Prohibition was deny'd; becauſe the Delegates are the proper Judges to determine, whether an Appeal abates by their Law or not: And tho', according to the Rules of the *Common-Law*, it does abate; yet by their Rules it does not abate, and the Matter is wholly of their Cognizance; and the Commiſſion is not determin'd by the Appellant's Death.

* Mod. Rep. Vol. 1. p. 3.

† Mod. Rep. Vol. 1. p. 21.

‡ Mod. Rep. Vol. 1. p. 22.

The Churchwardens of *Ridgwel* in *Eſſex* preſented in the Archdeacon's Court there one *Pannel* for being a *Railer* and *Sower of Diſcord* among his Neighbours, whereupon he was enjoin'd Purgation: But the Temporal Court awarded a Prohibition; for the Cauſe (they ſaid) did belong to the *Leet* and not to the Spiritual Court *, unleſs the Offence was committed in the Church or Church-yard, and the like, according to the Statute. *Elizabeth Wats*, Wife of *Edward*, libell'd in the Spiritual Court againſt *Jane Coningsby* for a Legacy of One hundred Pounds, and the Defendant pleaded *Wats* the Husband's Releaſe given after Marriage, and both the Witneſſes being dead the Releaſe was not allow'd in the *Court Chriſtian:* Whereupon a Prohibition was granted touching this Averment, *viz. That the Witneſſes being dead, they offer'd to prove their Hand-writing, and that tho'* Wats *acknowledg'd his ſubſcribing the Releaſe, yet the Spiritual Court diſallow'd of the Evidence* †. A Prohibition was likewiſe pray'd to the Eccleſiaſtical Court, becauſe a Parſon libell'd therein againſt one for calling him *Knave*, and it was granted; becauſe it did not appear to relate to any Thing touching his Function: And a Caſe was cited to be adjudg'd the 24*th* of *Eliz.* a Suit being in the Spiritual Court for theſe Words, *viz. Sir Prieſt, you are a Knave*; and a Prohibition was granted ‡. And thus much of a Prohibition for the preſent. I ſhall beg leave to cloſe this Title by ſaying ſomething of a Writ called a *Præmunire facias*, becauſe it reſpects the Clergy and their Courts very often; and they may be in frequent Danger of it.

* Hob. Rep. p. 246. 247.

† Hob. Rep. p. 247.

‡ Ventr. Rep. pt. 1. p. 2.

Now ſome think, that this Writ came to have its Name and to be called a *Præmunire*, becauſe it fortifies the Juriſdiction of the Crown againſt all foreign Juriſdictions whatſoever, and likewiſe againſt all ſuch Perſons as ſhall at any time uſurp thereon, either by preſuming to make Laws without the Royal Licenſe, or by proceeding in the Execution of Laws already made contrary to the known Practice of the Realm;

as

as appears by several Acts of Parliament *. But my Lord *Coke* says, That it is so called from a Word in the Writ it self: For the Words of the Writ are, *Præmunire facias* præfatum A. B. &c. *quod tunc sit coram nobis*, &c. where *Præmunire* is used for *Præmonere*; and thus divers Interpreters of the *Civil* and *Canon-Law* use it: For they are *præmuniti*, that are *præmoniti*. By the Statutes here quoted in the Margin the Reader may see what Statutes have been made at several times to make Offences in danger of a *Præmunire*: Which I have cited, that Men may avoid the Judgment of so heavy a Punishment. For the Judgment in a *Præmunire* is, that the Defendant shall from thenceforth be out of the King's Protection, and his Lands and Tenements, Goods and Chattels forfeited to the King, and that his Body shall remain in Prison at the King's Pleasure. And so odious was this Offence of a *Præmunire*, that a Person attainted thereof might be slain by any Man without danger of Law; because it was provided by Law, that a Man might act by him as by the King's Enemy; and any Man might lawfully kill an Enemy: But Queen *Elizabeth* and her Parliament †, disliking this extream and inhumane Rigour of Law in that Point; provided, that it should not be lawful for any Person to slay another in any manner attainted, as aforesaid.

* 35. E. 1. 25 E. 3. c. 22. 25 E. 3. 27 E. 3. c. 1. 38 E. 3. c. 3. 2 R. 2. c. 3. 12 R. 2. c. 5. 16 R. 2. c. 5. 2 H. 4. c. 3. 24 H. 8. c. 12. 25 H. 8. c. 19. & 20. 26. H. 8. c. 16. 1 Eliz. c. 1. 5 Eliz. c. 1. 13 Eliz. c. 2. & 8. 27 Eliz. c. 2. 39 Eliz. c. 18.

† 5 Eliz. c. 1.

By a Statute made in *Richard* the Second's Reign, called the Statute of *Præmunire* ‡, it was enacted, That whereas the Bishop of *Rome* under a Pretence of an Absolute Supremacy over the Church, took upon him by his Mandates to dispose of most of the Bishopricks, Abbacies, and other Ecclesiastical Benefices of Worth in *England*; and if the Bishops did upon the legal Presentments of the Patrons of such Benefices, institute any Clerks to them, they were therefore excommunicated by the Pope, to the great Damage and unjust Wrong of the King's good Subject. And whereas the Bishop of *Rome* took upon him to translate and remove the said Bishops either out of the Realm, or from one See to another within the Realm, without the Knowledge of the King, or the Consent of the Bishops themselves. Therefore if any Person shall purchase or cause to be purchas'd in the Court of *Rome* any such Translations, Sentences of Excommunication, Bulls, or other Instruments, to the Detriment of the King or the Realm, both they and such as bring, receive, notify, or put them in execution, shall be put out of the King's Protection, and their Lands and Tenements, Goods and Chattels shall be forfeited to the King, and their Bodies attach'd, if they can be found, Process being made out against them by the Writ called *Præmunire facias*, as is ordain'd in other former Statutes of Provisors. This Statute was receiv'd at the Court of *Rome* by the Pope and Cardinals with the greatest Grief imaginable, who were before grown very peevish and angry on the Account of the Statute of *Mortmain*, and other less severe Acts against the Papal Incroachments not long before made here in *England*: But this Act put the Pope into such a Fury, that he called the Act it self by the Name of *execrabile Statutum*, a cursed Statute, and the Passing of it *fœdum & turpe facinus*, a base and wicked Act.

‡ 12 R. 2. c. 12.

Of Proof, or Judicial Evidence in general, &c.

THERE is no Truth better known throughout the Law than this, *viz*, That no Suit or *Judicial* Controverſy whatever ſhould want its proper Evidence for the juſt Determination thereof, however ſuch Suit may ſtand in need of other Parts of a *Judicial* Proceſs: And, therefore, I ſhall here treat of *Judicial* Proof or Evidence in general, and hereafter ſpeak of *Witneſſes* under a particular Title, as I have already done of *Inſtruments*; the two great *Species* of legal Evidence. Now Proof, in *Latin* ſtiled *Probatio*, is (according to ſome Perſons) the Evidence or Demonſtration of ſome doubtful Matter made clear and known to us by fit and proper Arguments or *Mediums* *. But *Goffredus* impugns this Definition, becauſe it does not follow from hence, that Proof is made by Witneſſes or Inſtruments, it being *ſimply* ſaid herein *by fit and proper Arguments or* Mediums: For (ſays he) under the Word *Argument* we cannot comprehend Witneſſes and Inſtruments, ſince an Argument only diſplays the Truth of Things by a *logical* Search and Inveſtigation thereof; it being ſo called according to the Etymologiſts, becauſe it is *argutè inventum*, a kind of ſubtle Invention, or the Diſcovery of Things by means of Subtlety †. Wherefore he defines Proof to be the ſhewing of a Thing which is doubtful, by the Means of full Evidence made by Witneſſes, Inſtruments, and frequently by Indications, Preſumptions and Conjectures: Uſing the Word *frequently*, becauſe Preſumptions and Conjectures are not uſed in every Cauſe (as in Criminal Caſes) unleſs they are very ſtrong and powerful, and even vehement againſt the Perſon accus'd. But *Hoſtienſis* diſlikes this Definition, becauſe Proof may be made ſeveral other ways than therein contain'd. But ſetting aſide both Definitions of *Judicial* Proof (I think) it may be defin'd to be a clear and evident Declaration or Demonſtration of a Matter which was before doubtful, convey'd to us in a *Judicial* manner by fit and proper Arguments, and likewiſe by all other legal Methods. *Firſt*, By fit and proper Arguments; ſuch as Conjectures, Preſumptions, *Indicia*, and other adminicular Ways and Means. And, *Secondly*, By legal Methods, or Methods according to Law; ſuch as Witneſſes, Publick Inſtruments, and the like.

* Gloſſ. Bart. Azo & Sich. in Tit. 19. c. 4.

† X. 5. 40. 10.

Some deriv'd the *Latin* Word *Probatio* from the Adverb *Probè*; becauſe, according to a *Latin* Maxim, *Probè facit, qui probat*, or in *Engliſh*, *He does well that proves a Matter of Fact:* For he, that manifeſts a doubtful Fact or Thing, ſubdues and gets the better of his Adverſary; and eſcapes the Penalties of ſuch as fail in their Proofs. Others derive it from the *Latin* Word *Propalatio*, which denotes a Manifeſtation of ſomething that is doubtful. And, *laſtly*, others derive it from theſe two *Latin* Words, *viz*. *Proba* and *Actio* ‖. But theſe are School-Subtleties, and below the Gravity of a ſober Writer; and, therefore, I ſhall leave them to the *Grammarians* to chew on.

‡ Calv. lex. Jur. v. *probatio.*

‖ Abb. in Rubr. x. 2. 19. n. 2.

Now

Now of Proofs there are two *Species* according to the general Diviſion thereof: The firſt is ſtiled *Inartificial*, and the other *Artificial* Proof. *Inartificial* Proof is that Kind of Evidence which ſome call *direct* Proof and Evidence, or, in other Terms, *true* and *proper* Proof: And this does not want the Art of an Orator, nor a Lawyers Aſſiſtance to manage and ſupport it, becauſe it ſtrongly proceeds from its own Nature and Quality, and not from the Wit and Invention of either of theſe Perſons; it being withal extrinſically true and clear. But, notwithſtanding this it requires the Management of a Lawyer and an Orator too in order to ſet it forth, if the Matter be deduc'd and diſcuſs'd in a Court of Judicature. *Artificial* Proof is that which exiſts and entirely depends on the Rules of Art: For when certain Principles and Propoſitions are laid down as the Foundation of this Proof, 'tis the Art and Prudence of a Lawyer or Orator to examine and try what may be inferr'd from thence as certain Conſequences and Deductions. *Ariſtotle* in his Rhetorick* gives us five *Species* of *Inartificial* Proof, *viz. Law*, *Witneſſes*, *Compacts*, *Oaths*, and *Examinations*: But *Cicero* † adds to theſe five *the Decrees of the Senate*, the *Anſwers of the Lawyers*, the *Res Judicata*, *Covenants*, *&c.* But *Quintilian* ‡ does not reckon *Laws* among them, ſaying, That they are *Sentences*, *Definitions*, *Determinations*, *&c.* by the Means whereof the Matter for which Proofs are introduc'd, is it ſelf determin'd. *Ariſtotle* and *Cicero* may be well enough excus'd for reckoning the Laws among the ſeveral *Species* of *Inartificial* Proof, ſince they deem'd all ſuch Things to be Proofs, whereby Advocates and Patrons of Cauſes, lead Judges to their Sentences. *Milo* ſays, "That the Judges ought to acquit him of the Death of *Clodius*; for "if he murder'd him, when he only defended himſelf, then he was "guilty of Murder. But the Law of Nature grants a Man the Right "of Self-defence: For (ſays he) from the Law of Nature, if an Adverſary lays Snares for another's Life, let him be ſlain." This Law proves *Milo*'s Aſſault or killing of *Clodius* to be lawful. But *Inartificial* Proof is not properly and truly Proof, or (at leaſt) in the Senſe made uſe of among Lawyers: Therefore, paſſing by this *Species* of Proof I ſhall endeavour to explain the other in the ſequel of this Title.

* lib. 1. c. 15

† lib. 2. de Orat.

‡ lib. 2. de Inſt. Orat. c. 2.

And, *Firſt*, I ſhall conſider the ſeveral *Species* of *Artificial* Proof, in other Terms called legal and judicial Evidence, as they are comprehended under the ſecond Branch of this my general Diviſion of Proof. For this ſeems moſt properly to belong to a Diſcourſe of this Nature, wherein we have to do with the Buſineſs of Judicature. Now legal or canonical Proof conſiſts of ſeveral *Species* or Kinds of Evidence *. As for Example: There is one Kind of Proof, which we call *Evidentia facti*, as when the Perſon is taken in the very Act of committing a Crime †; which is alſo ſtiled a *Notoriety of Fact*. A ſecond Kind of Proof is that, which is made by the Party's own Confeſſion ‡, which is Threefold, *viz.* that which is in *Latin* ſtiled *vera Confeſſio*, as when 'tis made *Ore proprio* ‖; and this is the ſtrongeſt of all Evidence in reſpect of Condemnation. The other two ways of Confeſſion are what we ſtile a *feigned* and *preſumptive* Confeſſion, as by Flight, Contumacy, and the like. A third *Species* of Proof is made by Depoſition of Witneſſes *, of which I ſhall diſcourſe hereafter. A fourth is by exhibiting of both publick and private Inſtruments †, which I have already handled under that Title. And the Gloſs on the Law adds a fifth *Species*, *viz.* that of a violent Preſumption. But *Hoſtienſis* ſubjoins four others, *viz.* a *Conſentient* Fame ‡, the giving of an Oath ‖, the Ocular Inſpection of the Judge *, and ancient Books and Records †. And he alſo ſays, that Proof is ſometimes

* X. 2. 13. 15. fin.

† 50 Diſt. 29. 81 Diſt. 10.

‡ X. 2. 13. 15.

‖ 15 Q. 6. 1.

* X. 2. 21. 7.

† 16 Q. 3. 15. 2.

‡ 4 Q. 3. 2. 2.

‖ 16 Q. 3. 7.

* X. 4. 15. 6.

† X. 2. 19. 13.

times made by Letters under the Epiſcopal Seal *. *Rebuffus* reckons up no leſs than twenty *Species* of *Judicial* Proof or Evidence. But I ſhall not here trouble the Reader with ſo great a Number; but divide this Kind of Proof into what we call *full* Proof, and that which we term a *half* Proof.

* X. 2. 19. 7.

Now that is called *full* Proof, which gives ſo great an Aſſurance to the Judge, that he ſeems to himſelf to be fully inſtructed in the Merits of the Cauſe: And this Kind of Proof is made by two or three Witneſſes at the leaſt. For there are ſome Matters, which according to the *Canon-Law* do require five, ſeven or more Witneſſes to make full Proof; yet full Proof cannot be ſaid to be made by one Witneſs alone. A publick Inſtrument is ſaid to be full Proof, which has the ſame Force in all *Judicial* Proceedings, as the Depoſition of Witneſſes have. And the Lawyers do likewiſe affirm that to be full Proof, which conſiſts of two half Proofs or more, that are well grounded; as that of one Witneſs and the Oath of the Party in *Civil* Cauſes; for in theſe Caſes an Oath adminiſtred on a half Proof made in Defect of a full Proof makes a full Proof *, if the Perſon ſworn be a Man of Integrity. And, again, full Proof may be made by the Teſtimony of one Witneſs, and a well-grounded Fame concurrent thereunto. For tho' it ſeems to be laid down as a Rule in Law, *viz.* That two imperfect Things do not make one perfect one; yet this Rule is only to be underſtood in that Senſe, when two imperfect Things do tend to different Ends; as when two different Things do tend to divers *Species* of Excuſe. But it ought to be taken in a contrary Senſe, when the end of two imperfect Things is one and the ſame end, as in the Caſe here of making a *Judicial* Proof, which the Judge may collect not only from one Kind of Proof, but from various and ſeveral *Species* thereof: And thus, *Singula quæ non proſunt, cumulata juvant* † *vel officiunt.* A half Proof is that which does not make full Proof; and of this Kind we may reckon the Teſtimony of one Witneſs, Fame, private Writings, and the like.

* X. 2. 19. 2.

† X. 2. 19. 13.

Sometimes Proof accrues to the Plaintiff only, and ſometimes to the Plaintiff and Defendant: For 'tis incumbent on each of theſe Parties to prove their Matters and Allegations deduc'd in Judgment. For 'tis the Duty of the Plaintiff to prove his Libel or Declaration, if the Defendant denies the Fact, *&c.* therein contain'd: For if the Plaintiff ſhall not prove the ſame, the Defendant ſhall be acquitted ‡, tho' he has prov'd nothing at all; but if the Adverſe Party confeſſes the Plaintiff's Intention, he is reliev'd *ab onere probandi.* But in ſeveral Caſes it's only incumbent on the Defendant to make Proof, as I ſhall ſhew in the next Section. He that alledges a Thing to be loſt, ought to prove the ſame, and that by clear and manifeſt Evidence, according to the Gloſs, and the Opinion of the Doctors. But 'tis otherwiſe, if it does not appear that the Thing came to the Hands of him that is impleaded in the Suit. As when an Executor (as we call him) is conven'd *de redendo legato*; for if it does appear that the Legacy came to his Hands, 'tis enough for him to declare upon Oath, that upon diligent Search he could not find the Thing in Diſpute: For when a Thing is not found on ſuch Search, 'tis preſum'd to be already loſt. *Secondly*, 'Tis otherwiſe if the exhibiting a Thing, which is ſaid to be loſt, be ſued for *Officio Judicis* and not by Right of Action; for then 'tis ſufficient for the Perſon to ſwear, That he loſt it by Chance: But, in a Suit by Right of Action, the Defendant may be allowed by his Oath to prove the Thing loſt. Thus, if a Man ſhall found his Intention by a Plea *ſuper re amiſſâ*, as a Banker, who prays to have the

‡ X. 2. 12. 3.

Copy

Copy of an Account exhibited, becauſe he has loſt the Original, *viz.* his Book of Accounts, he ſhall not in ſuch a Caſe prove the ſame by his Oath, but by clear and manifeſt Proofs. A Fact deduc'd with a Quality ought to be prov'd with that Quality: For 'tis not enough, that the Fact be prov'd without the Quality, or the Quality without the Fact; becauſe a Fact deduc'd with a Quality is the Foundation of the Plaintiff's Intention *.

The Defendant is bound to make Proof, when by way of Exception he propounds ſome Fact or Matter, which peremptorily deſtroys the Plaintiff's Libel or Petition †: For Example, in ſuch Exceptions as theſe, *viz.* when a Preſcription or Limitation *de non petendo*, a Novation, Payment of Debt, or a Releaſe thereof, and the like, are propounded in Judgment. The Defendant is alſo oblig'd to make Proof, when the Common Law or a Preſumption favours the Plaintiff. For Example, As Plaintiff I demand of my Brother that Right which is due to me by Reaſon of my Succeſſion to a certain Eſtate belonging to my Father in his Life-time. My Brother denies any Right accruing to me in ſuch an Eſtate. In this Caſe my Brother muſt ſet forth and prove, how I was barr'd from ſuch Eſtate of Inheritance: For the Common Law here militates for me the Plaintiff; and, according to the *Civil-Law*, adjudges the Inheritance to accrue to me in common with my Brother. By the *Common-Law* here I mean *Common-Right* according to the *Civil-Law*. *Thirdly*, The Defendant is likewiſe bound to make Proof when the Cauſe of Suit is a Privileg'd Cauſe in the Plaintiff's Favour. For Example, If the Plaintiff, being a Pupil or other privileg'd Perſon, has paid a Creditor too much, and is willing to recover what he has paid in his own Wrong. In this Caſe the Creditor ought to ſet forth and ſhew by Articles, That he has only receiv'd what was due to him; or if he cannot do that, he ought to prove what was firſt due to him, and what Payments have been ſince made him thereupon. But when contrary Facts or Matters are alledg'd, 'tis the Duty of each Party to prove the ſame; and ſo likewiſe in Matters relating to Poſſeſſion: For in ſuch Matters each Party becomes both Plaintiff and Defendant.

If the Violation of an Oath be made on the Score of any Contract or Partnerſhip enter'd into in Prejudice of the Rector or Vicar of a Pariſh, on the Account of any Pact or Conſpiracy, ſuch Breach of Oath may be well prov'd by the Inſtrument wherein ſuch Pact or Conſpiracy was eſtabliſh'd; provided the ſame be diſcuſs'd by giving an Oath: For otherwiſe Proof cannot be made by an Inſtrument in a *Criminal* Cauſe without the Aid of ſome adminicular Proof *. But the Proof of a Will may be made by an Inſtrument as well in a *nuncupative*, as in another Will which is not *nuncupative*, as to the Probat of its Solemnity, tho' not as to the Proof of the Will it ſelf. For it may be prov'd by two Witneſſes of Integrity produc'd thereon, unleſs the Cuſtom of the Place, where the Will was made, requires a *Notarial* Act. For 'tis enough in Reſpect of *Canonical* Equity, that the Will of the Deceas'd appears by the Teſtimony of two conſentient Witneſſes ſuperiour to every legal Exception, in order to demand the ſame to Execution, whether ſuch Will be made to Charitable Uſes or not. The Pregnancy of a Woman is well prov'd by the Search and Examination of Midwives, and by their Report and Averment thereof; by whoſe Declaration we ought to abide, as being Perſons well ſkill'd in an Affair of this Nature: As we likewiſe abide by their Depoſitions, when the Matter in Queſtion is touching an immature Birth, the Life of a Child born, and other Things of this Kind belonging to their Office and Employment ‡; becauſe Credit

* Gail. lib. 1. Obſ. 3. n. 5.

† D. 22. 3. 9.

* Lindw. lib. 2. Tit. 6. c. 3. v. *probationes legitimas.*

‡ Ang. in l. 5. D. 5. 4. n. 2.

ought to be given to every one in the Art and Buſineſs wherein he has
* X. 2. 19. 4. been converſant, and is therefore preſum'd to have Skill and Knowlege*. But there ought to be three Witneſſes (at leaſt) called together, to inſpect the Pregnancy of a Woman, and if two of them agree in their Verdict, 'tis ſufficient Proof of ſuch Pregnancy: For according to *Andreas*, two of them (at leaſt) ought to agree in their Report, elſe they prove nothing at all. For to prove a Matter referr'd to many, two of the Perſons skill'd in the Thing referr'd to them ought (at leaſt) to agree in their Verdict, eſpecially if their Preſence may be had. But the Depoſitions of Midwives have only Force, when they depoſe upon Oath; it being otherwiſe if they give their Evidence without an Oath taken, ſince then they prove nothing at all. According to *Baldus*, a Woman's Pregnancy may alſo be prov'd from her Milk, and this he calls a concludent Proof from the Neceſſity of Nature; for it naturally happens, that a Woman who has Milk in her Breaſt is either Pregnant, or elſe has been ſo lately.

According to the *Civil* and *Canon-Law* Proofs are arbitrary, and depend on the meer Diſcretion of the Judge: For the Judge may *ex animi ſui motu* give Credit to Witneſſes, tho' their Depoſitions be not clear. But (I think) the more equitable Way would be for the Judge to call upon ſuch Witneſſes to explain themſelves in ſuch a Point of their Depoſitions, as appears obſcure to him, if the Witneſſes were not examin'd by him, and their Depoſitions taken in his Preſence. But tho'
† Caſtr. in l. 31. D. 12. 2. all Proofs are arbitrary, and left to the Judge's Diſcretion †, yet the
‡ Rom. Conſ. 376. Hipp. Conſ. 8. n. 25. Judge's Diſcretion ought to be conſonant to Law and Equity‡. The Judge may give Credit to Proofs that ariſe only from ſingle Witneſſes, or from Preſumptions and Conjectures in ſome particular Caſes: For theſe ſort of Proofs obtain in a ſpecial manner in ſuch Matters as are difficult to prove, or cannot be prov'd *directly*, becauſe then the Law is content with leſs Evidence, and ſatisfied with ſuch Proofs as may be
† Cail. lib. 2. Obſ. 93. n. 18. had in ſuch a Caſe †. In *Holland* and other trading Countries, full and entire Credit is given to Merchants and Tradeſmens Books, if they are ſworn to, or confirm'd by the Death of the Party, which is Equivalent to an Oath: But this only holds good in ſuch Matters as relate to
‡ Groenv. de Labrog. C. 4 19. 6. Trade and Merchandize, and not in other Matters‡. And, therefore, if a Merchant ſhall in his Book of Accompts write down *Titius* to have bought ſeveral Wares and Commodities, and therein ſays that *Mævius* has given Security for the Payment, or ſet down that he has lent ſo much Money to *Sempronius*: I ſay, that as to the Security or Money lent, ſuch Accompt-Book ſhall be deem'd no Proof or Evidence in Law. In all Caſes wherein a certain and determinate Knowlege of Things cannot be had and acquir'd, Teſtimony made by Credulity is admitted as ſufficient Evidence. And 'tis to be obſerv'd, that a Witneſs depoſing on his certain Knowlege touching any one's Fitneſs and Qualification, does *eo ipſo* undergo the Risk of Perjury, ſince no certain and determinate Truth can be aſſign'd and given thereof; and, therefore, ſuch Witneſs ought only to ſpeak touching his Belief. 'Tis further to be obſerv'd, that a Perſon is ſaid to know that which he only knows by Credulity, or a ſtrong Preſumption, when the Truth thereof cannot be otherwiſe aſſign'd and made known: But then he is not ſaid to know it *ſimpliciter*, but only as the Nature of the Thing permits and allows of. For a Man can only be oblig'd to Operations according to the Bounds of Nature, and cannot be compell'd to go beyond ſuch Bounds to Things impoſſible, or in ſome Meaſure impoſſible. And thus Evidence is good in this Caſe, and the Teſtimony of one Witneſs is not vitiated, if he ſays, *that he knows that*,

hat, which he has only receiv'd from Credulity, or a ſtrong Preſumption; if he tempers his Evidence *ad metas Naturæ*: But if a Man either *expreſly* or *tacitly* avers a Perſon to be fitly qualified for ſuch a Preferment, he does not commit Perjury, if he does not know him to be unworthy of ſuch Preferment.

Tho' the Writing of a Notary Publick be what we ſtile an *approv'd Evidence* *, yet the free and *Judicial* Confeſſion of the Party himſelf is nevertheleſs the beſt Proof that can be produc'd †: And ſuch a Confeſſion made in open Court is equally ſufficient Proof in Criminal as 'tis in Civil Cauſes; ſince there can be no ſtronger Evidence than that which proceeds from a Man's own Mouth confeſſing his Crime. But Proofs and Evidences by Writing, eſpecially that of a private Hand, are but half Proofs; becauſe a Similitude of Hand-writing may eaſily deceive a Witneſs: But yet a private Writing ſhall be good Proof againſt the Writer himſelf ‡, if his Hand-writing be known and prov'd; and ſo likewiſe it ſhall be againſt the Subſcriber thereof. An *Almanack*, wherein a Father has wrote his Son's Nativity, in *England* has been allow'd as good Evidence to prove his Son's Nonage.

* Rald. in l. 3. C. 7. 52.
† X. 3. 2. 7.
‡ Dd. in l. 31. D. 12. 2.

In the Buſineſs of Proof, a Judge ought firſt to have a great Regard to the Probability thereof. For he that depoſes and gives Evidence touching a Thing not probable and likely to be true, is not far diſtant from Falſhood it ſelf, in ſuch his Depoſition. *Secondly*, All Proof ought to be *ſimple**, *certain* † and *concludent* ‡. And ſuch Proof is ſaid to be *ſimply* made, when the Depoſition of the Witneſs is made *ſine plicâ*, without Reſerves and Limitations: But if any Thing be aſſerted in any Depoſition or Inſtrument with Foldings and Subterfuges, Proof is ſaid not to be *ſimply* made. Nor is a Proof ſaid to be *concludent*, unleſs the Quality thereunto annex'd be alſo prov'd; and, therefore, ſuch a Proof is not relevant. For an inconcludent Proof is ſo far from being good Evidence, that it renders the Matter ſtill more doubtful and uncertain. Now a concludent Proof or Evidence is ſaid to be that, when a Witneſs aſſigns ſome concluſive Reaſon for his Knowlege or Belief of the Thing atteſted by him; as that he ſaw it with his own Eyes, or heard it with his own Ears, and the like. Nor, *Thirdly*, does a doubtful Proof relieve the Perſon that produces ſuch dubious Evidence ‖; but it is ſo far from being of any Advantage to him, that it is always interpreted againſt him *, according to this Maxim, *viz. Aliquid non eſſe & eſſe & non apparere paria ſunt.*

* X. 2. 19. 6.
† X. 2. 19. 8.
‡ Alciat. in l. 13. C. 2. 4. n. 11.
‖ Aret. Conſ. 23. n. 3.
* Abb. in c. 8. x. 2. 19. n. 34.

There is one Kind of Proof, which is from the Nature of it ſtiled *notorious*; another which is term'd *manifeſt*; and a third which is called *liquid* Proof: Now that Thing is ſaid to be notorious, which appears unto all Men alike, and cannot be darken'd or ſhadow'd by any Colour whatſoever; nor does it ſtand in need of any Proof properly ſo called; as that there is ſuch a Church as St. *Paul's* in *London*, or ſuch a Palace as St. *James's* in *Weſtminſter*. And the ſame may be ſaid of that Thing, which the Judge perceives and knows by Inſpection alone: As when any one is accus'd of killing *Sempronius*, and *Sempronius* is at the ſame time exhibited to the Judge alive in Perſon. And as ſuch an Allegation of the Notoriety of Fact may be ſometimes made, it is deem'd in Law to be ſtrongeſt of all Proof, if we may properly called it *Proof*. But that is called *manifeſt* Proof, when the Fact alledg'd is of ſuch a Nature, that it may be prov'd beyond all Contradiction: As when 'tis alleg'd and prov'd, that *Titius* was killed in the View of all the People, or that *Seius* exerciſes the Buſineſs of a Publick Banker or Uſurer; and ſo of other Things of the like Nature: But ſome will have it, that

manifeſt

manifeſt Proof is ſaid to be that which is collected from evident Conjectures and Preſumptions; from whom I beg leave to differ. *Liquid Proof* is ſaid to be that which appears to the Judge from the Act of Court; ſince that cannot properly ſaid to be *manifeſt* or *notorious*. By the *Canon-Law* a *Jew* is not admitted to give Evidence againſt a *Chriſtian*, eſpecially if he be a Clergyman; for by that Law the Proofs againſt a Clergyman ought to be much clearer than thoſe againſt a Layman *. Tho' Proofs introduc'd to one Effect are good Evidence to another Effect between the ſame Perſons; yet if Proof be made againſt one Perſon (among ſeveral others) accus'd of one and the ſame Crime, ſuch Proof is no Evidence againſt the reſt, but ſuch Proof ought either to be re-examin'd, or elſe freſh Evidence muſt be had †. As in all Criminal Cauſes Evidence or Notoriety of Fact is full Proof, ſo likewiſe in ſuch Cauſes all manner of Proofs ought to be clearer than the Light of the Sun at Noon-day: And herein according to the *Civil* and *Canon-Law* two Witneſſes of entire Credit and Reputation do make full Proof. For two or three Witneſſes are ſufficient for the Proof of any Matter of Fact, unleſs it be in ſome particular Caſes, where a greater Number of Witneſſes are requir'd, as I ſhall hereafter obſerve under the Title of *Witneſſes*. All Proof ought to be made before a Concluſion in the Cauſe; for afterwards there is no Room left for Proof made by Inſtruments.

* Abb. in c. 23 x. 2. 19. n. 1.

† Abb. in c. 5. x. 5. 16. n. 5.

Of Canonical Purgation, &c.

THE Word *Purgare* in *Latin* ſignifies the ſame as *Excuſare* *: So that *Purgation* is the Means, whereby a Man excuſes himſelf from a Crime imputed to him, and ſhews himſelf innocent. Indeed the Verb *purgare* in the *Civil-Law* has ſeveral Significations, as *purgare Moram*, which is the ſame as *emendare* †: And a Debtor is then ſaid *purgare moram*, when he has for ſome time refus'd to pay a Debt demanded of him, and yet afterwards makes a Tender thereof: Whereupon he is properly and uſually ſaid *purgare moram*, which is the ſame as *emendare*, *eluere*, and *delere moram*. *Purgare innocentiam* ‡, *purgare exiſtimationem* ‖, *purgare pudorem* *, *purgare ritum* †, *purgare fontem* ‡, &c. In the *Prætor*'s Edict it ſignifies to level a Publick Way, and to cleanſe a Street, *&c.* But in *Judicial* Matters, as I ſhall here handle the Word, it imports the ſame as to excuſe and blot out a Crime ‡ (as aforeſaid). For heretofore ſuch as were ſuſpected of any Crime were wont to purge themſelves; ſometimes by Duelling or ſingle Combat ‖; ſometimes by cold or boiling Water, into which they were thrown *; and ſometimes by walking on a red hot Iron †. And tho' we read of the Example of Duelling in the 17*th* Chapter of the firſt Book of *Samuel*, touching *David* and *Goliah*, yet ſuch ſingle Combat is not admitted now-a-Days ‡: For when Men tempted God with ſuch Afflictions of Torments and Cruelty, they were rightly abrogated and repeal'd: And afterwards ſuch a Form of Purgation was introduc'd, that when any

* D. 48. 1. 5.

† D. 45. 1. 91. 3.

‡ D. 49. 14. 22
‖ D. 47. 10. 1. 6
* D. 3. 3. 25
† D. 43. 22. 1. 6

‡ D. 48. 1. 5.

‖ X. 5. 35. 1.
* X. 5. 34. 8.
† 5. 35. 3.

‡ C. 11. 43. 11
x. 5. 4. 35. 2.

any Perſon was by an Information brought before any Magiſtrate for a Crime, he was to bring ſeven Perſons or fewer, according to the Nature and Quality of his Crime, to give their Teſtimony and Evidence touching his Innocence: And theſe being credible Perſons, and living within his Neighbourhood, they may be preſum'd to have a pretty good Knowlege of the Truth of the Matter. Then the ſuſpected Perſon was to ſwear himſelf, That he had not committed ſuch a Crime as was objected to him; after which his Compurgators took an Oath, *That they believ'd the principal Party ſwearing did ſpeak the Truth* ‖. So that a *Canonical Purgation* is now, when Perſons that are defam'd or accus'd of a Crime, and cannot be convicted thereof, are compell'd to ſhew their Innocence by their own Oaths, and the Oaths of their Compurgators, as aforeſaid: And it is called *Canonical Purgation*, becauſe it was invented and introduc'd by the *Canon-Law*. ‖ X. 5. 34. 16.

This Purgation may be enjoin'd a Perſon on the Account of vehement Suſpicion, or by reaſon of any publick Infamy or Scandal ariſing from a probable Conjecture: For either of theſe Things is of it ſelf enough to command a Purgation, tho' no legal Enquiry has been previous thereunto. But tho' Purgation may be enjoyn'd upon a bare Suſpicion of the Judge or Superiour only; yet a Suſpicion of the Judge or Superiour, which admits of Proof, is not ſufficient for this end *: And a Perſon deficient in his *Canonical Purgation* is by a Fiction of Law deem'd as a Perſon convict †. But Purgation ought not to be enjoyn'd any one, unleſs he be defam'd *apud bonos & graves*: For 'tis requir'd, that this Infamy ſhould not have its Riſe from Enemies or malicious Perſons ‡: Nor ought *Canonical Purgation* to be enjoyn'd a Man on the Account of any light Suggeſtion, Detection or Denunciation ‖. And 'tis the ſame Thing, if a Perſon be in no wiſe defam'd; for then Purgation ſhall not be enjoyn'd him: And if Purgation be enjoyn'd him, that is in no wiſe defam'd, there is room for an Appeal*. And tho' the Ordinary may proceed to an Enquiry againſt any Perſon ſubject to his Juriſdiction, even without any previous Infamy or bad Report of him, where the Suſpicion is likely and admits of Proof with him and others †; yet 'tis otherwiſe, when he will proceed to Purgation, which is a Proof of the Perſon's Innocency. For Purgation is a negative Kind of Proof, with which the the Defendant ought not to be onerated without ſufficient Cauſe; that is to ſay, without ſome previous Infamy ‡. But the Suſpicion of a Biſhop alone is ſufficient to the End, that he may enjoyn a Man *Canonical Purgation*. For when any Scandal or grievous Suſpicion lies againſt any one, his Prelate may proceed to an Enquiry; and if he does not find full Proofs againſt the Perſon, he may enjoyn him *Canonical Purgation* ‖: And if he ſhall perform his Purgation, then he ſhall be pronounc'd to be a Man of good Fame and ſound Teſtimony; and acquitted of the Infamy charg'd upon him. But tho' the occult and private Suſpicion of a Biſhop only be not ſufficient to induce ſuch a Purgation *; yet 'tis otherwiſe, where the Suſpicion is likely and provable before the Biſhops and others: And this Opinion is commonly held good. Indeed *Hen. de Bowick* ſays †, That he does not believe the Suſpicion of a Biſhop and others to be enough to enjoyn a Man Purgation without ſome ill Fame previous thereunto; that is to ſay, unleſs the Perſon has given ſome Scandal by his Behaviour: But 'tis otherwiſe, if he has given ſuch Scandal, as may induce a Suſpicion: For then Purgation may be enjoyn'd him for the ſake of clearing himſelf, and avoiding ſuch Scandal ‡. And thus (according to him) we may underſtand the Opinion of thoſe Men, who ſay, That where any one is ſuſ-

* X. 5. 34. 12.

† X. 5. 1. 23.

X. 5. 34. 7.

X. 5. 34. 10.

‡ 11 Q. 3. 52.

‖ 2 Q. 5. 8.

* X. 5. 34. 6.

† Gloſſ. in c. 2. VI. 5. 1.

‡ Arch. in c. 6. 2 Q. 5.

‖ X. 5. 34. 6.

* 6 Q. 2. 3.

† In. c. 5. x. 14. 31.

‡ Arg. x. 1. 9. 10.

ſpected of an enormous Crime, tho' there be no Accuſer and no evil Fame ſubſiſting, yet the Perſon ſuſpected ſhall be oblig'd to purge himſelf ‖: And an enormous Crime is ſaid to be that, which begets and engenders Scandal, though otherwiſe of it ſelf it be not enormous; for Men ought to keep themſelves free from all Criminal Imputations.

‖ Dd in c. 2. 7 Q. 2.

Before the Judge proceeds to enjoyn *Canonical Purgation*, and to receive the ſame, he ought to give a publick Intimation or Denunciation, to the end, That if any one will accuſe the Perſon now ready to purge himſelf, he ſhould come and proceed within a certain Time prefix'd *, And theſe Solemnities of Law ought not to be omitted even by the Conſent of Parties †; becauſe, as they concern the Utility of the Publick they ought not to be remitted by the Parties. Though (according to the ancient Laws) the Number of the Compurgators was limitted in many Caſes ‡, yet at this Day the Number is arbitray ‖: And where the Aſſignation of a Number is arbitary, 'tis here provided, that ſuch *Arbitrium* ſhould not be extended beyond the Number fix, when Purgation is enjoin'd for Fornication, or for a Crime equal or inferiour to it. Now, among ſuch Crimes as are greater or equal to Fornication and Adultery, the *Canon-Law* gives us ſeveral Examples: As *Hereſy* *, *Homicide* †, *Treaſon* ‡, *Sacrilege* ‖, *Inceſt* ‡‡, *Conſpiracy* ‖‖, *Falſe-witneſs* *, *Simony* †, *Uſury* ‡, and the Sin againſt Nature commonly called *Sodomy* ‖ or *Buggery*. For one Sin is greater than another in ſeveral Reſpects. As, *Firſt*, in Reſpect of a Lapſe or Fall from a greater Good. *Secondly*, In Reſpect of the Meaſure and Bulk of the Puniſhment aſſign'd to it. *Thirdly*, In Reſpect of the Example which it adminiſters and gives unto others from thence. *Fourthly*, In Reſpect of its Condition, Place, Time and Perſon. *Fifthly*, In Reſpect of the Turpitude and Pravity thereof: And, *Sixthly*, in Reſpect of the frequent Repetition of it.

* X. 5. 34. 8.

† Bern. in c. 4. x. 1. 29.

‡ Hoſt. Sum. x. 5. 34.

‖ X. 5. 1. 21.

* 22 Q. 2. 8.
† 33 Q. 2. 9.
‡ 89 Diſt.
‖ 2 Q. 1. 7.
‡‡ 3 Q. 4. 4.
‖‖ 11 Q. 1. 22.
* X. 5. 20. 7.
† X. 5. 5. 6.
‡ X. 5. 19. 5.
‖ 32 Q. 7. 13.

A Perſon ought not to be called or drawn out of the Deanery, where he is commorant, or has offended, to perform his Purgation *; becauſe the Law ſeems to favour as well the Labours and Expences of the Perſon to undergo *Purgation*, as it does the *Compurgators* themſelves. And another Reaſon may be aſſign'd for this, *viz.* Becauſe *Purgation* ought to be perform'd in that Place, and among the Inhabitants, where he has been defam'd, to the end that ſuch evil Report may dye, and be extinguiſh'd in the Place where it firſt happen'd to have its Riſe ‡. Altho'it be regular for a Perſon to purge himſelf by the Oath of his Peers, and ſuch Perſons as are of the ſame Order, State and Condition with himſelf; yet for want of ſuch Perſons, or they being his Enemies, he may purge himſelf by the Means of ſuch Perſons as are Inferiour to himſelf, *viz.* by Laymen and Women; and even thoſe of the Conſanguinity may be his Compurgators: For 'tis enough if the Compurgator be tollerated by the Church †. But yet only ſuch Perſons ought to be admitted to be *Compurgators*, as are of the Neighbourhood, and Men of good Reputation and Credit ‡. In Caſes that are notorious, Purgation ought not to be enjoyn'd; but a Sentence of Condemnation ought to be pronounc'd ‖: Nor ought Purgation to be enjoyn'd at the Election of him, who is to undergo ſuch Purgation, but at the Election of the Judge alone. *Compurgators* ought to be Perſons of great Honeſty and Integrity; and ought very well to know the Perſon whom they would purge from any Infamy or Suſpicion: And herein they ought not to be hindred either by the Judge or any other Perſon. I have ſaid it is a Rule in Law, that every one ought to purge himſelf by the Oath of his Peers, and of ſuch Perſons as are of the ſame State and Order of himſelf *; and

* Lindw. lib. 5. Tit. 14. c. 4.

† Bern. in c. 5. x. 1. 41. v. *Diſtantiam.*

‡ X. 5. 1. 23.

‖ X. 5. 34. 9.

‡ X. 5. 34. 11.

‖ X. 5. 34. 12.
X 5. 34. 15.

† X. 5. 34. 7.
* X. 5. 34. 5 & 8.

and

and for want of ſuch Perſons, or if they are Enemies, he may purge himſelf even by the Means of Women and inferiour Laymen, and even by thoſe of his own Conſanguinity*: This is to be underſtood of Clerks as well as Laymen. But touching the Oath of *Compurgators*, and what is the Oath of him that is enjoyn'd Purgation, ſee the ſecond Part of the *Decretum* †; and touching what is to be done in caſe the Perſon enjoyn'd Purgation cannot meet with proper *Compurgators*, ſee the *Decretals* ‡.

* 2 Q. 5. Gloſſ.

† 2 Q. 5 18.

‡ X. 5. 1. 10.

Of the Recuſation of a Judge, and the Reaſons for it, &c.

THERE being ſeveral Exceptions in Law, whereby *Judicial* Acts and Proceedings are ſuſpended for a Time, I ſhall here treat of the *Recuſation* of a Judge, as one, which tho' regularly ſpeaking ought to be firſt in Point of Time; yet as it beſt ſuits this Place, according to the Method of my Proceeding in this Work, I was oblig'd to leave it to the laſt Exception. Now this *Recuſation* obtains, when a Judge has either before the Suit commenc'd, or in the Cauſe it ſelf, render'd himſelf ſuſpected to the Parties in Judgment on ſome Account or other: For then he may be recus'd and ſet aſide, and his Juriſdiction is in the mean while ſuſpended, till ſuch Time as the Cauſe of ſuch *Recuſation* is examin'd and determin'd by Arbitrators choſen for that Purpoſe; and if he ſhould proceed to do any Act in the Cauſe (pending ſuch Recuſation) the Proceſs is null and void *ipſo Jure* *. For as the *Civil* and *Canon-Law* know no ſuch Thing as a *Jury* of Twelve Men to try the Fact, as is done here in *England*, the Proof of the Fact, according to thoſe Laws, is left to the Arbitrary Determination of the Judge, who ought to be an upright and impartial Umpire thereof. And, therefore, if he adminiſters any Suſpicion of Malice, Corruption, want of Knowlege, and the like, he may be ſet aſide by a Recuſation from taking Cognizance of the Cauſe; and this Recuſation is a Challenge to his Integrity, *&c.*

* Arch. in c. 8. VI. 1. 14.

Now among many other Things to be obſerv'd in the Recuſation of a Judge, ſome *Recuſatory* Exception ought to be alledg'd in the firſt Place† not only before Conteſtation of Suit, but generally ſpeaking it ought to be the firſt Exception made in a *Judicial* Proceeding, even before all other *dilatory* Exceptions; becauſe if any other *dilatory* Exception be objected, and the Judge pronounces thereon, it fairly induces a Conſent to the Judge and his Juriſdiction‡, ſo that afterwards he cannot be ſet aſide by any Recuſation, unleſs the Cauſe of ſuch Recuſation afterwards came to the Knowlege of the Party recuſing him: Wherefore, every Perſon ought to take Care how he appears before a ſuſpected Judge without a Recuſation or Proteſtation (at leaſt) againſt his Juriſdiction, leſt he ſhould be deem'd to conſent thereunto.

† C. 3. 1. 16. x. 2. 28. 6.

‡ X. 1 29 20. x. 2. 20. 25.

There are various and ſeveral Cauſes for which a Judge may be recus'd as ſuſpected: Some of which I ſhall here ſubjoin. And, *Firſt*, A Judge may be recus'd on the Score of great Familiarity, and an intimate

mate Acquaintance or Friendſhip with the Adverſe Party; for a moderate Familiarity and Acquaintance is not ſufficient hereunto *: And great Familiarity is included under the Notion of Friendſhip and Domeſticity, as living together in the ſame Houſe, and the like. A *ſecond* Cauſe of Suſpicion is, when the Judge is of † Conſanguinity or ‡ Affinity to the Adverſe Party; which (notwithſtanding) does not proceed, if the Judge be of equal Kindred unto each Party, becauſe then he cannot be recus'd as ſuſpected of Partiality ‖. When a Judge is of Conſanguinity or Kindred to any Prelate or Rector of a Church, he may by the *Canon-Law* be recus'd as a ſuſpected Perſon in the Cauſe of that Church *. *Thirdly*, When any *Ordinary* Judge is ſuſpected upon a juſt Account, his Vicar or Surrogate may be recus'd on the ſame Account, tho' there be no other Cauſe of Suſpicion in particular aſſign'd againſt him †. A *fourth* Cauſe of Recuſation is, when any one deſires to be a Judge in his own Cauſe ‡, ſince no King or Emperor can be a Judge in his own Cauſe, but ought to delegate the ſame to another Perſon, if the Suit be with one who is not his Subject: But he may be a Judge between himſelf and a Subject, if he recognizes no Superiour ‖. A *fifth* Cauſe is, when the Judge is a capital Enemy to the Party *; and, according to *Decius*, any Enmity is ſufficient to ſet him aſide, tho' not capital. And the *Abbot* ſays, That he who is of Kindred by Conſanguinity to the Enemy of the Adverſe Party, may be recus'd: For, according to him †, he who couples any Family, Pedigree, Kindred or Friendſhip with my Enemy, is ſaid to be an Enemy to me; becauſe he is adjug'd to be a Perſon of the ſame Intention; and, conſequently, of the ſame Malice with the Enemy of the Adverſe Party ‡. A *ſixth* Cauſe is, when the Judge ſojourns, boards and diets with the other Party, or with the Adverſary of the other Party ‖. A *ſeventh* Reaſon is, when the Judge is a Fellow-Countryman with either of the Parties, as being born in the ſame City *, *&c.* But this only holds true, when ſuch Fellow-Citizens are known to be out of their own City or Country: for in remote Parts Men are apt to love each other as Brethren. But tho' this be a juſt Cauſe of Suſpicion in a Delegrate, as being of the ſame Country or City; yet it is none of an *Ordinary* Judge. An *eighth* Cauſe is, when a Judge is ſubject to my Adverſary in reſpect of Juriſdiction, *viz.* becauſe he is either his Suffragan or his Vaſſal; for in ſuch a Caſe I may recuſe him as ſuſpected †: And 'tis the ſame Thing, when the Judge is in any other reſpect a Subject to the Adverſe Party contending with me; becauſe he is thereby apt to deviate from the right Path of Juſtice thro' Fear of his Superiour ‡. A *ninth* Reaſon is, when the Judge has been an Advocate to the other Party in that very Cauſe wherein he would be a Judge ‖: But 'tis otherwiſe, if he has been an Advocate to the other Party in ſome other Cauſe entirely diſtinct and independant from the Cauſe in Hand; becauſe an Advocate in one Cauſe may be a juſt Judge in another of mine entirely diſtinct and independant from the Cauſe now before him; and, therefore, he ſhall not be recus'd; nor is it a ſufficient Cauſe for the Recuſation of a Judge to ſay, That the Judge's Son or Kinſman, or one that boards with the Judge, is an Advocate in the Cauſe. A *tenth* Cauſe is, if the Judge ſhews too much Favour to the other ſide, by aggrieving one Party, and exhibiting too great Demonſtrations of Friendſhip and Kindneſs in the Cauſe to the other *: But moderate Favour and Friendſhip is not enough to recuſe a Judge. Another Reaſon is, if one of the Parties frequently viſits the Judge at his Lodgings, or ſecretly whiſpers in his Ear by private Converſation with him; ſince he may

X. 1. 29. 25. Abb. & Gloſſ. ibi.

† X. 2. 28. 36. ‡ D. 2. 1. 10. x. 2. 6. 4.

‖ Part. in l. 10. D. 2. 1.

* Deciusin c. 36. x. 2. 28.

† Felin. in c. 25. x. 1. 29. ‡ D. 2. 1. 10.

‖ Soc. Conſ. 120. Vol. 1. * Abb. in c. 4. x. 2. 6.

† Abb. ut ſup.

‡ Felin. in c. 4. x. 2. 6.

‖ Abb. in c. 4. x. 2. 6.

* Abb. ut ſup.

† X. 2. 6. 4. Abb. & Dd. ibi.

‡ Abb. in c. 4. x. 2. 6.

‖ D. 2. 1. 17. Alex. & Dd. ibi.

* Abb. in c. 4. x. 2. 6.

may for this be recus'd by the other Party *. A *twelfth* Cauſe of Suſpicion is, if the Judge behaves himſelf with any Animoſity or Injuſtice, or proceeds *Extra-judicially* againſt the Perſon, or threatens the Party to do him an Injury, and the like †. And another Cauſe is, if the Judge himſelf has a Suit like unto that, wherein he would ſit as Judge; becauſe he is from hence render'd ſuſpected, on a Preſumption that he will give the like Judgment in that Cauſe, as he would have given in his own ‡. A *fourteenth* Reaſon is, if the Party *Recuſant* has any Cauſe himſelf depending with the Judge, in the Judge's private Capacity; as that he is at Law with him in ſome other Court: For ſuch Law-ſuit often engenders Hatred and Enmity, which are ſufficient Reaſons to recuſe a Judge ‖. Again, if the Judge has ſhewn himſelf unwilling to exerciſe any Act of Humanity with the Party in Judgment, refuſing to admit him *ad oſculum pacis*: For he is upon this Account preſum'd to be an Enemy, and may be recus'd *. For the *Abbot* ſays, that this is one way of proving a Man's Enmity, it being uſual in the Chriſtian Church heretofore to give the Kiſs of Peace to each other: And if any one refus'd to admit another hereunto, he was from hence preſum'd to be an Enemy. And 'tis the ſame Thing, if the Judge will not ſalute or put off his Hat to the Party; for the Law from hence deems him an Enemy †: Or if the Judge has formerly been an Enemy to the Adverſe Party, and now reconciled, he may be recus'd as a ſuſpected Judge, ſince an Enemy reconciled ſtill remains under ſome Danger of Suſpicion; and, therefore, may be ſet aſide from giving Evidence in the Cauſe ‡. Another Reaſon is, if a Prelate Endeavours to be a Judge in the Cauſe of his Church ‖. For tho' *de Jure* he may be a Judge, if not recus'd; yet ſtill he may be recus'd as a ſuſpected one on the Score of a preſumptive Intereſt and Affection to ſuch a Cauſe. A Judge is alſo render'd ſuſpected, if he has been only ſo far engaged in a Cauſe as to be conſulted therein, and to have given his Opinion for one of the Parties, tho' he has not been an Advocate in the Cauſe, ſince Pride and Ambition may prevail with him to leave the Paths of Truth and Juſtice for the Sake of Victory: But 'tis otherwiſe if he has not declar'd his Opinion on the Merits of the Cauſe, tho' he has been conſulted therein in ſome particular Point *. If a *Canon* of the ſame Church with the Judge litigates before him, he may be in ſuch a Caſe recus'd by the Adverſe Party †: But if both the Litigants are *Canons* of the ſame Church with him, 'tis otherwiſe, becauſe the like Conſideration of Affection excludes all Suſpicion ‡. A Judge may likewiſe be recus'd, when it has been appeal'd from the Judge's Sentence, becauſe he has only injur'd and aggriev'd the Appellant. For (pending the Appeal) he is render'd ſuſpected to the Party appealing as well in every other Cauſe, as in that appeal'd ‖. If a Judge ſhall receive any Bribe, Preſent or Gift from either of the Parties, he may be ſet aſide as a falſe Judge *: And ſo he may, if the Cauſe does in any reſpect regard the Advantage or Diſadvantage of ſuch Judge; as becauſe he is liable to an Eviction of the Thing in Controverſy, or is a Surety for one of the Parties †. And 'tis the ſame Thing if the Judge has been prevail'd on by the Prayers and Sollicitations of either of the Parties, or has been corrupted by any Price or Reward for his Sentence, or any wiſe ſtands in fear of my Adverſary, or has too great a Love for him on ſome Account or other. Another Cauſe is, if the Judge be an illiterate Perſon or not skill'd in the Law, and the Matter be a Cauſe of a ſubtle and arduous Nature; for that, according to *Baldus* ‡, Cauſes of Subtlety ought not to be committed to groſs and fat-headed Judges; and *Jaſon* ſays ‖, That this is a

* Lanfr. in c. 11. x. 2. 19.

† Abb. in c. 7. x. 2. 13.

‡ Cloff. & Dd. in c. 18. x. 2. 1.

‖ Abb. in c. 23. x. 1. 29.

* Abb. ut ſup.

† Jaſ. in l. 16. C. 3. 1.

‡ Dec. ut ſup. ‖ Decius in c. 30. x. 2. 28.

* Dec. ut ſup. Dd. in l. 17. D. 2. 1.

† Dec. ut ſup.

‡ Dd. in c. 35. x. 1. 29.

‖ Dec. ut ſup.

* Dec. ut ſup.

† Dec. ut ſup.

‡ In l. 14. C. 6. 24.

‖ In l. 16. C. 3. 1.

juſt Cauſe of Suſpicion. A Judge may likewiſe be recus'd, if he be too ſevere and cruel in his Proceeding: For in this Caſe, according to *Jaſon* *, his Juriſdiction may be taken from him on the Score of ſuch his Cruelty; and, according to *Baldus* †, he may be recus'd, if he wants Diſcretion, in the ſame manner as if he were guilty of Iniquity; for if a Judge has been accuſtom'd to Iniquity, he may be ſet aſide ‡. Again, according to *Lanfrank* ‖, a Judge may be recus'd as a ſuſpected Judge, if he refuſes to hear an Advocate, tho' the Cauſe be clear in itſelf. And, *laſtly*, Every Cauſe that is ſufficient to remove and ſet aſide a Proctor, is, according to *Panormitan* ‖, ſufficient to remove and ſet aſide a Judge.

* In l. 16. C. 3. 1.
† In l. 2. D. 1. 6.
‡ Fald. in c. 12. x. 2. 19.
‖ In c. 2. Cl. 5. 11.
‖ In c. 36. x. 2. 28.

This Exception of Recuſation ought to be propounded before Conteſtation of Suit, as already related; unleſs there be ſome Cauſe or Matter of Suſpicion ariſing, which ſupervenes afterwards *: And in ſuch a Caſe Recuſation may be made in any Part of the Suit, even after a Concluſion in the Cauſe, according to *Felinus* †. But 'tis to be obſerv'd, that it ought not to be objected *ore tenus*, according to the *Canon-Law*, but in Writing, as an Appeal is from an *Interlocutory* Sentence, unto which 'tis liken'd and compar'd ‡: But the *Civil-Law* (I think) leaves it in the Breaſt of the Party, whether he will do it in Writing or not; but then his Reaſons ought either to be inſerted in the Acts of Court, or elſe given in Writing to the Arbitrators choſen on each ſide. There is alſo this Difference between the *Civil* and *Canon-Law*, *viz.* the *Canon-Law* requires, that the Cauſe of Suſpicion be ſpecially and particularly expreſs'd in the Recuſatory Libel ‖: But the *Civilians* ſay, that the Cauſe of Suſpicion need not to be thus expreſs'd, but that an Allegation of Suſpicion in general is enough before the Judge recus'd, according to the Form of recuſing ſet down in the Gloſs *; provided the Party recuſing takes the Oath of Calumny, *viz.* That he does not make this Recuſation thro' Calumny or Malice. And this Oath of Calumny is a *Species* of Proof for the preſent †, till the Cauſe and Matter of ſuch Recuſation is laid before the Arbitrators choſen to hear the ſame. For the Judge recus'd does not take Cognizance hereof, becauſe he may be preſum'd to be Partial in favour of himſelf: But he ought to name his Arbitrators, and compel the Parties recuſing him to do the like within three Days *, who ought to be admoniſh'd or cited hereunto †. And if the Arbitrators cannot agree among themſelves, but are divided in their Procedings or Opinions about the juſt Grounds of ſuch Recuſation, the Judge recus'd may oblige them to chuſe a third Perſon for the Deciſion hereof; and we are to abide by the Judgment of two of them; and if the Arbitrators elected ſhall refuſe to take the Award on themſelves, they may likewiſe be compell'd hereunto by the Judge recus'd ‡. But 'tis the Buſineſs of the Arbitrators to aſſign the Term-Probatory for the Proof of the *Recuſatory* Allegation, and to do other Matters of the like Nature ‖. The Law has appointed no Term certain for the Determination of ſuch Recuſation, but has left the ſame to be prefix'd by the Judge recus'd; and if the Arbitrators ſhall not determine the Matter within the Term prefix'd by him, he may proceed to take Cognizance of the principal Cauſe, notwithſtanding ſuch Recuſation propounded: But if the Judge recus'd ſhall prefix'd too ſhort a Term for the Hearing of this Matter, the Party recuſing him may appeal to the Superiour Judge; and an Appeal lies to the Prince, if the Arbitrators themſelves ſhall pronounce an unjuſt Sentence, or aggrieve either Party *. Regularly ſpeaking, every *Delegated* Judge may be recus'd, but an *Ordinary* Judge cannot by the *Civil-Law* †; but yet in ſuch a Caſe he ought not to ſit himſelf in Judgment, or (at leaſt) without an Aſſeſſor or an Aſſociate.

* Felin. c. 36. x. 2. 28.
† In c. 25. x. 1. 29.
‡ Joh. Andr. in C. 1. VI. 2. 15.
‖ In C. 61. x. 2. 28.
* In l. 16. C. 3. 1.
† Gloſſ. In l. 16. C. 3. 1.
* C. 3. 1. 18.
† Arg. D. 42. 1. 47.
‡ X. 2. 28 61. Gloſſ. inc. 39. x. 1. 29.
‖ Gloſſ. ut ſup.
* C. 3. 1. 18.
† C. 3. 1. 16. Nov. 86. c. 2.

Of

Of the Repairs of Churches, Chancels, &c.

IT not only becomes the Care of the Church, to have its Clergy well inſtructed in Religion, and handſomly provided for in Reſpect of their Maintenance, but it adds much to their Credit and Reputation among the People, to ſee their Edifices well ſupported, and the Houſe of God kept in decent Repair: And therefore, in ancient Times, when Churches came to have fix'd Revenues ſettled on them by the Bounty and Liberality of well diſpos'd Perſons, it was always provided in the Endowment of Churches, that ſome Portion ſhould be ſet aſide, and put into the Biſhop's Hands for the Repairs of the Edifice, and not entirely conſum'd on the Bellies of the Prieſts. And we meet with ſeveral Canons in Councils to this Purpoſe. In the firſt Council of *Orleans* *, a third of the Revenues was allotted for this end, and afterwards it came to a fourth Part (for one fourth Part went to the Repairs of the Manſe); but ſtill it was collected by the Biſhop, and laid out as deſign'd, as long as the Biſhops were wont to go on frequent Viſitations in their Dioceſſes, and to view each Pariſh Church in their own Perſon: But when they either grew lazy, or elſe ſpent their whole Time in the Care and Management of Temporal Affairs, into which they had let themſelves contrary to the Inſtitution of their Office, they devolv'd this Care on their Archdeacons †; and they alſo becoming Negligent herein, the Biſhops were at length oblig'd to transfer this Care on the Rectors of Pariſhes themſelves, with the Allocation annex'd to it, but yet ſubject to the Biſhop's Cognizance and Direction; and thus the Repairs of the Church does at this Day of *Common-Right* belong to the Rector of ſuch Church *. So that of *Common-Right* the Laity are not compellable hereunto †; tho' the *Canon-Law* will have it, that even Lay-Pariſhioners may be compell'd to repair their own Church by Virtue of a Cuſtom, ſince they ought to obſerve every laudable Cuſtom of the Church ‡: And thus by the Cuſtom or Common-Law of *England*, it belongs to the Pariſhioners to repair the *Nave* or Body of the Church, where they ſit and hear Divine Service; and the Repairs of the Chancel only belongs to the Rector ||. The *Nave* or Body of the Church is that Part of it which is *extra Cancellum*, or out of the Chancel.

* Can. 5. 14.

† X. 1. 23. 1. & 7.

* 10 Q. 10 & 11. 10 Q. 2 & 3.

† 12 Q. 2. 27.

‡ Joh. Andr. in c. 1. x. 3. 48.

|| Mod. Rep. pt. 1. p. 236.

And as the Biſhop had always the Cognizance and Direction of this Matter committed to him, the Spiritual Court may even now compel the Pariſhioners to repair their Pariſh-Church in Virtue of ſuch a Cuſtom, if it be in Decay and out of Repair, and may excommunicate every one of them ſeverally, till the greater Part of them do agree to aſſeſs and levy a Tax for the Repairs thereof; and ſuch as are willing to contribute thereunto ſhall be abſolv'd *: But the *Court Chriſtian* cannot levy a Rate, or aſſeſs them towards it. And tho' the Churchwardens ought to ſummon the Pariſhioners to meet for this end, before the Eccleſiaſtical Court can proceed againſt them; yet this Summons need not be from Houſe

* Mod. Rep. ut ſup.

Houſe to Houſe, but a general Publick Summons is ſufficient, and the major Part of them that appear may bind the whole Pariſh: But the Churchwardens cannot of themſelves impoſe a Tax for the Repairs of the Church; but the greater Part of the Pariſh may make a By-Law, and to this Effect they are a Corporation. It is like the Repairs of a Bridge at the Common-Law, where a *Diſtringas* ſhall iſſue againſt the Inhabitants to make them repair it; but neither the King's Court, nor a Juſtice of the Peace can impoſe a Tax for it. And tho' a Tax ſhould be illegally impos'd, as by a Commiſſion from the Biſhop to the Parſon and ſome of the Pariſhioners to aſſeſs a Tax; yet if it be aſſented to by the greater Part of the Pariſhioners, and confirm'd by them, they may in the Spiritual Court proceed to excommunicate the Perſons refuſing to pay it *.

* Mod. Rep. pt. 1. p. 235. 237.

Though two Parochial Churches ſhould be united; yet the Reparations of them ſhall be ſeveral, as before ſuch Union †: But if there be a Mother-Church, and a Chapel of Eaſe within the ſaid Pariſh, unto which the Inhabitants of a certain Precinct within the ſaid Pariſh do reſort to hear Divine Service, and tho' the Inhabitants of ſuch Precinct ſhould at their own Coſts and Charges repair ſuch Chapel; yet this ſhall not exempt them from contributing towards the Repairs of the Mother-Church; nay, tho' they ſhould Chriſten and receive the Sacrament therein, and have Churchwardens of their own. And ſo it has been frequently adjudg'd in the Eccleſiaſtical Courts †: And tho' there have been ſome Sentences on the contrary *viz.* on the Behalf of the Pariſhioners of ſuch Chapel, yet they have always been diſannull'd upon an Appeal. See the Caſe of the Pariſh of *Aſton* againſt *Caſtlebirmidge* Chapel in *Hobart*'s Reports ‡. For as the Pariſhioners had theſe Chapels at firſt for their own Eaſe, ſo they may reſort (if they pleaſe) to the Mother-Church, bury, chriſten, marry, and have all other Services and Advantages from thence; and the Rector or Vicar may ſerve them in Perſon (if he thinks fit) at their Chapel, as well as his Curate. But this is much ſtronger againſt ſuch Pariſhioners, if they reſerve unto themſelves a Right of burying, chriſtening, *&c.* at the Mother-Church. Yet if ſuch Inhabitants have been diſcharg'd Time out of Mind from contributing towards the Repairs of the Mother-Church, and they ſhall be proceeded againſt in the Spiritual Court, and ſentenc'd hereunto, a Prohibition will lye ‡. If a Town or Vill having a Chapel of Eaſe buries at the Mother-Church, and has, therefore, Time out of Mind repair'd Part of the Church-Wall; ſuch Pariſhioners may in this Caſe be excus'd from repairing the whole Church. The Inhabitants of ſuch a Place preſcribe to repair a Chapel of Eaſe, and for this Reaſon they have been Time out of Mind free from the Reparations of the Mother-Church; and their Plea was likewiſe held to be good: But if ſuch a Chapel has been built within Time of Memory, they ought then to prove ſuch an Agreement, by Virtue of which they are diſcharg'd from all Reparations to the Mother-Church ‖. The Inhabitants of *H.* having a Chapel of Eaſe, and a Cuſtom that thoſe within ſuch a Precinct ought to find a Rope for the third Bell, and to repair Part of the Mother-Church; in Conſideration of which they have been freed from the Payment of any Tithes to the Mother-Church. *Quære*, Whether this be a good Cuſtom or not? For the Matter was adjourn'd *. If it be libell'd in the Spiritual Court upon a Cuſtom, that a Chapel of Eaſe has Time out of Mind paid one Third Part towards the Repairs of the Mother-Church, and ſuch a Cuſtom is deny'd, a Prohibition will lye thereupon, if the Spiritual Court proceeds.

† 16 Eliz. 30 Eliz.

‡ P. 66.

‡ Hob. Rep. p. 67.

‖ Paſch. 17. Car. 1. B. R.

*March. Rep. p. 91.

If

If a Libel be exhibited againſt a Pariſh for not repairing the Church, tho' the Word *Eccleſia* may include the Chancel alſo, yet no Prohibition lies: But if a Rate or Tax be expreſly impos'd for the Repairs of the Body of the Church and of the Chancel, a Prohibition will lye ‖. For the Reparation of the Chancel belongs to him that receives the fourth Part of the Church's Income, which was anciently allotted for the building of the Church, as already obſerv'd; and thus of *Common-Right* it belongs to the Parſon, that has this fourth Part*, and not to the Pariſhioners, tho' Cuſtom has now with us transferr'd the Body of the Church on the Pariſhioners, and likewiſe the Repairs of the Chancel in the City of *London*, and ſome other Places †: And the Pariſhioners may be compell'd to obſerve this Cuſtom, where the Cuſtom is ſuch. It has been the Opinion of ſome Men, that if a Tax be made and allow'd of by the greater Part of the Pariſh, *pro Reparatione Eccleſiæ*, and afterwards the Money thus rais'd be laid out on the Repairs of the Chancel, it is well enough, and the Pariſh ought to allow it on the Churchwardens Accounts: But I hold the Law to be quite otherwiſe; for this was a manifeſt Miſapplication of the Pariſhioners Money given for the Repairs of the Body of the Church; and ſo it has been adjudg'd in the King's Courts.

‖ Mod. Rep. ut ſup.

* 10 Q. 3. 3.

† Mod. Rep. ut ſup. Lindw. lib. 1. Tit. 10. c. 4. v. *Reparationi.*

If a Church be fallen down, and the Pariſh ſo increas'd, that of Neceſſity they muſt have a larger Church, a Tax may be rais'd by the major Part of the Pariſh, as well for enlarging as repairing of it. Nor is the Conſent of every Pariſhioner neceſſary to the impoſing of a Tax in ſuch a Caſe for enlarging the Church; for the greater Part of the the Pariſh ſhall conclude the leſſer for enlarging a Church as well as for repairing it.

A Perſon liv'd in one Dioceſs, and occupy'd Lands in another, where he was tax'd towards finding of Bells for that Church where his Lands where ſituated; for Non-payment of which a Suit was commenc'd in the Spiritual Court, where the Lands were lying. And he ſuggeſted to the King's Court the Statute of *Henry* the Eighth *, That no Man ſhall be cited out of his Dioceſs, except for ſome Spiritual Cauſe neglected to be done therein: And a Prohibition was granted. For this was not a Spiritual Cauſe neglected to be done; becauſe Church-Ornaments are a Perſonal Charge of the Inhabitants, and not on the Land-owners dwelling elſewhere: But the Repairs of the Church it ſelf are a real Charge upon the Land †.

* 23 H. 8. c. 9.

† Mod. Rep. pt. 3. p. 211.

By a Provincial Conſtitution in *Lindwood* ‡, all Perſons, as well Clerks as Laymen, having Lands, Rents or Poſſeſſions, *&c.* which do not ariſe from the *Glebe* or Endowment of Churches to be repair'd, in whatever Pariſhes they lye within the Province of *Canterbury*, or ſhall hereafter have ſuch Lands, Rents, Poſſeſſions, *&c.* whether they live in ſuch Pariſhes or not, ought together with the reſt of the Pariſhioners to contribute (as oft as Need ſhall require) to all Charges that concern the Pariſhioners themſelves in reſpect of repairing their Church and adorning the ſame, and likewiſe to all Duties incumbent on them upon this Account either by Law or Cuſtom (a due Regard being had to the true Value and Portion of their Lands, Rents, Poſſeſſions, *&c.*) And hereunto the *local* Ordinaries may compel them by Eccleſiaſtical Cenſures, if it ſhall be deem'd neceſſary. So that according to this Conſtitution, Church-Ornaments, (which ought to be decent according to the Eſtate and Abilities of the Church ‖) are a Charge on the Land-owners dwelling elſewhere, as well as on the Inhabitants of ſuch Pariſh. But if Lands lying within a Pariſh do belong to another Church, and are Parcel of the *Glebe* or Endowment of another Church, the

‡ Lib. 3. Tit. 27. cap. 4.

‖ Gloſſ. in c. 1. Cl. 3. 15. 3. v. *Ornamentis.*

Perſons having Lands, *&c.* of this Kind ſhall contribute to the Repairs and Ornaments of that Church within the Pariſh whereof they are ſituated, notwithſtanding the Law here quoted in the Margin *, which ordains, that ſuch Lands as are of the *Glebe* or Endowment of a Church, ſhall be free and Exempt from the Payment of every Tax: But this is only in Reſpect of a Secular, and not in Regard of an Eccleſiaſtical Rate or Aſſeſsment: Therefore in this Caſe a Perſon having Lands and Poſſeſſions, which are Part of the *Glebe* or Endowment of another Church, ſhall be rightly oblig'd to contribute ſuch Tax as is of an Eccleſiaſtical Nature, according to *John de Athon* on the *Legatine* Conſtituions †; where he ſeems to hint, that a Tax or *Onus* for the Repairs of a Church, and which concerns the Pariſhioners, is an *Onus* in the Realty affecting Lands, and the like, ſaying, That every Pariſhioner is bound to repair the Church, according to that Portion of Land which he poſſeſſes within the Pariſh and likewiſe according to the Number of his quick and living Animals which he has therein ‡.

* X. 3. 39. 1. x. 3. 30. 2.

† Ottob. Tit. 17.

‡ Joh. de Ath. in Tit. eund. v. *hoc tenentur.*

I have already remembred, that the Parſon is chargeable with the Repairs of the Chancel, not only in reſpect of the Profits which he receives from burying therein; but alſo in reſpect of the *Canon-Law* obliging him to repair the whole Fabrick of the Church: And it was the Opinion of the *Common-Pleas* that the Spiritual Court may grant a Sequeſtration upon an Impropriate Parſonage for not repairing the Chancel of the Church. *Sed Quære*, Whether they can do it for not repairing the Parſonage-Houſe? For 'tis clearly held, that they may excommunicate the Impropriator for both, notwithſtanding the Statute of Diſſolutions. But tho' Cuſtom has diſcharg'd the Parſon from paying towards the Repairs of the *Nave* of the Church on his Repairing the Chancel, yet Cuſtom does not excuſe him from taking Care that the Church and Chancel be repair'd ‖: Beſides, 'tis not only the Intereſt of the Parſon to ſee this done on the Score of Decency, but becauſe the Parſon ought Yearly to render an Account hereof to the Biſhop, if ſuch Account be demanded of him ‡. And, moreover, he is by the *Canon-Law* bound to audit the Accounts of all Moneys, Revenues and Expences laid out and left for the building and repairing thereof. If the Pariſhioners will not repair the Church according to the Canon provided in this Behalf, they ought to be puniſh'd, according to ſome *, by an Eccleſiaſtical Interdict, and not by a general Excommunication, ſince the Repairs of the Church concerns the Pariſhioners as a Collective Body or Corporation, on which the Puniſhment of Excommunication cannot lawfully be inflicted, tho' it may on the particular Members being ſeverally culpable herein.

‖ Arg. D. 8. 2. 21.

‡ 12 Q. 3. 1.

* Lindw. lib. 2. Tit. 10. c. 4. v. *ſub pœna*

Now that Pariſhioners ought to contribute, and may be cited in a Cauſe of *Contribution* towards the Repairs of the Body of the Church, and to the Charge of furniſhing Books and other Utenſils requir'd (by Law) to be bought at the common Charge of the Pariſh, appears partly by the *Regiſter*, and partly by *Fitzherbert* in his *Natura Brevium* †, who gathers it from the *Regiſter*. For if a Biſhop (ſays he) cites any of the Pariſhioners of a Church to be Contributary to the Reparations of the Pariſh Church, or of any Chapel annex'd to it, and the Party ſues a Prohibition directed to the Biſhop, upon a Surmiſe that he is impleaded (touching a Lay-Fee) in the *Court Chriſtian*, the Biſhop ſhall have a *Conſultation* granted on this Matter being ſhewn in his Behalf. And this Cognizance is likewiſe confirm'd unto the Spiritual Court by the Royal Injunctions ſet forth in the firſt Year of Queen *Elizabeth*'s Reign under the Great Seat of *England* ‡ for a better Record of the Matter, the Queen being authorized thereunto by *Act of Parliament*.

† F. N. B. Tit. Conſult. fol. 50.

‡ A.D. 1559.

ment. For in these Injunctions we have mention made of sundry Utensils, Ornaments, Books, and other Things, which ought to be provided at the Common Cost of every Parish, and to be supply'd thereunto from Time to Time: And whether they be wanting or no, is to be enquir'd into by the Ecclesiastical Judges, who ought to urge the Observation of the Injunction against the Infringers by Processes and Censures Ecclesiastical, according to the Course of that Law. And herein these Injunctions only follow the Common-Law: For if a Ter-Tenant, who holds Land, has usually paid for such Tenement a Pound of Wax, or the like, unto the Church, and does with-hold the same, the Church-wardens may sue him for it in the Ecclesiastical Court. And likewise if a Man that with-holds Church-Goods, does by his last Will enjoyn his Executors to deliver the same, any of the Parish may sue the Executors for them in the Ecclesiastical Court. But to affirm the Right of Proceeding in the Ecclesiastical Court against such as refuse to contribute towards the Repairs of the Church, we have a Judgement in a *Consultation* (recorded in the *Register* *) to this Effect, *viz. Vobis significamus, quod super Reparatione & Emendatione defectuum corporis Ecclesiæ (juxta consuetudinem approbatam) faciendâ, procedere poteritis, & ea facere quæ ad forum Ecclesiasticum noveritis pertinere, dictâ Prohibitione non obstante.* And Money it self may be lawfully sued for in the Ecclesiastical Court on this Account, as appears by another *Consultation.* And so 'tis also provided by a Statute in this Behalf (among other Things) *viz. That Prelates may punish for leaving Church-yards unclosed, or for that the Church is uncovered, or not conveniently decked; in which Cases, none other Pennance can be enjoyn'd but Pecuniary* †. But I need not prove that the Sun shines at Noon-day to any Person that has his Sight.

* Reg. p. 45. a.

† Circumspecte agatis. 13 Edw. 1.

And whereas divers Persons did formerly, out of a covetous Temper of Mind, (and, I fear, do still) neglect the Repairs of their Parsonage-Houses, and other Buildings belonging to their Benefices (tho' they receiv'd large Profits from thence) which such Persons are immediately bound to repair in such a manner that they do not go to Ruin and Decay: Therefore, all Clergymen, of whatever Denomination they be, are enjoyn'd by a *Legatine* Constitution in *Lindwood* ‡, to keep the *Manse* and other Edifices belonging to their Livings, in decent Repair; and hereunto they ought to be admonish'd by their Bishops and Archdeacons, in case of Failure; and compell'd if they are inferiour Clergymen. For if any one shall after such Admonition for two Months neglect such Repairs, the Bishop may either proceed against him by Censures, according to the *Canon-Law*; or else cause the same to be done out of the Fruits and Profits of such Benefice, by way of Sequestration, only causing so much to be receiv'd from thence as is sufficient for such Repairs: But if he shall cause more than is sufficient to be thus receiv'd, the Party aggriev'd may be reliev'd by the Benefit of an Appeal. Among these Church-Buildings here mention'd, the Constitution reckons the Chancel: So that a Sequestration will not only lye for the *Manse* or Parsonage-House, but for the Chancel also. And, *lastly*, 'tis to be observ'd, that in all Repairs, whether of the *Manse*, or of the Church and Chancel, the Expences laid out thereon ought rather to be necessary according to the Quality and Wants of the Thing to be repair'd, than costly and magnificent *: But yet in a richer Benefice the Buildings ought to be more sumptuous and stately than in a poor: and so likewise ought the Ornaments of the Church †.

‡ Ottobon. Tit. 17.

* Arg. D. 25. l. 1. &c.

† Dd. in c. 1. Cl. 3. 14. 3. v. *indecentibus.*

Of

Of Reſidence, the Duty of it, and the Puniſhment of Non-Reſidence, &c.

AS a Husband is preſum'd to live with his Wife, ſo is a Clergyman, who is married to his Church, preſum'd by Reſidence to be Incumbent on his Living *; and the Danger as well as the Sin is great, if he unlawfully abſents himſelf from thence: For a Clergyman is not only oblig'd to abſtain from ſuch Things as may divert his Mind from the Service of God, and the Celebration of Divine Service in his Pariſh-Church, but ought alſo to reſide on his Cure, to diſcharge the Duty enjoyn'd him by his Function with all poſſible Induſtry and Integrity of Life, in reſpect of the Benefice and Cure of Souls he is poſſeſs'd of; and not to abſent himſelf from thence without evident Neceſſity. Now the *Reſidence* of a Clergyman in the Poſſeſſion of an Eccleſiaſtical Benefice is nothing elſe but a conſtant Attendance, and continued Abode of ſuch Perſon in the Pariſh where he has any Eccleſiaſtical Benefice, with a firm Mind and Purpoſe of performing that Service, which is requir'd at his Hands; and as this is *local*, he is conſequently ſaid to be Non-Reſident who does not inhabit and dwell in the Place, where his Benefice or Dignity is ſituated, (for a *Dignity* is here compriz'd under the Name of a *Benefice*) but abſents himſelf at a Diſtance from thence. For he cannot be called a Reſident, who is ſo far diſtant from the Bounds and Borders of his Pariſh or Church, that the Pariſhioners cannot have a ready and eaſy Acceſs to him; ſince he can neither ſaid to be corporally or virtually preſent, who lives at ſuch an inconvenient Diſtance; or, in other Terms, he cannot be ſaid to be Reſident for the End and Purpoſe, for which the Duty of Reſidence is enjoyn'd him, who thus abſents himſelf from his Church. But, according to the Papal-Law, 'tis otherwiſe, if he only betakes himſelf to a Place, whereunto the Pariſhioners may have an eaſy Recourſe to him as their Pariſh Miniſter for the Relief of their Spiritual Neceſſities, and receiving the Sacraments. And the Reaſons of this is, (ſay the *Canoniſts*) not only becauſe he that is at ſo ſmall a Diſtance from his Cure ſeems to be at no Diſtance at all, but becauſe (ſay they) an Abſence of this Kind is not contrary to the End, for which Reſidence is commanded.

* X. 3 4. 11.

And hence it follows, *Firſt*, according to them, that he may be ſaid to be Reſident who dwells even out of the Verge of the Pariſh, provided he lives within reach thereof: Yet, notwithſtanding this indulgent Doctrine for the Sake of Gain to the *Apoſtolick Chamber* or *Exchequer*, all the *Canoniſts* agree, 'tis much better for the Miniſter of a Pariſh to dwell near his Church, whereby he may adminiſter Divine Service, and give the Sacraments to the People with more Readineſs and Conveniency. And hence 'tis alſo according to them, that he, who has two Pariſhes united ought to live in that which is the Principal and of the greater Dignity of the two, than at the other: But if they are both Principal and of equal Dignity, he may reſide on which he pleaſes.

Secondly,

Secondly, It follows, according to *Beia*, that he is ſaid to be Reſident, who is only at a ſmall diſtance from the Precinct of his Pariſh, becauſe this kind of Diſtance ſeems not to tend to any notable Diſadvantage of the Pariſhioners, naturally ſpeaking: But 'tis otherwiſe, if the Parſon lives three or four Miles diſtant from the Borders of his Pariſh; for then it may happen, that his Pariſhioners may ſuffer ſome great Damage and Inconvenience by ſuch a Diſtance. In has been a Queſtion among ſome ſtrict *Caſuiſts*, Whether he may be ſaid to be Reſident, who goes out of the Bounds of his Pariſh ſome Hours in the Day? But tho' this idle Doubt deſerves no Solution, yet the better *Caſuiſts* anſwer in the Affirmative, tho' he ſhould do this for the Sake of Recreation; provided his Pariſhioners ſuffer no Spiritual Damage from hence, becauſe *Modicum pro nihilo reputatur.* In *England* no one is ſaid to be Reſident at his Living, who does not dwell at the Parſonage-Houſe, according to *Coke* *: But the better Opinion (I think) is, that if the Parſon be Reſident in any Houſe in his Pariſh, 'tis ſufficient †; for the Parſonage-Houſe may be alienated by a former Parſon by the Conſent of the Patron and Ordinary, or leaſed out in ſuch a manner as that his Succeſſor cannot live in it: Or who abſents himſelf from his Pariſh more than Eighty Days in one Year *, *Continuis vel interpolatis vicibus*, or two Months, according to another Statute †.

* 6 Rep. fol. 21.
† Vid. Crok. Moor, &c.
* 13 Eliz. cap 20.
† 21 H. 8. c. 13

The Word *Reſidence* imports a Perſonal Reſidence; and, therefore, a Man that has a Benefice in a Pariſh-Church, with Cure of Souls, is ſtrictly bound to ſuch a Reſidence, unleſs it be in ſome certain Caſes, wherein ſuch Beneficiary may ſerve the Cure by a Deputy or Subſtitute ‡. As, *Firſt*, for Example ſake, *Ratione perplexitatis* (as the *Canoniſts* ſtile it) *viz.* when a Man has two Benefices, and each of them require a Perſonal Reſidence: For as he cannot divide himſelf into two Parts, ſo he can only ſerve one of his Benefices. *Secondly*, In reſpect of ſome Occupation or Employment; as in the Caſe of a Biſhop, who has Archdeacons, Vicars-General, and the like ‖. *Thirdly*, In Regard of ſome Conſtitution or reaſonable Cuſtom; as becauſe the Beneficiary is a *Pauper*, or in indigent Circumſtances, not having where withal to maintain himſelf, on one ſmall Living; and is, therefore, oblig'd to ſeek out for the Remainder of his Livelihood elſewhere *. But becauſe Cuſtoms may vary in ſuch Caſes, 'tis to be noted, That he, who abſents himſelf from his Benefice (perhaps) in regard of ſuch a Cuſtom, where his Living is poor and beggarly, is bound to appoint a Vicar or Curate to perform and Diſcharge the Duty of his Cure in his Abſence. *Fourthly*, In reſpect of a Diſpenſation for Non-Reſidence †: For tho' Reſidence be ſo ſtrictly enjoyn'd the Clergy as well by the Laws as in Point of Conſcience; yet their Reſidence may be diſpens'd with in ſeveral Caſes by their proper Biſhops or Ordinaries, to whom this Power of diſpenſing with them herein does of *Common-Right* belong. *Fifthly*, In reſpect of a Man's Removal from one Place to another, for the Sake of a better Air towards the Recovery of his Health, and the like *. *Sixthly*, On the Account of ſuch an Abſence as the Law approves of, *viz.* Abſence on the Score of Study; but then this Abſence ought to be with the Biſhop's Leave †. *Seventhly*, On the Score of propagating the Faith, and improving the true Wiſhop of God ‡. And, *laſtly*, according to the *Romiſh* Church, in reſpect of going a Pilgrimage to the Holy-Land ‖, entring into ſome Religious Order *, and the like. But a Perſonal Reſidence, according to the *Canon-Law*, is not requir'd of ſuch Rectors as have Vicars placed under them in their Benefices: But this is only true, when their Pariſh Church is annex'd to

‡ Dd. in c. 30. x. 3. 5. 2.
‖ X. 1. 23. 1
* X. 3. 4. 16.
† X. 1. 17. 6.
* X. 3. 48. 6.
x. 3. 6. per tot.
† X. 3. 4. 4. & 12.
‡ 7 Q. 1. 15. & 16.
‖ X. 3. 34. 11.
* X 3. 24. 4.

ſome Prebend or Dignity; for then the principal Perſon is excus'd from
X. 3. 5. 30. a perſonal Reſidence by reaſon of his Vicar *, who is bound to conſtant Reſidence; and becauſe ſuch Principal is oblig'd to reſide on his greater Benefice: But this reaſon does not obtain, when there is a Rector and Vicar in ſame the Church, and ſuch Church has no Dependance on another Church: And hence it is, that a Parſon who has an indep ndent Church is not excus'd from Reſidence, by reaſon of a Vicar which he has there. Nor is it any Objection hereunto (perhaps) to ſay, that ſuch Rector has not the Cure of Souls, but the Vicar has it: For the Cure is *habitually* and (as we ſay) *quoad Proprietatem* lodg'd in the principal Rector, tho' as to the Exerciſe and Effect of that Cure it
† Anch. in c. is in the Hands of the Vicar †.
30. x. 3. 5. A Biſhop is of *Common-Right* oblig'd to a Perſonal Reſidence at his Church on all *Sundays* or *Lord's-Days* in the Year: But by *Otho*'s
* Tit. 21. Conſtitution 'tis ſaid *, That Biſhops ought to reſide and attend their Churches, particularly, on *Sundays* and *Holidays* during the Time of
‡ Lindw. lib. 3. Tit. 4. c. 1. Ottobon. Tit. 21 *Lent* and *Advent* †. And in another Conſtitution 'tis ſpecifically expreſs'd, *viz. de die Cænæ:* For then they ought to be preſent at their Churches, according to the *Romiſh* Worſhip and Diſcipline, *ad conficiendum Chriſma*; and tho' we have in our Church rejected the Superſtitious and Idolatrous Part of their Worſhip, yet an equal Reaſon holds for the Biſhops frequent Preſence at his Cathedral, and in his Dioceſs, not only for the Adminiſtration of the Lord's-Supper, but for the other Duties of his Office. And if a Biſhop has ſeveral Cathedrals and Sees, as in the Dioceſs of *Bath* and *Wells*, and of *Litchfield* and *Coventry*, he may at certain Seaſons, and on certain *Holidays*, be Reſident at the one, and at certain Seaſons and *Holidays* be Reſident at the other: For Cathe-
‡ X. 1. 7. 4. dral Churches are in our Books ſtiled *Epiſcoporum Sponſæ* ‡, with whom the Biſhop ought to reſide; and, therefore, in this Caſe (ſome ſay) a Biſhop may have two Spiritual Wives, tho' this ſeems abſurd; for the whole Dioceſs is his Care, and not his Cathedral Church alone.

I have already remember'd, that the Reſidence of a Beneficiary is his *conſtant* and *continued* Abode in his Pariſh, *with a firm Mind and Purpoſe of performing that Service, which is required at his Hands*; becauſe 'tis to little Purpoſe for a Clergyman to reſide at his Benefice, if
‖ X. 3. 5. 30. x. 3. 4. 3. he neglects the Cure and Service of his Church ‖. And, *as to the conſtant and continued Abode at the Place of his Benefice*, this ought not to be underſtood with that Severity, as that he ſhould never abſent himſelf from thence; for Words ought to be taken in a *Civil* Acceptation *. And this is true as well in reſpect of ſuch as have Dignities, as
‖ D. 8. 1. 9. Arch. in c. 14. VI. 1. 6. v. *Reſidentiam.* in regard of thoſe that have a Diverſity of Benefices; as one Benefice with a Title, and another *in Commendam* †; and alſo in reſpect of ſuch
† X. 1. 6. 54. as have dependant Benefices ‡. But where a Benefice has an *Onus* or
‡ X. 3. 5. 30. & 33. Charge annex'd to it, or has only one Miniſter, there the Word (*Reſidence*) is taken in a ſtrict Senſe ‖: But in a Place or Pariſh, where
‖ X. 3. 5. 11. & 30. there are more Miniſters than one, it is not taken in ſo confin'd and
* 82 Diſt. 2. ſtrict a manner *. Hence it is, that tho' the Word *Reſidence* may be underſtood ſeveral ways; yet we ought never to uſe a ſubtle or cunning Interpretation thereof to the Prejudice of the Church; but ſuch an Expoſition of it only, as to avoid all Frauds, Colluſions, and Negli-
† X. 1. 23. 3. gences whatever †.

If a Dean of a Cathedral Church, Archdeacon or Benefic'd Clergyman does not reſide at his Church wherein he has a Deanery, Archdeaconry or Eccleſiaſtical Benefice, he ought to be cited and admoniſh'd
‡ X. 2. 4. 8. to return to his Church by a Time prefix'd in the Citation ‡; and if he

he ſhall not then return thither within the ſaid Term, or alledge ſome juſt Cauſe of Impediment, he ſhall be depriv'd of his Deanery, Archdeaconry, or Benefice, and another Perſon ſubſtituted in his room *. And this is more eſpecially true, if he has been abſent from thence for any length of Time, and the Intereſt of the Church requires the Aid and Preſence of the Perſon thus contumaciouſly abſenting himſelf †. But if he has been only abſent from thence for a ſmall Space of Time, a Term peremptory is not readily prefix'd; nor ſhall he preſently undergo the Puniſhment of Contumacy on this Account. But beſides the Puniſhments which are inflicted *in Foro Contentioſo*, on Non-Reſident Clerks, who rather chuſe to follow their Pleaſures than attend the Diſcharge of their Duties, they do by the *Canon-Law* commit a mortal Sin, and have no Rights to the Profits of their Eccleſiaſtical Livings: And according to the Archbiſhop of *Florence*, if they receive ſuch Profit they ſhall be oblig'd to refund the ſame, ſince the Revenues of the Church are the Stipends of ſuch as do Service therein ‡. For the principal End of a Clerk's Reſidence ought not to be the collecting the Fruits and Profits of his Benefice, but for the Sake of adminiſtring Divine Service, *&c.* and only in conſequence hereof he obtains the Profits of his Benefice. For if a *Canon* comes principally to Church for the ſake of obtaining filthy Lucre, *viz.* his *Daily Diſtributions*, it will in the *Romiſh* Church be deem'd *mental* Simony in him at leaſt. By a Statute of the Realm of *England* *, every Spiritaul Perſon promoted to any Archdeaconry, Deanery or Dignity in any Cathedral or Collegiate Church, or being benefic'd with any Parſonage or Vicaridge ſhall be perſonally Reſident and abiding upon his ſaid Dignity, Prebend or Benefice, or one of them at leaſt; on Pain to forfeit for not being ſo Reſident by the Space of one Month together, or of two Months (to be accounted at ſeveral times) in any one Year, the Sum of Ten Pounds to be divided between the King and the Proſecutor. But by the 28*th Hen.* 8. *cap.* 12. the Chancellor, Vice-Chancellor, Commiſſary, Rulers of Colleges and Halls, Doctors of the Chair, and Readers of Divinity in either of the Univerſities, are excus'd from a Perſonal Reſidence, provided they reſide in the Univerſities: and ſo likewiſe are Perſons under forty Years of Age living in the Univerſities, with their Biſhop's Licence on the Score of Study: But all other Perſons are liable to the Penalty of the Statute of the 21*ſt Hen.* 8. *cap.* 13. And by an Act in the Reign of Queen *Elizabeth* †, no Leaſe made of any Benefice or Eccleſiaſtical Promotion, with Cure, or any Part thereof, (and not impropriated) ſhall endure any longer than while the Leſſer ſhall be Ordinarily Reſident and ſerving the Cure of ſuch Benefice, without Abſence of eighty Days in any one Year, but that every ſuch Leaſe, *as ſoon as it or any Part thereof ſhall come into any Poſſeſſion or Uſe above forbidden*, or immediately upon ſuch Abſence ſhall ceaſe and be void: And the Incumbent ſo offending ſhall loſe a Years Profit of his Benefice, to be diſtributed by the Ordinary among the Poor of the Pariſh.

It has been a Doubt among the Schoolmen, Whether Perſons may be excus'd from Reſidence in Point of Conſcience; becauſe an Obligation in this reſpect once purchas'd, cannot be taken away, as Eſtates and Things Eccleſiaſtical cannot be alienated *. But as we ought often to forego a Right, becauſe the Laws whereby we acquire a Thing, may ſometimes be limited and reſtrained on a good Account, the Legiſlators Mind being always to be regarded: So (ſay theſe *Caſuiſts*) we ought ſometimes to depart from the Rigour of the Law, and to follow the Equity of it, which allows of Non-Reſidence in many Caſes reckon'd up in the *Canon-Law*.

* X. 3 4 8. 9 & 10.

† X. 3. 4. 8. v. *decem annis.*

‡ Par. 3. Tit. 2 cap. 1. || X. 3. 4. 3.

* 21 H. 8. cap. 13.

† 13 Eliz. cap. 20.

* X. 3. 13. 5.

Law. As, *Firſt*, a Clerk may be abſent from his Church, if he be in the Pope's Service *; or waiting on his proper Biſhop †: For thoſe that are in the Pope's Servic (ſays the Abbot ‡) ſeem to be in the Service of the whole Church. Thus a Biſhop may, according to the *Papal-Law*, make uſe of the Service of his *Canons*, and withdraw them from their Duty in Divine Service; and they ſhall be reckon'd as preſent at their Church. But ſome will have it, that the Biſhop can only call two of theſe *Canons* to his Aſſiſtance‖ as Chaplains; and others hold this to be left entirely to his Diſcretion. Again, a Clerk may abſent himſelf from his Church if he be in the faithful Proſecution of his own Rights, as at Law, and the like *; or if he ſhall be abſent on the Score of his Studies in the Law or Divinity †: But, according to the Council of *Trent*, no Perſon ſhall abſent himſelf any longer than five Years on any Account. But yet, in all the aforeſaid Caſes of Abſence, the Clerk ought to acquaint the Biſhop with the Reaſon thereof; and to deſire his Approbation.

* Abb. in c. 16. x. 5. 40.
† X. 3. 4. 7.
‡ In c. 16. x. 5. 40.
‖ X. 3. 4. 15.
* X. 3. 4. 14.
† X. 3. 4. 12.

If a Clerk does not reſide on his Benefice, he is preſum'd in Law to be Non-Reſident upon an unjuſt Account ‡; unleſs he alledges and proves a juſt Cauſe for his Non-Reſidence ‖: And, therefore, 'tis from hence inferr'd, That a Clergyman ought to be cited at the Church where he is preſum'd to keep his Reſidence, as is prov'd from the aforeſaid Chapter quoted in the Margin. See alſo *Alciatus* his Treatiſe of *Preſumptions* *. And a Rector or Parſon who does not reſide at his Pariſh-Church, or puts not in a perpetual Vicar, when his Church is annex'd to a great Prebend or Dignity (as aforeſaid) ſhall be depriv'd thereof: For he that has a Parochial Church, ought regularly to ſerve the ſame in his own proper Perſon according to due courſe of Law †, and not by a Vicar; unleſs (perchance) ſuch be annex'd to a greater Benefice, in which caſe he may ſerve the ſame by a perpetual Vicar canonically inſtituted thereinto; and hence came *Sine-Cures* among us. And the Vicar was to have a ſuitable Portion out of the Profits of ſuch Church under Pain of the Rectors Deprivation, if he did refuſe the ſame: And ſuch Church was to be conferr'd on ſome other Perſon, who was both willing and able to fulfil the ſaid Duty of Perſonal Reſidence therein himſelf. Indeed, our Pluraliſts have urged many Reaſons and Pleas in Favour of Non-Reſidence, as that there is an Allowance given by the Law to ſeveral Perſons to hold more Benefices than one, and ſince the Diſtribution of Benefices is not by the Law of God, but by the Law of the Land, what Fault is there in uſing the Privileges which the Law gives? But there cannot be a conſtant Perſonal Reſidence in more Places than one. Again, the general Service of the Church is more to be preferr'd than taking care of a particular Pariſh; becauſe the neceſſary Duties of a Pariſh may be ſupply'd by Perſons approv'd by the Biſhop, and a ſingle Living ſeldom affords a ſufficient Competency for Perſons to be capable of Publick Service. *Thirdly*, That the way of the Clergies Subſiſtance now is much alter'd from what it was when Celibacy was enjoyn'd them: For a Competency was always ſuppos'd, where Reſidence was ſtrictly commanded; and what was a Competency to a ſingle Perſon is not ſo to a Family. *Fourthly*, That the Church has a Power of relaxing the Severity of ancient Canons from the different Circumſtances of Things; and when the general Good of the Church may be more promoted therein: And in the removal of Clergymen from one Dioceſs to another, and the Tranſlation of Biſhops. *Fifthly*, That the caſe is now different, as to Diſpenſation, from what it was in the *Romiſh* Church, as to the Number of Benefices, and the manner of obtaining

‡ Abb. in c. 11. x. 3. 4. n. 11.
‖ Inn. in c. 4. x. 2. 15. n. 3.
* Reg. 1. n. 1.
† Lindw. lib. 3. Tit. 4. cap. 2.

taining them: That a general Reſtraint is laid on Pluralities, and the Metropolitan is now the Judge, when Diſpenſations are fit to be granted. Theſe are the chief Arguments for Non-Reſidence with us. But on the other ſide 'tis objected, That in the firſt Conſtitution of Parochial Churches every Incumbent or Poſſeſſor was bound to a ſtrict Reſidence, as appears by the ſeveral Canons expreſly made in Councils, enjoyning this Duty. But why do I mention the Canons ſo frequently decreed about Reſidence, ſince the very Nature of the Cure of Souls indiſpenſably requires it: And this is the reaſon which the *Caſuiſts* give * why a Perſonal Reſidence is not commanded in Scripture, as otherwiſe it might.

* Reginald. prax. l. 3. c. 5. p. 52.

For if a Perſon be requir'd to do ſuch Things which cannot be done without it, *Reſidence* is imply'd. As a Pilot to a Ship needs no Command to be in his Ship; for how can he do the Office of a Pilot out of it? Let none think to excuſe themſelves by ſaying, *That our Church only takes them for Curates, and that the Biſhops have the Paſtoral Charge:* For by our old *Provincial Conſtitutions* (which are ſtill in Force ſo far as they are not repugnant to the Law of the Land) even thoſe who have the ſmalleſt Cures are called *Paſtors*; and *Lindwood* there notes ‖, that a Parochial Prieſt is ſaid to be a *Paſtor*, and not only by way of Alluſion, but in reſpect of the Cure of Souls. And the *Canon-Law* declares, that a Paſtor cannot excuſe himſelf, *Si Lupus Oves comedit, & Paſtor neſcit* †. The Provincial Canon ſays, that the Care of the Lord's Flock ought not to be committed to ſuch Perſons, who are either *negligent* or *ignorant* of the Charge or Guardianſhip committed to them, or know not how to be watchful over them, as they ought to be: So that the great Duty of a Paſtor conſiſts in watching over his Flock, and knowing the Condition thereof, that he may awake the ſleepy and ſecure Sinner, inſtruct the Ignorant, reclaim the Vicious, rebuke the Profane, convince the Erroneous, ſatisfy the Doubtful, confirm the Wavering, recover the Lapſed, and be uſeful to all, according to their ſeveral Circumſtances and Conditions †. 'Tis not to preach a Sermon or two in a Week's time to their Pariſhioners, that is the main of the Duty of Pariſh Prieſts, but to apply themſelves ſuitably to the Condition of their Flock: But he, who is a Stranger to his Flock, and only viſits them now and then, can never be ſaid to watch over it; he may watch over the *Fleeces*, but he underſtands little of the State of his Flock, *viz.* of the Diſtempers they are under, and the Remedies proper for them.

‖ Lib. 3. Tit. 4. c. 2.

† X. de Reg. Jur. c. 10.

† Lindw. lib. 1. Tit 11. c. 3.

Every Pariſh Prieſt is admitted to the *Cure of Souls*, and at their Ordination they ſolemnly promiſe to teach the People committed to their Care and Charge. 'Tis true, the *Canoniſts* have diſtinguiſh'd between *Rectories* and *Vicaridges*, as to Perſonal Reſidence: But we are to conſider theſe Things. *Firſt*, The *Canon-Law* ſtrictly obliges every one that has a *Parochial Cure* to *perpetual Reſidence* ‡; and excepts only two Caſes, *viz.* when the Living is annex'd to a Prebend or Dignity (as aforeſaid, and then he who has it is to appoint a perpetual Vicar inſtituted with a ſufficient Maintenance: And, *Secondly*, after this Liberty obtain'd for dignify'd Perſons to have *Vicars* endow'd in their Places, the Point of Reſidence was ſtrictly enjoyn'd to them: And we find in *Lindwood* a difference made between a *Perſonatus* and *Vicaria* ‖; but this was ſtill meant of a Vicaridge endow'd. And in another Provincial Conſtitution we read *, that an Oath of *Perſonal Reſidence* is required from all ſuch Vicars, tho' the Value of the Vicaridge did not exceed five Marks *per Ann.* which, as appears by *Lindwood* elſewhere, was then deem'd ſufficient for *Maintenance* and *Hoſpitality*. And to cover the ſhameful

‡ X. 3. 5. 30.

‖ Lib. 2. Tit. cap. 1. v. *perſonatus*.

* Lib. 3. Tit. 4. cap. 2.

Diſpenſations that were commonly granted to the higher *Clergy*, under the Pretence of the *Papal Power*, the poor *Vicars* were by a *Conſtitution* of *Otho** bound to take a ſtrict Oath of *continual Reſidence*; and without it their Inſtitution was declar'd to be null and void. But even in that Caſe the Gloſs there ſays, *That they may be ſome time abſent for the Benefit of the Church or State*, but not for their own particular Advantage. But the Obligation in Point of Conſcience ſtill remains the ſame, tho' *diſpenſing with Laws* may take away the Penalty of *Non-Reſidence* in ſome Caſes. *John de Athon*, Canon of *Lincoln*, who wrote the Gloſſes on the *Legatine Conſtitutions*, does not deny but Rectors are as well bound to *Reſidence* as Vicars; but theſe are more ſtrictly ty'd by their Oath; and becauſe a *Vicar* cannot appoint a Vicar, but a Parſon may †.

* Tit. 10.

† Joh. de Ath. in Tit. 10.

A *Faculty* for Non-Reſidence is in reſpect of any other Perſon than the Pope himſelf, by the *Canoniſts* ſtiled a *Licence*: But in reſpect of the Pope 'tis called an *Indulgence* ‡. And hence I infer, that, according to the Papal-Law, no other Perſon but the Pope can grant an *Indulgence* touching *Non-Reſidence*; becauſe as this is contrary to the Common Law of the Church, and in Prejudice of the Papal Power; ſo a Biſhop cannot grant an *Indulgence*, tho' he may grant a *Licence*; becauſe this Word *Licentia* does not import a *nuda voluntas*, but a Grant made on ſome good Cauſe or other ‖. Therefore, tho' no Perſon inferiour to the Pope can grant an *Indulgence* for a Parſon to abſent himſelf from his Benefice, which the Pope can do without any Cauſe exiſting; yet ſuch an inferiour Prelate may without the Pope grant a *Licence* for a Parſon thus to abſent himſelf, provided it be granted on ſome good Conſideration or other. The *Canoniſts* likewiſe make a Diſtinction between Abſence *a Choro* (as they ſtile it) and *Non-Reſidence*: Becauſe he is ſaid to be *Non-Reſident*, who does not live in the Place where his Church ſtands or his Benefice lies; but he is ſaid to be abſent *a Choro*, who is not preſent at, and attending on Divine Service, tho' he lives in the Town or Pariſh where his Benefice or Dignity is ſituated.

‡ X. 1.11.15

‖ Bart. in l. 9. D. 34. 1

Of the Reſignation of an Eccleſiaſtical Benefice.

IT ſometimes happens that a Prelate or Rector of a Church does renounce the Right which accrues to him either by Election, Tranſlation, Inſtitution, and the like: And this Act of Renunciation induces a Quitting or Relinguiſhing of the Church or Prelacy, which ſuch Perſon has claimed by Election, Tranſlation, Inſtitution, *&c.* And it is commonly called with us a *Reſignation*. Now a *Reſignation*, therefore, is defin'd by the *Canon-Law* * to be an Abdication or a Departure from that Right, which a Biſhop, Prelate, Dignitary or Benefic'd Perſon has in his Biſhoprick, Prelacy, Dignity, Benefice, and the like, made by the Permiſſion and Conſent of his Superiour, or the Chapter of the Cathedral Church, on ſome juſt Grounds or other †. And ſuch Reſignation is by the ſame Law ſaid to be Twofold, *viz. Spontaneous* and *Coacted*. The firſt is, when the

* X. 1. 9. 2.

† X. 1. 9. 4 & 9.

the Perſon renouncing does with a free Mind and Will, and for ſome lawful Cauſe or other, reſign his Right into the Hands of his Superiour *. A *coacted* Reſignation is that which is not made freely, but is extorted thro' Fear, Force or Oppreſſion, or procur'd by the Intervention of Money, or by the Means of ſome unlawful Promiſe, without any juſt Cauſe or Conſideration whatſoever †. The efficient Cauſe of a *Spontaneous* Reſignation is the Will of the Perſon to whom the Right belongs, which he quits and departs from ‡: And the Form of ſuch a Reſignation is, that the Perſon renouncing ſhould freely and voluntarily with the Conſent of his Superiour reſign the Right, which accrues to him, into the Hands of ſuch Superiour *ſimply* by a Term of Reſignation or Surrender, as *Reſigno*, and the like; reciting the Cauſe which moves him hereunto, and making Oath touching the Truth thereof. And if the Perſon be a Biſhop, then by the Papal Law it is made into the Hands of the Pope; and if he be an inferiour Prelate or Clerk, then 'tis made into the Hands of the Biſhop, Chapter or other inferiour Ordinary, that has the Power of confirming or giving Inſtitution unto the Benefice or Dignity thus reſign'd ‖.

* X. 1. 9. 5.

† VI. 1. 7. 2. X. 1. 9. 5.

‡ X. 3. 31. 16 & 23.

‖ X. 1. 9. 3. 18 Q. 2. 8. 7 Q. 1. 19. 33 Q. 5. 3.

Now there are ſix juſt Reaſons on which Account a Superiour ought to admit of a Reſignation, *viz.* A Conſciouſneſs of any Crime committed, Debility of Body, Defect of Knowledge, great Scandal given, when the People are intractable, or maliciouſly bent againſt the Perſon quitting; and, according to the Papal Law, Irregularity of the Perſon *. *Firſt*, A Conſciouſneſs of ſome Crime committed; but then this Crime ought only to be ſuch which may hinder and impeach him in the execution of his Office after a Performance of Pennance, as Simony, Apoſtacy, Schiſm, and the like; for 'tis not every Crime that will juſtify a Reſignation, but only ſuch as will render a Man infamous *ipſo Jure* †, or which is committed in not obſerving the Form of an Election ‡. *Secondly*, A Debility of Body is a good Cauſe to warrant a Reſignation; but then it ought to be ſuch as proceeds from Infirmity or old Age, or from ſuch Cauſe only as renders a Man incapable of executing his Paſtoral Office ‖. *Thirdly*, A Man may pray to be diſcharged from his Benefice for want of Knowledge or ſufficient Learning, *viz.* if he has not obtain'd a Knowledge of thoſe Things which relate to his Office: And here the *Canoniſts* obſerve, That tho' a Defect of Knowledge be no Sin, but only a Puniſhment †; yet a neglect of learning thoſe Things which he ought to know, is a Sin ‡. *Fourthly*, the Malice of the People may oblige a Perſon to reſign his Benefice, *viz.* when the People are of ſo ſtubborn a Temper, that they will not profit themſelves by his Inſtructions or good Example ‖; or when the People perſecute their Paſtor with open Force and Violence, or with an inward implacable Hatred. A *fifth* Reaſon is *grave Scandalum*, as when a Paſtor is become ſo odious for his Crimes, or for an ill Conduct of Life, that he has no Hopes of doing any Good in his Pariſh or Dioceſs *. The *ſixth* is every *Irregularity* in a Perſon, which is an Impediment to the Ordination of a Clerk, without a Diſpenſation, as Bigamy, Baſtardy, and the like †. But few or none of theſe are regarded with us; for in *England* it is entirely in the Biſhop's Breaſt, whether he will accept of a Reſignation or not. And if a Perſon thus willing to ſurrender his Benefice, ſhall on the Biſhop's Non-Acceptance of his Reſignation, withdraw himſelf, and the like, the Biſhop may proceed to Deprivation, or put his Living under a Sequeſtration for Contumacy, as by the *Canon-Law*.

* X. 1. 9. 10 & 11.

† 3 Q. 7. 2. 17.

‡ X. 1. 6. 42.

‖ X. 1. 9. 10 3. 7. Q. 1. 18

† 15 Q. 1. 1.

‡ 38 Diſt. 1.

‖ X. 1. 9. 10. 9

* X. 1. 9. 10. 6.

† X. 1. 6. 7. 50 Diſt. 59.

I have ſaid, *That the Reſignation of a Benefice ought to be made into the Hands of him who has the Power of admitting or inſtituting a Clerk there-*

thereinto, commonly called the *Ordinary* or *Superiour*, who ought to be ſuch a Perſon as may alſo deprive the Incumbent thus reſigning his Benefice, whether he will or not, on the Score of ſome Eccleſiaſtical Crime, whether ſuch Perſon be the Biſhop to whom of *Common Right* it belongs in his Dioceſs to grant Admiſſion and Inſtitution, *&c.* or whether he be an inferiour Prelate, who may have this Power either by Cuſtom preſcrib'd, or elſe by ſome ſpecial Privilege *. And hence it is, if ſuch a Reſignation be made into the Hands of a Layman, though it be made *ſponte & purè*, yet it is not binding in Prejudice of the Church or of him, to whom the Admiſſion of ſuch Reſignation belongs, in ſuch a manner, but that the Church or Superiour may reclaim the Perſon thus reſigning: But yet 'tis valid in Prejudice to the Perſon making ſuch Reſignation, if the Ordinary will ratify and confirm the ſame; ſo that he cannot recover his Benefice again (eſpecially) if the Ordinary admits of ſuch Reſignation †. For by ſuch a Reſignation the Poſſeſſion of the Benefice is loſt, tho' not the Property thereof; becauſe Poſſeſſion is loſt by Intention alone ‡, but Property is not ſo departed from: And again, becauſe a Reſignation is not binding without the Biſhop's Conſent ‖. But note, where the Ordinary does not receive and admit a Reſignation made in reſpect of ſome Benefice, it being made into ſome other Hands than his who ought to receive it; and is in Debate with himſelf whether he ſhall admit it or not; and if the Perſon tendring the ſame ſhall in the mean while repent thereof, (the *Matter remaining entire*) he may without any new Inſtitution occupy and repoſſeſs himſelf of ſuch Benefice, in the ſame manner as he enjoy'd it before *. And thus in like manner a Reſignation made into the Hands of a Proctor does not make the Church void, without the Biſhop's Acceptance thereof.

* X. 1. 9. 4. *cum ibi notatis*

† Goff. & Bern ‡ c. 8. x. 1. 9. in C. 7. 32. 4.

‖ Innoc. in c. 8. x. 1. 9.

* Arg D. 20. 6. 10. x. 1. 9. 15.

Every Perſon may, on the aforeſaid Terms, reſign his Benefice (if he pleaſes) in order to make a Proviſion for another Man; provided, he does not deduce this Act of Reſignation *in Pactum*, that is to ſay, provided he makes no Covenant relating thereunto, but does it *puré & liberaliter*; for if he makes any Covenant in relation thereunto, ſuch Reſignation is with the *Canoniſts* deem'd Simony †. There is a *tacit* and an *expreſs* Renunciation of a Benefice, *&c.* And this expreſs Reſignation is either *ſimple* or *conditional*. A *pure ſimple* Reſignation is made without any Pact or Condition at all: But, on the contrary, the other is made by ſome Pact or Condition or other. Upon a *pure* Reſignation a Benefice is immediately void, and the Ordinary or Patron may (if he pleaſes) collate a fit Perſon thereunto. But a *conditional Reſignation* is ſeldom admitted; tho' it may be ſometimes allow'd, when 'tis made in Favour of ſome Perſon, whom the Perſon quitting the ſame deſires ſhould be collated or inſtituted thereunto, and not otherwiſe: Which Condition ought not to be made before the Ordinary, becauſe ſuch a Reſignation favours of Simony ‡. And tho' the Perſon leaving the ſame may intreat the Ordinary to confer it on ſuch a one without any Taint of Simony, provided it be a fit Perſon (for elſe 'tis Simony ‖): Yet the Ordinary is not bound to confer it on the Perſon thus recommended, ſince a Collation after a Reſignation is entirely in his own Diſpoſal, if the Church be veſted in his Gift as Patron. It has been ſaid, *That every Reſignation ought to be ſpontaneous, and without Fear, Fraud, Force, and the like*; for if it ſhall be made thro' any Impulſe of Fear, Force, *&c.* it ſhall be revok'd and annull'd; and this alſo holds true, and is to be underſtood in a Perſon conſtituting a Proctor to make a Reſignation in his Behalf. But then this ought to be

† Gloſſ. in c. 12. x. 1. 29.

‡ 1 Q. 2. 2. x. 1. 35. 4 & 8.

‖ Gloſſ. in c. 10. x. 1. 14.

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a juſt and well-grounded Fear, and not a light and vain Act of Cowardice, but ſuch as may happen to a Man of Conſtancy and Reſolution. And, therefore, if a Man be diſpoſſeſs'd of a Temporal Eſtate, or an Eccleſiaſtical Living by Force or Fear, he may be re-inſtated by a Poſſeſſory Action or Remedy; and if a Surrender or Reſignation be pleaded thereunto, the Judge may and ought (notwithſtanding ſuch Surrender or Reſignation) to reſtore him to the Poſſeſſion thereof: And ſo ſays the *Civil* and *Canon-Law*. But, *Firſt*, 'tis neceſſary to prove, that an *unjuſt* Force was inflicted on him; for ſuch a Force as is accounted juſt is deem'd no Force at all: As when, in a Controverſy about a Benefice the Judge finds *Titius* to be unjuſtly poſſeſs'd of ſuch a Benefice; and, therefore, compels him by a Sentence of Excommunication to quit and abjure the ſame. And by the *Civil-Law* when a Man is order'd to make Reſtitution, he may be compelled thereunto *manu Militari*, if he refuſes to yield Obedience to the Judge's Decree.

The Reſignation of a Benefice, and the like, may be prov'd by Witneſſes, whether it be *ſpontaneous* or not; and thoſe Witneſſes that depoſe *de non ſpontaneâ Reſignatione* are preferr'd to ſuch as depoſe touching a *ſpontaneous* Reſignation: Becauſe the firſt are the Plaintiff's Witneſſes, which may prove a *coacted* and not a *ſpontaneous* Reſignation: But 'tis difficult to prove a *ſpontaneous* Reſignation, ſince the Heart of Man appears to none but God alone. The Reſignation of a Benefice is not preſum'd to be made *voluntarily*, ſince 'tis procur'd (perhaps) with much Labour and Expence; and, from ſuch Labour and Expence, the Reſignation of ſuch a Benefice may be preſum'd to be Simoniacal: Wherefore, Biſhops in ſuch a Caſe ought to be very careful how they admit of ſuch Reſignation; and may lawfully require the Perſon reſigning to make Oath, that he does not quit the ſame with any unlawful or ſimoniacal View. The Effect and Conſequence of a Reſignation is, that whatever is done after ſuch Reſignation, which reſpects the Office and Power of the Perſon that makes it, is null and void; and in no wiſe ſubſiſtent: Wherefore, a Perſon that receives Holy Orders from a Biſhop that has reſign'd his Biſhoprick, ſhall not execute the Office of a Parſon. But yet 'tis firſt neceſſary, by the *Canon-Law*, that ſuch Perſon ſhould not only have reſign'd the Place of his Biſhoprick, but his Dignity likewiſe as well as his Dioceſs: But we maintain nothing of the *indelible* Character here with us in this reſpect. Again, by that Law the Perſon ordain'd ought to have Knowledge of the Biſhop's Reſignation; for if he be ignorant thereof, ſay the *Papiſts*, he ſhall be reliev'd by a Diſpenſation, as being not culpable herein. And 'tis the ſame Thing if a Perſon knowingly or ignorantly receives Holy Orders from an excommunicated Biſhop. Thus by a Reſignation an Incumbency to a Living is determin'd, if the Biſhop receives the ſame: And in a Donative a Reſignation to one of the Founders or Patrons of the Church, (as it may be here made) is ſufficient, where there are more than one; for it enures to them all. *Vide* Title *Donative*. And where there is a Reſignation, it extends to all the Lands and Profits belonging to ſuch a Church; for the Lands and Profits belonging thereunto are thereby given up as paſſing with the Church itſelf, tho' the Letters of Reſignation only mention the Church. See the Caſe of *Fairchild*, v. *Gaire*.

Of the Sabbath, otherwiſe called Sunday *or* Lord's-Day, *and Feaſts, Holidays,* &c. *in the Church.*

THE Word *Sabbath* is ſometimes with us taken for the Seventh Day of the Week; and in this Senſe it ſtands properly, and is interpreted to be the ſame Thing as *Reſt*, becauſe on that Day the Author of all Things, according to the *Scriptural* Phraſe, reſted from all his Works. The Word *Sabbath* is ſometimes put for the whole Week in Scripture *, as *Jejuno bis in Sabbato*, or, I faſt twice in the Week: And ſometimes 'tis uſed for every Day in the Week, as *primâ die Sabbati* †, that is to ſay, the firſt Day after the Sabbath, *ſecundâ Sabbati*, *&c.* For the ancient *Chriſtians* having receiv'd a ſet Account of the ſeven Days of the Weeks from the *Jews*, nam'd them as the *Jews* did *: And, therefore, ſtiled them the *firſt Day of the Sabbath*, the *ſecond Day of the Sabbath*, *&c.* Sometimes they called them by the *Latin* Word *Feria*; for *Feria* is the ſame with the Word *Sabbath*, denoting *Reſt*. And it was ſo called from the Verb *ferior*, either becauſe the Sacrifices were killed on thoſe Days, and Men apply'd themſelves to Divine Worſhip, or elſe *a Feriendis epulis*, from the Banquets prepared. Therefore, as the *Jews* term'd the Week-Days the *firſt*, *ſecond* and *third* of the *Sabbath*, ſo the ancient *Chriſtians* alſo term'd them the *firſt*, *ſecond* and *third Feria*, making an Alteration only in this reſpect, *viz.* That they kept the proper Sabbath *holy*, as the *Jews* did; but obſerv'd their Sabbath on the firſt Day of the *Sabbath*, or Week, which they call *Sunday*, or the Lord's-Day; and ſometimes the *Chriſtian Sabbath*. And this is called the *Lord's-Day*, or the *Chriſtian* Sabbath, becauſe God did on that Day raiſe up his Son *Jeſus Chriſt* from the Dead, as on the *Jewiſh* Sabbath he reſted from all his Works † or Labours (if I may ſo call them). For the Reaſon why the Church has conſtituted the *Lord's-Day* in the Place of the *Jewiſh* Sabbath is manifold, *viz.* *Firſt*, Becauſe *Chriſt* roſe on that Day from the Dead ‡, as juſt now hinted. *Secondly*, Becauſe the *Chriſtian* Church would not ſeem to ſymbolize and agree with the *Jews* in that Day, and to obſerve their Ceremonies. *Thirdly*, On the Score of various and ſeveral Prerogatives, which this ſeems to have above other Days, as the *Papiſts* imagine. And hence we may obſerve, this Obſervation of the *Lord's-Day* is not a Matter of *Divine Right* but only founded on the *Canon-Law*, as all the Doctors do confeſs in Oppoſition to the Opinion of *Angelus* and *Sylveſter:* And, conſequently, the Obſervation of this Day may be abrogated either by Cuſtom or Human Authority, and changed into another Day, ſince a legal Cuſtom and human Authority may each of them repeal any human Law. And the ſame Thing may be ſaid touching Feſtivals or Saints-Day, as we call them, of which I ſhall treat by and by.

* Luk. c. 18. v. 12.

† Mar c. 16. v. 2 & 9.

* Tertull. de Jejun.

† Gen. cap. 1.

‡ 75 Diſt. 5.

But tho' the Church may change the Day of the *Chriſtian* Sabbath, yet we know by the Light of Nature, that ſome certain Day ought to be

be (eſpecially) deputed and ſet aſide for Divine Worſhip; and that all Perſons reſting from their Labour ought to aſſiſt at this Worſhip: And hence 'tis, that ſome call the fourth Commandment of the Decalogue a moral Precept, becauſe it does not from the Nature of Things appoint and determine ſome certain Time of Reſt from our Labours, ordaining one Day in the Week to be delightfully ſpent in the Worſhip of God alone; and this (they ſay) belongs to Morality. But as this Commandment (I think) is only a Ceremonial Precept, it does not oblige Men entirely to ceaſe from all Labours even on a *Sunday* itſelf; but only from ſuch as are not Servile and of Neceſſity; and this, becauſe the Ceremonials of the old Law and (particularly) of the *Jewiſh* Sabbath, are aboliſh'd by the Death of *Chriſt*. By the ancient *Civil-Law* Perſons placed in the Country and aſſign'd for the Husbandry or Tillage of Lands might freely exerciſe their Calling on the *Lord's-Day* *. But this is forbidden not only by the Law of *Moſes* †, the *Novels* ‡, and the Council of *Orange* ‖; but *Ameſius* and other learned Divines think it to be unlawful according to the Law. But by the Cuſtom of *Holland* the Matter is ſo temper'd, that 'tis lawful in *Harveſt* Time to cut and gather the Fruits of the Earth, which are ripe, on the *Lord's-Day*; and to do all other neceſſary Works, leſt ſome Damage ſhould enſue to them by any Delay. This Privilege was granted to the People by *Ralph* Biſhop of *Utrecht* *, and afterwards confirm'd by *Keur van Delfland* on the 15*th* of *January*, 1592. And *Mornacius* ſays, that the ſame holds good according to the Cuſtom and Uſage of *France*. As to us here in *England* all *Sundays*, and other great Feſtivals, were obſerv'd by our Anceſtors the *Britains*; and we find that in the *Saxon* Times, King *Ina* made a Law, That if any Servant did work on the *Lord's-Day* by his Maſter's Command, it was a ſufficient Cauſe to diſcharge him from his Service, and to make him Free: But if he worked without ſuch Order, the Servant was to be whipp'd. So likewiſe if a Freeman worked on that Day, he was to be made a Bondman, or to pay Sixty Shillings. King *Alfred*, after him, made a Law, That Freedmen ſhould enjoy their Liberties on the *Lord's-Day*, and certain *Holidays*. And when the *Danes* had ſubdu'd the *Saxons*, *Canutus* made a Law at *Winchester*, That there ſhould be no Market, Hunting, or Meeting of the People for *Civil* Affairs on that Day, unleſs in Caſes of Neceſſity. Yet in the *Norman* Times Markets were generally held on the *Lord's-Day*; and Eccleſiaſtical Synods and Councils for State Affairs were ſo held, as they may be ſtill. But it was afterwards decreed in a Provincial Council held at *Oxford*, That *Sunday* ſhould be obſerv'd with all Reverence, and that no Servile Work ſhould be done on that Day, only Tillage and Sailing were allow'd, if need requir'd it: And about 130 Years afterwards, it was in a Synod decreed, That there ſhould be a general Reſtraint from all manner of Work on that Day. But, notwithſtanding theſe Reſtrictions and Decrees, Fairs and Markets were ſtill kept on that Day, and uſually in the Church-yards, becauſe the Parſon had the Benefit thereof, where they are kept in many Places at this Time; and particularly St. *James*'s Fair held Yearly at *Briſtol* is kept in St. *James*'s Church-yard. The firſt Reſtraint of keeping Markets and Fairs on *Sunday*, was in King *Edward* the Third's Time, when a Statute was made †, enacting, That Wools might be expos'd to Sale at the Staple every Day, except *Sunday*: And the like Reſtraint was afterwards made by Parliament in *Henry* the Sixth's Reign ‡, on Pain of forfeiting the Wares thus expos'd to Sale in ſuch Fairs, *&c.* to the Lord of the Franchiſe. But tho' Markets and Fairs might not be

* C. 3. 12. 3

† Exod c. 20 v. 21.

‡ Nov. 54.

‖ A. D. 550. Can. 21.

* Febr 28. A. D. 1434.

† 28 Edw. 3. cap. 14.

‡ 27 H. 6. c. 5

be kept on *Sundays*, yet People might expoſe Goods to Sale in their
* 4 Edw. c. 7. Shops on thoſe Days; and, therefore *, a Statute was made to prohibit Shoemakers in *London*, or within three Miles round that Place to ſell any Boots or Shoes on the Sabbath-Day, which implies that they might be ſold elſewhere. But afterwards a Law was made †, That all *Sun-*
† 5 & 6 Ed. 6. c. 3. *days* in the Years ſhould be kept Holy. 'Tis true this Law was re-
‡ Ann. 1 Mar. peal'd in Queen *Mary*'s Reign ‡, and ſtood repeal'd till the firſt of King
‖ 1 Jac. c. 25. *James* ‖, who repeal'd Queen *Mary*'s Act, but did not by expreſs Words revive the Act of *Edward* the Sixth; and therefore it was a Doubt whether King *Edward*'s Act was in Force: But the Law ſeems to be, that where one Statute which repeals another is repeal'd it ſelf, it makes the firſt Act which was repeal'd to be ſtill in Force. By an Act of Queen
* 1 Eliz. c. 2. *Elizabeth* *, no Diſtinction is made between *Sundays* and *Holidays*; for all Perſons are enjoyn'd by that Law to reſort to their Pariſh-Churches, or upon Let thereof to ſome other Church on thoſe Days. Which brings me next to ſpeak of *Holidays* or Church-Feſtivals.

The Celebration of *Holidays* or Church-Feſtivals (as we call them) on a Religious Account, is a Matter of Divine Inſtitution, according to the *Canon-Law*, being founded (as the *Papiſts* pretend) on the Old Teſtament; and in Proof hereof they quote the fifth, twentieth and thirtieth Chapters of *Deuteronomy*; and the twentieth Chapter of *Ezechiel*; and would likewiſe infer it from the Words of the fourth Commandment. Indeed in all theſe Places of the Old Teſtament we are commanded to ſanctify the *Sabbath*, and to keep the *Seventh Day*. *The Seventh Day* (ſays the Lord) *ſhall be Holy unto you, a Sabbath*
† Exod. cap. 31. v. 14. *and a Day of Reſt* †. But I find no expreſs Command for the Celebration of Holidays: And, therefore, this muſt be by the Inſtitution and Appointment of the Church, as really it was, not only to exhibit ſome Token of our Joy for the Glory of departed Saints, but in order alſo to induce other Men to lead holy and virtuous Lives; and to
‡ X. 2. 9. 5. follow their Example ‡. But the *Romiſh* Church has added another Reaſon hereunto, *viz.* That we may by the Interceſſion of the Saints, whom they pray to and we commemorate on thoſe Days, obtain of God a Remiſſion of our Sins, and all that we wiſh for, whilſt we honour and worſhip his Saints. And by the *Canon-Law* the Pope and a general Council have a Power of appointing Holidays, and alſo of abrogating ſuch as the whole Church has receiv'd: But they have abrogated but few; the Buſineſs of that Church being rather to multiply and increaſe the Number of them, than to diminiſh the ſame, on the Score of that great Profits their Prieſts make to themſelves on thoſe Days by Maſſes and other ways.

Theſe Holidays or Saint's-Days (as ſome term them) as well as the Lord's-Day, were in the ancient Church called *Feſtivals*, not only in Imitation of the *Jewiſh* Feaſts, but likewiſe on the Account of drinking Wine and eating Fleſh, which the Primitive *Chriſtians* might or were
‡ 44 Diſt. 1. commanded to eat and drink on theſe Days ‡. For there were in thoſe Times ſome Men ſo Superſtitiouſly given, that they placed Religion in faſting upon thoſe Days. Wherefore by the 58*th* Apoſtolical Canon, Clergymen were forbid to be found faſting on the Lord's-Day, or on any Sabbath-Day (except that of *Eaſter*-Eve) under Pain of Depoſition from their Orders: And if any Layman was criminal herein, he was to be ſuſpended from Church-Communion. And 'tis further enacted by
‖ Can. Apoſt. 45. theſe Canons ‖, That if a Biſhop, Prieſt or Deacon did not uſe Fleſh and Wine on Feſtival-Days, he ſhould be depos'd as one having a ſear'd Conſcience, and as a Cauſe of Scandal. They that abſtain'd from Wine

and

and Fleſh did it out of an Opinion, That the Creation was evil, and that the World was not made by the Father of *Jeſus Chriſt*.

If a Clergyman ſhall abſent himſelf from his Church on ſolemn Feaſt-Days (ſays the *Canon-Law*) *viz.* on our Lord's Nativity, on the *Epiphany*, *Eaſter-Day*, or *Whitſun-Day*, and had rather follow his Secular Gains than the Service of God, he ſhall be ſuſpended from the Communion of the Church for three Years: And a Prieſt or Deacon ſhall in the like manner be liable to the ſame Cenſure, if he abſents himſelf from his Church for three Weeks together *. Again, 'tis enjoyn'd by the *Canon-Law*, That the Feaſt of *Pentecoſt*, or *Whitſun-Day*, ſhall not be obſerv'd with leſs Joy and Reverence than the Feaſt of *Eaſter* †: For as we faſt on the *Sabbath* (ſays the Law) and keep the *Vigils* of each Feſtival, ſo we ought to celebrate both the ſaid Feaſts with the like Mirth and Devotion. From what I have here ſaid, it may be obſerv'd, that the ancient *Canon-Law* does not boaſt of the Antiquity of many Feſtivals in the Church, *Chriſt's Nativity*, *Epiphany*, *Eaſter-Day*, and *Pentecoſt* being all the ancient Feaſts of the Church; and what have been introduc'd ſince (I fear) have been rather appointed for the Sake of Oblations and Offerings to the Prieſts than on any Religious Account, tho' ſome Good to Religion may flow from hence; and, therefore, I ſuppoſe our Church continues them: For I cannot find from any Reading of mine, that we can trace what we call the *Saint's-Days* higher than the eighth or ninth Century, if we follow good Authority.

* 7. Q. 1. 29.

† 76 Diſt. 9.

But it has been a great Diſpute among ſome Men, when a Feaſt or Holiday ſhall be ſaid to commence. The *Canoniſts* ſay, that ſuch a Day does not ſeem to be computed *de Veſperâ ad Veſperam* (as the Divines, and (eſpecially) the *Spaniſh* Clergy maintain): Nor ought ſuch a Cuſtom or Uſage of computing to be regarded, ſay the *Canoniſts*; becauſe 'tis expreſly ſaid in the *Canon-Law*, that the Day ſhall commence from the middle of the Night, and ſhall end at the Midnight following; or (at leaſt) that it ſhall begin in the Morning at Sun-riſing, and end in the Evening at Sun-ſetting. But in the Council of *Terragona* ‡, where we find the firſt mention of any Monks in *Spain*, it was decreed, That after the manner of the *Jewiſh* Sabbath, the Lord's-Day ſhould begin on *Saturday* Evening; and hence it is, that among the *Spaniards*, the Cuſtom of keeping of Holidays and Rejoycing on *Saturday* Nights ſtill remains. But tho' the *Canon-Law* will have the Obſervance of the Lord's Day to be *a Veſperâ in Veſperam* ||, yet it ſays, that the beginning and ending of Holidays ſhall be govern'd according to the Importance of the Day, and the Cuſtom of the Country where 'tis obſerv'd *. In Civil Affairs the Day (indeed) begins and ends at ſeveral Hours, according to different Reſpects; for in reſpect of Matters of Judicature it begins in the Morning and ends in the Evening, and 'tis the ſame Thing in Matters of ſervile Employment. But in the *Romiſh* Church, as to the Celebration of Divine Service, it begins in the Evening from their *Veſpers*.

‡ A. D. 516.

|| X. 2. 9 1.

* X. 2. 9. 2.

Tho' it be lawful even by the *Canon-Law* to work on Holidays in Caſes of Neceſſity; yet by that Law it is not lawful to take an Oath on ſuch Days, nor to hold Pleas in Cauſes of Blood †, nor ought Civil Cauſes to be heard and determin'd thereon; and whatever Proceſs at Law or Sentence ſhall be given on ſuch Days, it ſhall not be valid, tho' it be done with Conſent of Parties ‡: And this holds good in reſpect of all Cauſes whatſoever, unleſs Piety or Neceſſity be concern'd. But here I only ſpeak of ſuch Holidays as are enjoin'd by the Authority of the

† X. 2. 9. 1.

‡ X. 2. 9. 5.

Church: For there are other ſolemn Feſtivals, which are introduc'd and commanded by Princes on the Account of ſome ſignal Victory over the Enemy, or the Birth of a Son, and the like, which are called *Feriæ repentinæ*; and for other Civil Matters to be done *. And the Reaſon the Law aſſigns for this, is, becauſe ſuch Holidays are not enjoin'd out of Reverence to God, but for ſome other Reaſons of State: But if we would know the true Reaſon why the *Romiſh* Church depreciates theſe State Holidays, we may conclude it to be from hence, *viz.* becauſe there are no Altar-Oblations on thoſe Days for the Prieſts.

* Hoſt. in Sum. §. *Qualiter.* x. 2. 9.

Of the Sacraments, and the Law concerning them.

THE Words *Sacrament*, *Sacrifice* and *Myſtery* do each of them bear a different Signification according to the *Canoniſts*. For a *Sacrament* is defin'd by them to be a viſible Form of inviſible Grace *: But a *Sacrifice* is a holy Rite, which (they ſay) is made by ſome myſtical Prayer, and is a viſible Thing †. And a *Myſtery* is a viſible Act apply'd to a Sacrament, containing in itſelf a ſecret Diſpenſation. The Sacraments in the *Romiſh* Church are ſeven in Number, *viz. Baptiſm*, the *Body of Chriſt* ‡, which we call the Lord's-Supper, *Extream Unction* ||, *Pennance* *, *Matrimony* †, *Confirmation* ‡, and *Orders*. But we Proteſtants of the Reformed Religion acknowledge only two as generally neceſſary to Salvation, *viz. Baptiſm* and the *Lord's-Supper*, the laſt in other Terms called the *Euchariſt* and the *Holy Communion*. And theſe Sacraments ought to be freely given to ſuch as deſire the ſame, without any Fee or Demand made by the Prieſt for the Adminiſtration of them *: But yet the *Canon-Law* ſays, that the Ordinary may compel the Laity to obſerve laudable Cuſtoms, which is the ſame Thing as to allow the Clergy to make a Demand in ſeveral Caſes. I have already treated of *Baptiſm* in its proper Place; and, therefore, I ſhall only here ſpeak of the *Euchariſt* in a particular manner.

* Con. 2 Diſt. 32
† Con. ut ſup.
‡ Con. 1 Diſt. 69.
|| 26. Q. 7. 1.
* Pæn. 1 Diſt.
† 30. Q. 2. 41.
‡ Con. 4. Diſt.
* X. 5. 3. 9 & 42.

Now this Sacrament of the *Euchariſt* is typify'd out to us by the Prophet *Malachi* †; and 'tis plain, that Infants were in St. *Cyprian*'s Time admitted hereunto, and did in his Country receive the holy *Euchariſt*; which, indeed, was a juſt Conſequence of interpreting St *John*'s Goſpel, *viz. Except ye eat the Fleſh of the Son of Man, and drink his Blood, ye have no Life in you* ‡; as reſpecting the holy *Euchariſt*; ſince upon the Foot of that Principle Children could no more be depriv'd of the holy *Euchariſt* than they could of *Baptiſm*. And as to the Preparations neceſſary hereunto, which are ſo much contended for by ſuch as would be glad to have Confeſſion of Sins made to them, the ſame Objections might lye againſt Infant-Baptiſm, as againſt Infant-Communion. But tho' this Practice obtain'd in St. *Cyprian*'s Time, yet *Tertullian*'s Silence herein, when he had a juſt Occaſion of mentioning the ſame (on his giving Advice againſt Infant-Baptiſm) gives ſome Reaſon of ſuſpecting, that it was not much practis'd before *Cyprian*'s Time; and, therefore, not very general. Tho' after *Cyprian*'s Time it continu'd in the *Weſtern*

† Cap. 6. v. 10. & 11.
‡ Cap. 6. v. 53.

Weſtern Church very generally till the eleventh Century; when the abſurd Doctrine and Belief of *Tranſubſtantion* ſupplanted it. In ancient Times the Biſhop's were wont at the Feaſt of *Eaſter*, which was the great Time of Receiving to ſend the *Euchariſt* to other Biſhops in the Name of *Eulogiæ:* But this idle Cuſtom was at length forbidden in the Council of *Laodicea* *. And from this Sending the Euchariſt about to the Communicants the *Papiſts* now call it the Maſs or *Miſſa* in the *Latin* Tongue.

* Can. 14.

The *Romiſh* Church diſtinguiſhes their Sacraments into *Neceſſary* and *Voluntary*; making *Orders* and *Matrimony* to be only *voluntary* Sacraments. *Baptiſm* they ſtile *Sacramentum intrantium* †. The *Euchariſt Sacramentum progredientium*; and for that Reaſon it is alſo called a *Viaticum* ‡. Pennance they term *Sacramentum redeuntium* ‖. Extream Unction *Sacramentum exeuntium* *. And Confirmation is with them *Sacramentum pugnantium* †. But as theſe are Diſtinctions little known to thoſe who only maintain two Sacraments neceſſary to Salvation, I will diſmiſs this Enquiry, and proceed to ſpeak of the Law touching the Sacrament of the Lord's Supper. And here,

† Con. 4 Diſt. 142.
‡ 26. Q. 6. 7.
‖ 26. Q. 7. 4.
* 26. Q. 7. 1.
† Con. 5. Diſt. 2.

By a Provincial Conſtitution in *Lindwood* ‡ all Laymen are to be admoniſh'd and put in Mind of receiving the *Euchariſt* or holy Communion thrice in the Year, as by King *James*'s Canons ‖, *viz.* at *Eaſter* *, *Whitſontide* † and *Chriſtmas* ‡; and likewiſe according to the Direction of the *Canon-Law* it ſelf. And before the ſaid Feaſt they ought to prepare themſelves for the Receiving hereof according to the ſaid Conſtitution, by ſome Acts of Faſting or Abſtinence, as the Pariſh-Prieſt ſhall adviſe ‖. Some Perſons formerly were ſo ſuperſtitiouſly bent, that before *Chriſtmas* (following his Advice) they would abſtain from Fleſh during the whole Time of *Advent*; and before *Eaſter* faſted the whole *Lent*, or (at leaſt) the greateſt Part thereof; and likewiſe before *Whitſontide* from the firſt Day of *Rogation-Week* till *Whit-Sunday*. And by this Conſtitution whoever ſhall not once in the Year (at leaſt) *viz.* at *Eaſter* *, receive the holy Communion, unleſs he be advis'd by his Prieſt to abſtain from thence, ſhall in his Life-time be ſuſpended *ab Ingreſſu Eccleſiæ*, and after his Death be depriv'd of Church-Burial. But this latter Part of the Conſtitution, which is Penal, has loſt its Force. Again, tho' the Sacraments may be receiv'd and taken from wicked Miniſters, as long as they are tolerated to adminiſter them †; becauſe ſuch unclean Wretches cannot defile the Sacrament ‡, and ſince 'tis the holy Spirit which gives Efficacy thereunto by whatever Miniſters they are exhibited ‖: Yet they ought not knowingly, according to the *Canon-Law*, to be receiv'd from a Heretick *.

‡ Lib. Tit. 5. 16. c. 16.
‖ Can. 21.
* X. 5. 38. 12.
† Con. 2. Diſt. 19.
‡ Con. utſup.
‖ Lindw. ut ſupr.
* X. 5. 38. 12.
† 1. Q. 1. 36. & 38.
‡ 1. Q. 1. 39.
‖ 1. Q. 1. 38.
* 23. Q. 1. 34.

And by another Conſtitution in *Lindwood* †, no one ought to adminiſter the holy Communion or the Sacrament of the Euchariſt, to the Pariſhioner of another Curate, without the evident Leave of ſuch Curate. And this is in Conformity to the *Canon-Law*, which ſays, That the Sacraments are only to be given to the Pariſhioners †. But yet this Conſtitution or Ordinance does not extend it ſelf to Travellers and Pilgrims; nor ought it to be in Derogation of any Caſe of Neceſſity; for a Traveller is a Pariſhioner to every Church where he comes *. For as in Caſes of Neceſſity every Presbyter may, according to that Law, hear the Confeſſion of another's Pariſhioner ‡; ſo in the like Caſe every Presbyter may adminiſter the Euchariſt ‖: But this Sacrament ought not to be exhibited by any Clerk inferiour to a Presbyter in the *Romiſh* Church *; but 'tis otherwiſe with us, tho' a Deacon cannot conſecrate the Elements of Bread and Wine.

† Lib. 3. Tit. 15. c. 2.
† 16 Q. 1. 10.
* Arg. D. 5. 1. 19.
‡ 26 Q. 6. 12
‖ 50 Diſt. 63. 1. Q. 1. 70.
* Con. 4 Diſt. 123.

In

In the *Romiſh* Church at the Celebration of the Hoſt or Euchariſt a Bell ought to be rung, to the end that all ſuch Perſons as cannot every Day attend the Celebration of the Maſs, may be on their bended Knees, whereſoever they are, either in the Fields, or in their own Houſes, *&c.*

And in our Church, becauſe there can be no Converſion to God, where the Sacraments of his Church are contemn'd and ſet at naught, it is enacted by a Statute of *Edward* the Sixth *, That no one ſhall ſpeak or do any Thing in Contempt of the Holy Sacrament, under Pain of Impriſonment, and to make Fine and Ranſom at the King's Pleaſure. And three Juſtices of the Peace (one being in *Quorum*) have Power to take Information by the Oath of two lawful Witneſſes or Perſons (at leaſt) touching the aforeſaid Offence, and to bind over by Recognizance every Accuſer and Witneſs in five Pounds each to appear the next Seſſions to give Evidence againſt the Offenders, who are there to be enquir'd of before three or more Juſtices by the Oaths of twelve Men, and to be indicted, if the Matter alledg'd againſt them be found true. Three Juſtices or more have likewiſe Power to ſend out two Writs, *viz.* a *Capias* and an *Exigent*, and a *Capias ut-lagatum* againſt ſuch Offenders in all Counties and Liberties; And upon their Appearance to determine the Contempts and Offences aforeſaid, or to take Bail for their Appearance as aforeſaid. And the Juſtices have alſo Power to direct a Writ in the King's Name to the Biſhop of the Dioceſs where the Offence was committed, by which he ſhall be requir'd to be preſent himſelf, or (ſome for him ſufficiently learned) at the Arraignment of the Offender, and to give Advice concerning the Offence committed.

* 1 E. 6. c. 1.

And as the Sacraments are not to be given to ſuch as are not under the Cure of the Prieſt that adminiſters them †; ſo they ought not to be given to harden'd and impenitent Sinners, nor to Schiſmaticks, and the like ‖: For they require not only a good Diſpoſition of Mind towards Religion, but Repentance of a paſt wicked Life.

† 18 Q. 2. 18.

‖ 26 Q. 7. fere per tot.

Of Sacrilege, the Species and Puniſhment of it.

SACRILEGE is a particular Crime, merely ſo nam'd at firſt by the Clergy, for before they baptiz'd it by this Name, it might as well have been called *Theft*, *Oppreſſion* or *Extortion:* But now he is ſaid to commit *Sacrilege* who ſteals or takes away any Thing, that is Sacred, from a ſacred Place; as out of Temples, Churches, and the like; or to even break open ſuch Places for this End and Purpoſe; or doth conſent or attempt to commit ſuch wicked Acts *. Prelates got this Crime under their Cognizance by virtue of that general Maxim, *viz. That all Wrong done to the Church muſt be judg'd by the Church:* And thus this Crime came to be puniſh'd in the Eccleſiaſtical Court. But the firſt time I can find that they challeng'd this Power here in *England*, was by *Egbert* Archbiſhop of *York* in the ſeventh Century; tho' ſince they have puniſh'd this Crime in the Spiritual Court, and (eſpecially) when the Power of the Church ran high, as it did before the Reformation: For I meet with two adjudg'd Caſes cited in *Fitzherbert's*

* D. 48. 13. 4. 6 & 9.

herbert's Grand Abridgment of the Law, to this Purpoſe †, *viz. If a Man takes Goods out of the Church-yard, he that has a Property therein may ſue him in the Court Chriſtian, and compel him to ſtand to the Judgment and Sentence of the Spiritual Court for this Offence.* And again, *. *If a Man takes Trees that are growing in the Church-yard, the Parſon may ſue for them in the Court Chriſtian, and for Sacrilege alſo.* But *Lindwood* ſpeaking of Sacrilege ſays †, That it is not a Crime *merely* Eccleſiaſtical, becauſe the Cognizance thereof may belong to a Temporal Judge (at leaſt) touching the corporal Puniſhment of it, with whom the *Juſtinian* Code agrees in reſpect of the Civil Penalty thereof ‡: And this *Hoſtienſis* himſelf confeſſes in reſpect of a corporal Puniſhment; tho' 'tis otherwiſe in reſpect of Church Cenſures, which ought to be inflicted on ſuch Perſons as commit the ſame ‖.

† M. 4. H. 3. per Fitzh. *Prohib.* n. 26.

* 17. H. 3. per Fitzh. ut ſup.

† Lib. 5. Tit. 15. c. 1. v. *Sacrilegio.*

‡ C. 1. 3. 10.

‖ Lindw. ut ſupra.

Now Sacrilege in our Books is underſtood two ways, *viz. ſtrictly* and *largely*, otherwiſe called *properly* and *improperly*. The *Canon-Law* defines it to be a Violation or Uſurpation of a Thing ſacred; and ſays, that it may be committed three ſeveral ways, *viz. Firſt*, In reſpect of a Man's Perſon *; as when one wounds or ſtrikes a Clergyman. *Secondly*, In reſpect of the Place; as when any one violates the Immunities of the Church or Church-yard †. And, *Thirdly*, in reſpect of a Thing; when any one uſurps or ſteals a Thing conſecrated or deputed to ſome ſacred Uſe, whether the Thing be taken away from a ſacred Place, or from a Place which is not ſacred; or whether the Thing be not ſacred, which is taken away from ſome ſacred Place ‡. And a Man is ſaid to be guilty of Sacrilege *ſtrictly* and *properly*, when he ſteals a Thing ſacred from ſome ſacred Place, and this according to the *Civil-Law* ‖: But by the *Canon-Law*, either is ſufficient *. In a *large* and *improper* Senſe of the Word, Sacrilege is extended to other Crimes: And, in purſuance hereof, a Man infringing the Liberties of the Church, or invading the Eſtate and Goods thereof, is called a ſacrilegious Perſon: And the Perſons that do invade and occupy ſuch Eſtates as are appropriated unto Divine Uſes, are excommunicated as ſacrilegious Perſons †, till they reſtore the ſame to the Church; and, moreover, by ſome Laws they are puniſhed in *Quadruplum*, and by others in *Decuplum* ‡.

* 17. Q. 22 & 29. Arch. ibi.

† 17. Q. 4. 21.

‡ ut ſupra.

‖ D. 48. 19. 16. 4.

* 17. Q. 4. 21.

† 12. Q. 2. 3. & 4.

‡ 12. Q. 2. 7. 9 & 10.

Sacrilege is puniſh'd by the Common Law of the Church ſeveral ways. As, *Firſt*, by an Excommunication pronounc'd, or (as we ſay) *ipſo Jure* ‖: And this is true, when 'tis committed againſt an Eccleſiaſtical Perſon, as by ſtriking a Clergyman, and the like. *Secondly*, By an Excommunication to be pronounc'd, *viz.* when 'tis committed againſt the Eſtate and Goods of the Church *. And ſometimes a Pecuniary Puniſhment or Fine is inflicted for Sacrilege committed †. And ſometimes the Perſon was condemn'd to perpetual Infamy, and committed to Priſon, or ſentenc'd to a Baniſhment of perpetual Deportation ‡, by the *Civilians* called *Relegation*. And, *laſtly*, if any one arreſted or ſtruck a Prieſt, or any Clerk in the lower Degrees of Orders, he was liable to a Canonical Pennance, and if he was Contumacious, he was coerced with an Excommunication. And in all Caſes he was deny'd Church-Burial ‖, unleſs in the Time of his Sickneſs he receiv'd Pennance and Abſolution from the Pariſh-Prieſt.

‖ 17. Q. 4. 29.

* 17. Q. 4. 21.

† X. 5. 17. 5.

‡ 17. Q. 4. 13.

‖ X. 5. 17. 5.

But, according to the *Civil-Law*, the Puniſhment of Sacrilege is more ſevere than by the Canons of the Church. For as the Puniſhment of Sacrilege among the *Greeks* was heretofore very grievous, as Burning, Drowning, and being thrown Headlong from ſome Precipice; ſo, by the *Roman* Law, a ſacrilegious Perſon was condemn'd to fight for his Life

with Beaſts, as Bears, Leopards, Lyons, &c. * And ſometimes he was condemn'd to be burnt alive, ſometimes to be hang'd on a Gibbet, ſometimes he was condemn'd to the Mines, ſometimes baniſh'd to an Iſland (in that Law called *Deportation)* and ſometimes beheaded. But then this was only committed, when any Thing of a ſacred Nature was ſtollen from a ſacred Place, and not as by the *Canon-Law*, which makes it Sacrilege to ſteal any Thing from a private Man, if it be depoſited in a ſacred Place, on the Account of ſome Injury done to the Place as well as to the Thing: For, by the *Civil-Law*, if a Thing of a private Nature be depoſited in a Church, and ſtollen from thence, an Action of Theft, and not of Sacrilege, lies againſt the Robber †. But then the *Canon-Law* makes Uſe of great Moderation in this Particular, when it is not committed againſt the Perſon of a Clerk by laying violent Hands on him, but only againſt the Goods of a private Man, or the like, decreeing, That ſuch ſacrilegious Perſons muſt receive three Admonitions before their Excommunication ‡. So that from what has been ſaid it appears, that the Clergy in former Times were more careful of their own Perſons than they were of the Goods and Furniture of the Church. But tho' among the Heathens ſome Offences of this Nature were puniſh'd with Death, and the Offenders were not allow'd the common Humanity of Burial, and all their Goods confiſcated: Yet it was not puniſh'd with Death by the *Canon-Law*, as already obſerv'd; nor was it ſo puniſh'd with us here in *England* anciently. For in King *Alfred*'s Reign the Puniſhment was only Pecuniary, *viz.* The Offender was to reſtore the Value of the Thing taken, and was likewiſe to pay the Value of his Head, which was about forty Pounds: But it was an Aggravation of the Fact to commit Sacrilege on a *Sunday*; for in ſuch a Caſe he was not only to pay the Value of his Head, but his Hand with which he committed the Fact was to be cut off; but this he might redeem at the ſame Price his Head was valu'd. And many Years afterwards the Puniſhment was by Excommunication in the Eccleſiaſtical Court, as being a Crime of a mix'd Nature; of which we have a remarkable Inſtance in *Henry* the Third's Reign ‖, when the King himſelf ſtanding with his Hand on his Breaſt, and the whole Houſe of Peers with lighted Torches in their Hands, pronounc'd thoſe Perſons excommunicated, who maliciouſly depriv'd the Church of their Rights, *&c.* then they threw down their Torches extinguiſh'd and ſmoaking, and all of them pronounc'd theſe Words, *viz. So let all thoſe who go againſt this Church be extinguiſh'd in Hell.* Our Anceſtors were ſo confident, that a ſacrilegious Perſon could not eſcape God's Judgment, that they deliver'd him over to Satan, or (as uſually ſaid) they curſed him with *Bell, Book* and *Candle*, *viz.* after the Curſe was pronounc'd, which was done four times in a Year, they ſaid *Fiat*, and then they ſhut the Book, put out the Candle, and ringed the Bell. But now if there be no actual Force, and the Goods of the Church are taken from thence, the Churchwardens may in ſuch a Caſe have an Action at Common Law againſt the Offender, and ſhall recover Damages; or elſe they may libel againſt them in the Spiritual Court *pro ſalute Animæ* *, which is the moſt proper Remedy; and there he may recover the Thing *in Specie:* But if there be Force offer'd, 'tis Burglary to break open the Church and enter it in the Night-time, with an Intent to ſteal †; becauſe in this reſpect the Church is in the Conſtruction of the Law the Manſion Houſe of God.

* D.48.13.6.

† D. 48.13.4.

‡ 17. Q. 4. 21.

‖ An. 38. H. 3.

* Siderſ. Rep. p. 281.

† Dyer. Rep. p. 99.

Of

Of the Sacriſt, Oſtiarius, *and other Church-Officers.*

THO' no Eccleſiaſtical Benefice can be given, unleſs it be in reſpect of ſome Duty or other to be done for it; yet every Office in the Church has not an Eccleſiaſtical Benefice annex'd to it, nor has it a perpetual Cure of Souls going along with it: And, therefore, we diſtinguiſh Eccleſiaſtical Perſons in another manner, than (as already remember'd) by the Stile of Biſhops, Prieſts and Deacons, *viz.* in reſpect to an Eccleſiaſtical Office *ſimply* given them. For there is one kind of Office, which is given *Eccleſiaſticks* in reſpect of Things Profane belonging to the Church, another in reſpect of Things Sacred, and a third in reſpect of Juriſdiction. *Firſt,* Some may be ſaid to have an Eccleſiaſtical Office in reſpect of Things Profane, or (in ſome Meaſure) Profane: And in this Senſe, according to the Gloſs *, the Keeper of the Gates, called *Oſtiarius* by the *Canoniſts*, the Keeper of the Meadows, the Steward or Treaſurer of the Church, called *Oeconomus*, and the *Sacriſt*, *&c.* may be ſaid to have Eccleſiaſtical Offices. Theſe Offices are known and diſtinguiſh'd from Church Benefices *ex Habitu adminiſtrationis*, *viz.* when any Perſons have the Management and Adminſtration of them without having the Honour and Prerogative of gaining any Stall in the Choir, or Voice in the Chapter, beyond others of their own Rank or Order. And 'tis the ſame Thing according to the Archdeacon ‡, if a Perſon has that unto which a Truſt or Charge is annex'd without any Prerogative of Honour.

* In l. 6. C. 12. 1.

‡ In c. 1. x. 1. 4.

Now the *Sacriſt* is ſaid to be him unto whom the Archdeacon has committed the Care and Cuſtody of the Sacred Veſſels, the Eccleſiaſtical Veſtments, Books, and the like, which are the Treaſure of the Church ‖; and ſometimes he has the Cuſtody of ſuch Things as are neceſſary towards the Lights of the Church, as Oyl, Wax, *&c.* according to a Decree of the Council of *Toledo* *: And he is ſo called from the Sacred Things which he has the keeping of; as the Place where ſuch Things are kept is in *Latin* called *Sacrarium*, or with us the *Veſtry*, tho' it be (*Ulpian* ſays †) a private Place. Sometimes this Place is in our Books called the *Treaſury*, and the Perſon executing the Office is in *Latin* term'd *Præfectus Theſaurarius* ‡. The *Sacriſt* had a Miniſter or Servant under him, called *Cuſtos Eccleſiæ*, whoſe Office it was to ring the Bells at Canonical Hours, to look after the Church-Furniture, and to take Care of the holy Fire that it does not go out, *&c.* There are three of theſe Churchmen in the Cathedral of *Wincheſter*; and they are ſomething like unto Pariſh-Sextons.

‖ X. 1. 23. 3.

* X. 1. 26. 1.

† In l. 9. D. 1. 8.

‡ 25. Diſt. 1.

As to the *Oſtiarius* or Door-keeper, the *Jews* had in ancient Times ſeveral Perſons in their Temples and Synagogues, whom we in *Latin* ſtile *Oſtiarii* or *Janitores*, and in *Engliſh* Door-keepers or Porters; who were choſen in a particular manner to wait at the Gate or Entrance of the Tabernacle, and were ſet over the Chambers and Treaſuries of the Houſe of God; as we may read in the firſt Book of the *Chronicles* ‖: And, according to *David*'s Opinion, theſe Men ought to be

‖ Cap. 9. v. 26.

be of the ſacred Order*. Wherefore, the *Romiſh* Church, which apes and follows the *Jewiſh* Synagogue (as near as poſſible) in all their Diſcipline and Ceremonies, will have their *Door-keeper* to be in Clerical Orders, tho' his Buſineſs and Duty in that Church as an Eccleſiaſtical Miniſter, is nothing elſe but to open and ſhut the inward and outward Doors, and to keep the Keys thereof; and likewiſe to admit Believers, and to keep out Unbelievers and excommunicated Perſons from coming into the Church †: And the Symbol or Badge of the Order granted him is the Delivery of the Church-Keys made him by the Biſhop ‡. It is alſo the Buſineſs of theſe Men, according to the Law and Diſcipline of that Church, to keep ſuch Perſons out of the Church during the whole Service-time, as are enjoin'd the Performance of publick Pennance. Thoſe Perſons, who execute ſomething the like Office and Duty in our Church, are in *Engliſh* ſtiled *Pariſh-Clerks*, and in *Latin* by the Name of *Oſtiarii*, as may be ſeen in the *Latin* Verſion of King *James*'s Canons ‖.

*Chron. cap. 22.

† 25. Diſt 1.

‡ 23. Diſt. 19.

‖ 50. Diſt. 64.

‖ Can. 91.

Of Schiſm and Schiſmaticks, &c.

THE Word *Schiſm*, which is deriv'd from the *Greek* Verb Σχίζω, denotes a Rent or Diviſion in the Church; and, according to *Goffredus*, is a Receſs or Departure from the Communion of the Church, either in Part or in the Whole: But becauſe this Definiton may as well ſerve Hereſy or Apoſtacy as Schiſm, properly ſo called, I ſhall here define it in other Terms to be an *unlawful Diſſent or Separation of Chriſtians from the Unity and Communion of the National Church, occaſion'd by their Diſobedience to the Government and Diſcipline thereof.* And it differs in Principles and Fundamentals from Hereſy; for Hereſy carries along with it a perverſe Opinion or *Dogma* in Point of Principle or Religious Fundamentals, which Schiſm does not *. But if *Schiſm* be permanent and laſting, it comes at length to be ſtiled *Hereſy*, according to the *Canon-Law*; becauſe a *Schiſmatick*, by perſiſting in his *Schiſm* (ſay the *Canoniſts*) ſuppoſes and believes, that he has made this Departure from the Church upon a right and ſolid Foundation of Truth, and is therefore by that Law deem'd a *Heretick* †. By the Laws of *England* a *Schiſmatick* is one that, divides and ſeparates himſelf from the Eſtabliſh'd Church of the Realm, not on Fundamentals of Faith, but on ſome Points of Religion relating to Church Diſcipline and external Worſhip: And thus Schiſm with us may be couched under the Definition above-given. In Unity there can be no Rent or Schiſm; and, therefore, (ſays the *Canon-Law* ‡) that ſuch as communicate with Schiſmaticks, do not communicate with the Unity of the Church. Unity, no doubt, is a divine Thing; and it is much to be wiſh'd, that all who call themſelves Chriſtians, were of one Mind and one Faith in Point of Religion: But if Perſons contend more for Uniformity of Diſcipline in the Church, than for Unity of Faith among Chriſtians, we can expect no good Effects from all our boaſted Pretenſions to Chriſtianity it ſelf. Peace, Love, and bearing with each others miſtaken Notions

* 24. Q. 3. 26.

† 24. Q. 3. 26.

‡ 24. Q. 1. 34.

Notions about hidden Points of Religion, with Hopes of convincing the Erroneous by gentle Means, may (perhaps) by the Grace of God, produce Unity of Faith amongſt us, which the Gallies and the Inquiſition-Court can never effect.

If a Biſhop, on the Examination of a Clerk preſented to an Eccleſiaſtical Living, finds him to be an inveterate Schiſmatick, he cannot by the Laws of the Church admit him to ſuch Living or Benefice * : But then the Biſhop ought to ſhew, wherein he is a Schiſmatick, otherwiſe a *Quare Impedit* will lye againſt the Biſhop as a Diſturber of the Patron's Right of Preſentation. In *Fitzherbert*'s Abridgment we read, that the Earl of *Arundel* brought a *Quare Impedit* againſt a Biſhop; and the Biſhop ſhew'd the Earl's Preſentee to be guilty of Perjury on ſeveral Accounts, for which Reaſon he was not capable of an Eccleſiaſtical Benefice, and ſo it ought to be in the Caſe of Schiſm. And *Dyer* in his Report ſays, that the Biſhop ought to ſet down the Diſability of the Clerk, and give Notice thereof to the Patron. In the ninth of Queen *Elizabeth*, a Biſhop refus'd a Clerk, becauſe he was a Haunter of Taverns and unlawful Games, *&c.* and for theſe and divers other Reaſons he was held to be a criminous Perſon, and unfit to be admitted to a Living: And there the Plea was thought not good; becauſe the Faults alledg'd were not evil in their own Nature, but only by a Prohibition of Law; and the Plea was alſo look'd upon as naught, becauſe he did not ſhew what the other Faults were. And the Reaſon why the Ordinary ought to alledge in ſpecial or certain, what Faults the Preſentee is guilty of, is, that the Patron may upon Knowledge thereof preſent another Clerk to the Ordinary, that is not ſtained with the like Faults: And how can the Patron tell that his Clerk is diſabled for ſuch a Fault, unleſs he certainly knows what the Fault is that he is charged with? On the contrary 'twas firſt ſaid, That when a Clerk is preſented to the Biſhop, the Examination of him entirely belongs to the Biſhop, as 'tis expreſs'd in the Statute *de Articulis Cleri* *: And becauſe the Cure of the Parſon is the Cure of the Ordinary †, the Biſhop need not ſhew, wherein he is a Schiſmatick; and the only Reaſon the Book-Caſe above quoted gives, why it ought to appear before what Judge and wherein a Man is perjur'd, is, becauſe if it be not before ſome Judge, it is not Perjury in the Eye of the Law: But the Court ſaid, that in the above-mentioned Caſe it was likewiſe ſhewn, wherein he was guilty of Perjury; and ſo in this Caſe it ought to appear, wherein a Perſon is guilty of Schiſm. But it was *Walſhe*'s Opinion in the Caſe of the twelfth of *Elizabeth*, That ſuch Things as concern the Manners and Behaviour of a Clerk ſhall be try'd by the Temporal Court; but the Ordinary ſhall have the Cognizance of ſuch Matters, as reſpect the Learning and Sufficiency of ſuch a Perſon.

* X. 5. §. 1.

* 9. E. 2. c. 13.

† 36. H. 6.

Schiſms and Diviſions were very ancient in the Chriſtian Church, as we learn from St *Paul*'s firſt Epiſtle to the *Corinthians*, from the tenth to the thirteenth Verſe of the firſt Chapter: But then theſe Diviſions were more about Faith than about Ceremonies; for as yet there was no ſettled Form of Diſcipline in the Church, but only this general Canon preſcribed by the Apoſtle †, *viz. Let all Things be done decently and in Order.* But the Papal *Canon-Law* reckons Schiſm next of Kin unto Hereſy itſelf; ſaying, There is no Schiſm which does not form unto itſelf ſome Hereſy or other. And then it reckons up ſeveral Kinds of Schiſmaticks. *Firſt*, In a large Senſe of the Word. *Secondly*, In a more confin'd Senſe thereof. And, *Thirdly*, in a ſtrict Senſe of it. In a large Senſe all criminous Perſons are deem'd Schiſmaticks ‡. In a more con-

† 1. Cor. cap. 14. v. 40.

‡ 1. Q. 1. 112.

* 24. Q. 3. 8. fin'd Sénſe all excommunicated Perſons are adjudg'd Schiſmaticks *, tho' ſome of theſe commit no Sin by remaining under an Excommunication. But in a ſtrict Senſe only thoſe are called Schiſmaticks, who divide themſelves from the Unity of the Church. *Firſt*, By making Conſtitutions peculiar to themſelves. *Secondly*, By ordaining their own Biſhops and Presbyters: And, *Thirdly*, thoſe are ſaid to be Schiſmaticks in this Senſe, who, in Contempt of the Eccleſiaſtical Conſtitutions, do make Combinations and Conſpiracies againſt the Biſhops and Prelates
† 11. Q. 1. of the Church †.

Of Seals Authentick, and the Evidence thereof.

* Vid p. 444. AS I have already, under a former Title *, obſerv'd, that Proof is ſometimes made by Letters under the Epiſcopal Seal, which is in Law ſtiled an *Authentick Seal*, I ſhall here ſay ſomething of *Authentick* Seals, and the Evidence they give to an Act in Law. For 'tis a known Truth among us, that a Seal makes no Proof at all, unleſs it be an *Authentick* Seal †: And as a Prince's Seal is called an
† X. 2. 22. 2.
‡ X. 2. 22. 9. *Authentick* Seal ‡; ſo in the like manner is the Seal of a Biſhop,
‖ X. 2. 19. 3. or Dean and Chapter ‖, and the like. According to the Notion of ſome Perſons, ſuch Seals as have no Impreſſion of Writing upon them, do not obtain the Force of *Authentick* Seals; becauſe they are then by this Means liable to Suſpicion, as they may be more eaſily counterfeited or imitated: Moreover, that in theſe Impreſſions *Forma dat eſſe rei.* Tho' I am, in this reſpect of the Authenticknes of ſuch Seals, of a contrary Opinion, and think, that the Law rather refers itſelf to the Effect than to the Form. But we ought to give Credit to a Seal againſt the Perſon ſigning with it, if ſuch Seal be not deny'd, tho' it be but the
* 1. Q. 7. 21. Seal of a private Perſon *: And this is true, unleſs there be ſome Statute or Cuſtom to the contrary. For the ſubſignation or putting a Man's Mark or Signet, which is alſo called his Seal, is ſuch an Evidence in Law againſt him, that he cannot elude the ſame, if he will acknowledge, that he ſign'd and made this Impreſſion under ſuch a Writing; and thus this Impreſſion of his Seal confirms the Authority of ſuch Writing. And from hence we take Occaſion to ſay, that there are two kind of Seals; the one called a *publick*, and the other a *private* Seal. I ſhall here firſt ſpeak of a publick Seal, which is that which Princes, Magiſtrates, Judges, Actuaries, and the like, do uſe in all Publick Acts, and in Matters of Judicial Proceeding. And, *Secondly*, ſomething in brief of a Private Seal. And,

Therefore, *Firſt*, in reſpect of a Publick Seal, which is likewiſe called
† X. 2. 19. 7. an *Authentick* Seal, 'tis a confirm'd Rule in Law, That full Credit ought to be given to ſuch Letters of a Judge as are ſtrengthned with his uſual or common Seal of a Judge †, if he does by any Letters atteſt the Truth of ſuch Things as do belong to his Office, and depend on his own Judgment and Diſcretion: And thus a Sentence of Excommunication ought to be ſtrengthned and corroborated by the Judge's *Authentick*

tick Seal*. But if a Subſcription of Witneſſes be alſo added to ſuch Letters, then it generally makes a juſt and full Proof of the Matters therein contain'd, againſt all Oppoſition†. And the Truth or Falſhood of Privileges ought likewiſe to appear from the *Authentick* Seals of ſuch Perſons as granted the ſame ‡. As for Inſtance, when the Univerſity of *Oxford* would plead any Privilege, ſuch Privilege ought to appear not only by the Seal of the Univerſity, but alſo under the Seal of the Prince that granted it.

* Innoc. in c. 1. vi. 5. 11.

† X. 2. 22. 2.

‡ X. 2. 22. 9.

The Seal of every Biſhop, Prelate of a Collegiate Church, and of every Perſon exerciſing Ordinary Juriſdiction, either by Law or Cuſtom, is an *Authentick* Seal*: But if a Biſhop juſt elected, confirm'd or conſecrated has not yet furniſh'd himſelf with an Authentick Seal, he may in ſome Caſes put his own private Signet or Coat-Armour to ſuch Letters as are of *voluntary* Juriſdiction, provided the ſame be ſufficiently known; becauſe he may ſeal them with another's Seal if the ſame be known†. But in Matters of *Contentious* Juriſdiction, a Biſhop's private Seal or Signet bearing his own Coat-Armour gives no Credit at all to an Inſtrument, or any other Matter; but he ought to put that Seal thereunto, which he generally uſes in the Diſpatch of all Church-Affairs, commonly called *the Seal of his Office*; and which is an *Authentick* Seal‡. But 'tis to be noted, that when a Seal is put to give Authority to a Writing *principally* and not *ſecondarily*, then ſuch Seal ought to be *Authentick*; but 'tis otherwiſe, if it be not *principally* put, but only *ſecundarily*.

* 11. Q. 3. 20 Dd ibi.

† C. 6. 3. 12. Dd. ibi.

‡ Bern. in c. 2. x. 2. 22. v. *Sigillum Authenticum.*

By a Provincial Conſtitution in *Lindwood* 'tis enacted‖, That no Dean of a Cathedral or Collegiate Church, or any Rural Dean, Archdeacon, or his or the Biſhop's Official ſhould ſet their Seal to any Proxy, unleſs the ſame be publickly requeſted in Court, or elſe before the Judge that has Cognizance of the Cauſe, by the Perſon that conſtitutes a Proctor; or elſe *Extrajudicially*, when the Perſon conſtituting ſuch Proctor does in his own proper Perſon duly requeſt the ſame. And if any Dean, Archdeacon, Official, *&c.* ſhall *ex certâ malitiâ* (for this Conſtitution was made to prevent Fraud and Deceit, as practis'd in thoſe Times) act contrary hereunto, he ſhall *ipſo facto* be ſuſpended *ab Officio & Beneficio* for three Years: And, beſides, if either of theſe Perſons ſhall be convicted hereof, he ſhall be oblig'd to make Satisfaction and Amends to the Party injur'd. But as Deans and ſuch Perſons are now ſeldom apply'd to for their Seals, this Conſtitution ſeems to be grown obſolete, tho' ſtill in Force. And likewiſe a Perſon that ſets his Seal to any Certificate or other Act, knowing the Perſon that deſires the ſame to have no concern in the Cauſe, and that he does this out of a fraudulent Purpoſe and Deſign, is guilty of Fraud and Malice; and ſhall be puniſh'd accordingly. To the end that a Seal may be called an *Authentick* Seal, it ought to have an Orbit and ſome Impreſſion thereon to hinder Suſpicion of Forgery*. And, therefore, it was enjoin'd by a *Legatine* Conſtitution in *Lindwood*†, That all Archbiſhops, Biſhops, and their Officials; and all Abbots, Principal Priors, Deans, Archdeacons, and their Officials; and likewiſe all Chapters of Cathedral Churches; and other Colleges and Convents (which were all of them to have their *Authentick* Seals) ſhould each of them reſpectively have the Name of his Dignity, Office or College engraven thereon in manifeſt Characters; and likewiſe the proper Name of ſuch Perſons as enjoy any perpetual Office or Dignity.

‖ Lib. 1. Tit. 18. c. 1.

* D. 28. 1. 22. 5. Pæn. 2. Diſt. 65. v. *Quidnam boni.*

† Otho. Tit. 27.

Of

Of Seats and Monuments in Churches.

AS there are ſeveral Controverſies at Law, which happens about Seats and Monuments in Churches, I will here conſider theſe Particulars, as they are of Eccleſiaſtical Cognizance, and do relate to the Spiritual Court: For in the Caſe of *Eaton* againſt *Ayliffe* it was ſaid by *Hutton* *, That Seats in the Generality are in the Power of the Ordinary to diſpoſe; and, conſequently, all Diſputes touching them do belong to the Church †: For tho', by the Common Law, the Church and Church-yard are (it ſeems) the Soil and Freehold of the Parſon, yet the uſe of the Body of the Church is common to all the Pariſhioners: And tho' the Seats are fix'd to the Freehold, yet the Church it ſelf is dedicated to God's Service; and the Seats are built there that the People may with more Convenience attend Divine Service. Therefore, the Law has thought fit to confer this Power of diſpoſing of Seats generally on the Ordinary; and likewiſe intruſted him with the Cognizance of this Matter, whenever any Contention ſhall ariſe upon a Complaint made to him about a Seat in the Body of the Church: Becauſe he, who has the general Cure of Souls within his Dioceſs, is preſum'd to have a due Regard to the Qualities of the Contending Parties; and by a deciſive Judgment to give Precedence to him, who ought to have it ‡. But where there is no Contention, and the Ordinary does not interpoſe, becauſe there is no Complaint made to him: There (I ſay) in ſuch a Caſe the Parſon and Church-wardens have Power to place the Pariſhioners in Seats; and in ſome Places the Church-wardens alone have this Power by Cuſtom, as in *London*.

* Hetley's Rep.

† 3. H. 7. 12. 9. E. 4. 14.

‡ Vid. Hall's Caſe.

Brabin, in order to have a Prohibition, ſurmiz'd, That in the Pariſh of *D.* a Cuſtom was and is, that the Pariſhioners have Time out of Mind been uſed to chuſe every Year Church-wardens, which have and are to repair the Seats of the Church, and to make new ones there as often as convenient; and alſo that theſe Church-wardens for the Time being with the Aſſent of twelve of the Pariſhioners may place and diſplace any of the Pariſhioners in their Seats at their Diſcretion, according to their Degrees and Qualities; and that they may erect a new Seat; and did with the Aſſent of twelve Pariſhioners place him the ſaid *Brabin* there: And that the Biſhop of *H.* made a Decree, whereby he remov'd *Brabin* from his ſaid Seat, and gave the ſame to *Trediman* and his Heirs for ever; and likewiſe decreed, that if *Brabin* or any other ſhould diſturb *Trediman*, he ſhould *eo ipſo* be excommunicated. *Brabin* did diſturb *Trediman*; and thereupon the Parſon pronounced the Excommunication. *Brabin* appeal'd to the *Arches*, and after that to the Court of *Delegates*, where the firſt Sentence was affirm'd: And then he pray'd a Prohibition, and had it. *Firſt*, Becauſe the ſaid Cuſtom was and is Reaſonable. *Secondly*, Becauſe the Decree was, That *Trediman* ſhould have the Seat to him and his Heirs, and that it was not ſo long as he or they ſhould dwell in the ſaid Pariſh, and that hereby if he

he reſides at *York*, he ought to have this Seat in *D.* Juſtice *Houghton* ſaid, That if there had not been an immemorial Cuſtom alledg'd for the Church-wardens to repair and make new Seats, no Prohibition could have been granted; for ancient Cuſtom *ne poet vaer* as to new Seats. And 'twas mov'd, that becauſe *Brabin* had appeal'd to the *Arches* on the firſt *Inſtance*, he came now too late to have a Prohibition: But the Plea was not allow'd *. For a Cauſe was cited between Dame *Layton* and *Huſſey* the Term before, wherein a Prohibition was granted, notwithſtanding the Appeal.

* Rolls Rep. p. 24.

Again in a Prohibition the Caſe was this: The Defendant libelled in the Conſiſtory Court of *London* for a Seat in the Church; and Sentence there paſſing againſt him, he appeal'd to the *Arches*. A Prohibition was pray'd, becauſe the Title to the Pew or Seat was grounded on a Preſcription: The Court anſwer'd, That as to the Title they were not to meddle with it, this being for a Seat in the Church. For (ſaid *Houghton)* this Diſpoſition of Pews in the Church belongs to the Order and Diſcretion of the Ordinary †; and to this Purpoſe is Sir *William Hall*'s Caſe againſt *Ellis*. And tho' Juſtice *Dodderidge* was of Opinion, That an Action of Treſpaſs would lye for a Diſturbance therein, as in the Caſe of a Grave-ſtone and Coat-Armour; for taking down of which an Action of Treſpaſs lies at the Common Law; yet the reſt of the Judges did all of them ſay, That they would not meddle with the deciding of ſuch Controverſies about Seats in the Church, but would leave the ſame to whom it did more properly belong ‡. And thus the Eccleſiaſtical Court has Juriſdiction and Power to diſpoſe of Pews and Seats in the Body of the Church, notwithſtanding the Church is the Parſon's Freehold; if there be no Cuſtom to the contrary.

† S. H. 71;

‡ Bulſtr. Rep. pt. 2d. *May.* v. *Gilbert.*

But if an Inhabitant and his Anceſtors have uſed Time out of Mind to repair an Iſle in the Church proper and peculiar to his Houſe, and has been wont to ſit there with his Domeſticks, in order to hear Divine Service, and been likewiſe accuſtomed to bury therein, this makes this Iſle ſo peculiar to himſelf and his Houſhold, that he cannot be diſplac'd by the Ordinary himſelf †, much leſs can he be interrupted by the Parſon or Church-wardens: But the conſtant ſitting and burying there, without uſing to repair it, does not give him any peculiar Property or Preheminence therein. And if the Iſle has been uſually repair'd at the Charge of all the Pariſh in common, the Ordinary may then from Time to Time appoint whom he pleaſes to ſit there, notwithſtanding any Uſage to the contrary. But in all Caſes where the Ordinary grants a Faculty either for building new Seats, or diſpoſing of the old ones, he ought to iſſue ought an Intimation or Notice to be given to the Pariſhioner, that none be thereby injur'd or moleſted in their ancient Right: For the Ordinary cannot remove Pariſhioners from their Seats, which they and their Anceſtors have enjoy'd Time immemorial, or beyond a forty Years Preſcription. When Seats in the Body of the Church are to be diſpos'd of by the Parſon or Church-wardens, it was formerly held that a Man could not preſcribe for a Seat there *: But now the Law is ſettled as to this Matter, *viz.* That one Man may preſcribe for a Seat in the Body of the Church; ſetting forth, that he is ſo ſeiz'd of an ancient Houſe, *&c.* and he and all thoſe whoſe Eſtate he hath therein, have, Time out of Mind, or for forty Years (at leaſt) laſt paſt, uſed and had a Seat in the Church for themſelves and their Families, as belonging to the ſaid Houſe, and that they repair'd the ſaid Seat †. And the Reaſon why he muſt alledge that he repair'd it, is, becauſe the Freehold being in the Parſon, there muſt be

† Cok. 12. Rep. p. 104. 2 Crok. Rep. p. 366. Godv. Rep. p. 200.

* Noy. Rep. p. 78. Latch. Rep. p. 116. Palm. Rep. p. 424.

† Cokes 12. Rep. fol. 105. Noy. Rep. 129. 130

ſome ſpecial Cauſe ſhewn for ſuch a Preſcription: But as to this Matter the Court diſtinguiſhed between an Action on the Caſe brought againſt a Diſturber, and a Suggeſtion for a Prohibition *. For in the firſt Caſe you need not alledge that you repair the Seat, becauſe the Action is againſt a Wrong-doer: But, upon a Suggeſtion for a Prohibition it muſt be alledg'd that you repair it, becauſe otherwiſe you ſhall not diveſt the Ordinary of that Right which properly belongs to him †.

* 1. Levinz. Rep. p. 72.

† Crok. 2. Rep p. 604. Palm. Rep. p. 46.

If a Seat is built in the Body of the Church, without the Biſhop's Conſent, the Church-wardens may pull it down, becauſe it was ſet up by a private Perſon, without the Licence of the Ordinary: But it was held (ſays *Noy*) that if in removing ſuch Seat, they cut or break the Timber, an Action of Treſpaſs lies againſt them ‡. This, like many other Caſes reported by *Noy*, is not Law: For the Freehold of the Church being in the Parſon, when the Perſon has fix'd a Seat to it, it then becomes Parcel of the Freehold; and, conſequently, the Right is in him; ſo that the breaking the Timber could not be Prejudicial to the other, as having no legal Right to the Materials after they were fixed to the Freehold.

‡ Noy Rep. p. 109.

As to the Chancel the Ordinary has no Authority to place any one there; for that is the Rector's Freehold, and ſo is the Church: But as he repairs the one, and not the other, he ſhall have the Chancel to himſelf in a peculiar manner. And 'tis for this Reaſon, that an Impropriator has the chief Seat in the Chancel. Yet a Man cannot preſcribe to have a Seat here, as belonging to an ancient Meſſuage ||.

|| Noy Rep. p. 133.

As to *Monuments* in Churches, *Coke* tells us *, That 'tis the laſt Work of Charity which we can do to the Deceaſed, to build a Monument for him: And as 'tis ſubſervient to ſeveral good Purpoſes, *viz.* to prove his Pedigree, to ſhew when and where he was bury'd, and to put us in Mind of Mortality, it is therefore called a *Monument*; becauſe *Monet nos quod ſumus Mortales, &c*, ſays the *Etymologiſt*. And tho' the Freehold of the Church or Churchyard where a Tomb or Monument is erected be in the Parſon, yet thoſe who build it, or their Executors, may have an Action on the Caſe againſt thoſe who deface it †; or may ſue in the Spiritual Court *in Cauſâ violationis Sepulcri.* The Lady *Wych* brought this Action againſt a Parſon for taking down a Coat-Armour of her Husband in the Chapel where he was bury'd: And Judgment was given againſt the Parſon, tho' he call'd it an Oblation, which it could not be, becauſe not deſign'd by the Giver as ſuch.

* 3d Inſt. p. 202. 9. Edw. 4. 14. a.

† 9. E 4. 14. a.

Of Sentences Diffinitive and Interlocutory.

A Sentence is a *Judicial* Declaration, which puts an end to a Suit or Controverſy, according to the Nature, Quality and Appearance of the Thing indiſpute: Containing either a Condemnation or an Abſolution of one of the Parties *Litigant* *. And 'tis called a Sentence *a Sentiendo*, becauſe the Judge, on Examination of the Cauſe declares and pronounces, according to his Sentiments of the Matter in Suit or Controverſy †. But this Definition agrees only with a *Diffinitive* Sentence

* Abb. in Rub. x. 2. 27.

† D. 8. 5. 6. 3.

tence; as that puts an end to the Suit or Controverſy. But an *Interlocutory* is deſcrib'd after another manner, it being a Sentence or Declaration of the Judge pronounc'd betwixt the Beginning and End of a Cauſe touching ſome Incident or emergent Matter in the Proceeding ‡: every Word and Decree of the Judge, that has a Relation to the Cauſe, being ſtiled an *Interlocutory*, according to *Baldus* ‖.

‡ Gloſſ. in c. 1. Cl. 2. 6. v. *Diffinitiva.* ‖ In l. 9. D.

And herein, *Firſt*, a Diffinitive Sentence differs from an *Interlocutory*, and is herein known, *viz.* For that the principal Matter in Queſtion, and which is *principally* deduc'd in Judgment, is determin'd by a Diffinitive Sentence: And this either by Condemnation or Abſolution *, as aforeſaid. But an *Interlocutory* does not concern the principal Matter, but only determines ſome Exception or other, which ariſes in the Proceedings; and by this an End is not put to the *principal* Matter in Controverſy †: For 'tis not called a Sentence without a final Condemnation or Abſolution contain'd therein, or elſe without ſome Words Equivalent thereunto ‡. *Secondly*, It differs from an *Interlocutory*, becauſe a Perſon condemn'd by a *diffinitive* Sentence, on the Account of any Crime is thereby render'd *infamous* not only by a Conſtitution in the Kingdom of *Sicily*, but alſo by the *Civil-Law* ‖: But a Man ſo condemn'd is not thus affected by an *Interlocutory* *. *Thirdly*, It differs from an *Interlocutory*; becauſe a Perſon condemn'd by a *diffinitive* Sentence may appeal from ſuch Sentence, and the Appeal alone without the Inhibition of the Superiour Judge ſuſpends the Force and Execution of ſuch Sentence: But, according to the *Civil-Law*, it cannot be appeal'd from an *Interlocutory* †; unleſs the Grievance be of ſuch a Nature that it cannot be redreſs'd by a *diffinitive* Sentence: And if it be appeal'd, the Execution of it is not ſuſpended without an Inhibition ‡. *Fourthly*, It differs from an *Interlocutory*, becauſe, by the Word *Sentence* ſimply uſed in a Statute or other Matter of Law, a diffinitive Sentence is always intended, and not an *Interlocutory* ‖. *Fifthly*, It differs from an *Interlocutory*, becauſe a *diffinitive* Sentence cannot be revers'd, after the Judge has pronounc'd the ſame, the Judge having hereby finiſh'd his Office *: But an *Interlocutory* may be revers'd at any time by the ſame Judge before a *diffinitive* Sentence be pronounc'd †: And in reſpect thereof it never paſſes *in Rem Judicatam*, the Judge having not as yet thereby diſcharg'd himſelf of his Office; becauſe the Judge who has pronounc'd an unjuſt *Interlocutory* (as by not admitting what ought to be admitted, or by admitting what ought not to be admitted, *&c.*) may even at the Foot of a diffinitive Sentence conſider thereof, and revoke the ſame by correcting what he has done amiſs ‡. *Sixthly*, It differs from an *Interlocutory*, becauſe a diffinitive Sentence may in the Cauſe of an Appeal be juſtify'd from the ſame, and from new Acts: But an *Interlocutory* cannot be revis'd from any other than the firſt Acts ‖. *Seventhly*, It differs from an *Interlocutory*, becauſe a diffinitive Sentence cannot be pronounc'd unleſs the Party be cited: But an *Interlocutory* may be pronounc'd without citing the Party; and the ſame ſhall be valid *. But then this ought only to be ſo underſtood, when an *Interlocutory* is of a light Importance and Conſideration. But 'tis otherwiſe, if it be of any great Conſequence to the Perſon; becauſe then it is not valid without a Citation or Monition †. *Eighthly*, It differs from an *Interlocutory*, becauſe a *diffinitive* Sentence is not valid, unleſs it be pronounc'd and given in Writing ‡: But this is otherwiſe of an *Interlocutory*, which may be pronounc'd without Writing, tho' it ought afterwards to be reduc'd into Writing, that it may appear from the Acts of Court ‖.

‖ Alex. in Rub D. 42. 1. & D.

* D. 42. 1. 15 † D. 42. 1. 14 & ibi. Bart. Alex. & Dd.

‡ Dec. Conſ. 83.

‖ Cl. 2. 12. 5. & ibi. Card. & Bart. in l. 3. D. 49. 5.

* Gloſſ. in l. 9. D. 1. 16. 1.

† Bart. Dd. in l. 16. D. 39. 1.

‡ C. 7. 44. 3

‖ Gloſſ. in c. 11. x. 2. 19.

Now

Now touching a *diffinitive* Sentence, three Things are requiſite, *viz.* *Firſt*, That it be made in Writing. *Secondly*, That it be recited or read *vivâ voce*. And, *Thirdly*, That it be pronounc'd by the Judge ſitting on the Bench or Tribunal. I have ſaid, That a *diffinitive* Sentence ought to be pronounc'd in Writing; but an *Interlocutory* may be pronounc'd *Ore tenus*, even without Writing, provided it be afterwards reduc'd into Writing by the Notary, and placed among the Acts of Court *. And hence 'tis, that if theſe oppoſite and proper Terms. *viz. In his ſcriptis pronunciamus* be not inſerted in a *diffinitive* Sentence, ſuch Sentence is not valid; becauſe theſe Words are requir'd *pro formâ*: But the ordaining Part of a Sentence may be pronounc'd by equipolant Terms, or ſuch Words as theſe, *viz. Statuo ordino, præcipio*, and the like †. After the ſame manner if it be ſaid in the Acts, That a Sentence was *data & lata, &c.* yet, unleſs the Word *lecta* be alſo there added, it is not valid: But it is ſufficient if it be thus expreſs'd, *viz. Sententia promulgata*. *Bartolus* ſays, that a Sentence may be pronounc'd without Writing by Conſent of Parties. For, indeed, 'tis not neceſſary that any Acts ſhould be in Writing, beſides a Libel and a *diffinitive* Sentence, for the reſt may be *Ore tenus*: But then they ought afterwards to be reduc'd into Writing by the Notary.

* Gloſſ. in c. 11. x. 2 19.

† X. 2.40.15.

A Sentence is a Matter of *ſtrict Law* ‖, and ought to be taken *properly*, and after a ſtrict manner; that is to ſay, *ſimpliciter* and according to the Nature of the Words and the Sound thereof as they lye; and not to receive any Interpretation from the Libel; and no more ought to be inferr'd from thence than the Words do naturally import. So that the Words pronounc'd *ad unum effectum* ought not to operate beyond ſuch Effect; nor ought a Sentence to operate beyond the Mind and Intention of the Judge. An ambiguous or doubtful Sentence may be interpreted by an Ordinary, but not by a delegated Judge *: But tho' an Ordinary Judge may regularly interpret his own Sentence, ſince he cannot be ſaid to offer any Thing anew by ſuch an Explanation and Confirmation of it, yet he cannot amend or ſupply any Defect in the ſame †, a Sentence being a Matter *ſtricti Juris*, as aforeſaid. But according to ſome, a Sentence receives its Interpretation from the Libel, and Acts of Court; particularly, if they do expreſly refer thereunto: And if a Sentence be obſcure, it ought be ſo explain'd and interpreted as to render the ſame juſt and valid, if it be poſſible. For the Words of a Sentence ought to have ſome Operation, and to be adapted (if poſſible) to the Form of the Petition or Thing demanded in the Libel; and not to be render'd vain and *ludibrious*, or as a Matter of Sport; or to ſerve the Pleaſure of the Wind, and the capricious Humours of Men. A Sentence, in a doubtful Caſe, ought always to be interpreted in Favour of the Defendant; and not to injure or prejudice him:

‖ Abb. in c. 15. x. 2. 26. n. 3.

*D. 42.1.15.

† D. 48.18.1. D. 4. 8. 19 & 20.

But to render a Sentence valid, it ought to be drawn in Purſuance and Conformity to the Libel ‡; and ought to be pronounc'd with an Invocation of the Name of God ‖: But it is ſufficient alone to cite the Perſon whoſe Intereſt is principally concern'd. And where a Sentence is deficient in Point of Form, it is thereby render'd null and void, becauſe Form gives an Eſſence to the Thing: And if the Proceſs in a Cauſe be null and void, the Sentence pronounc'd thereon is likewiſe null and void. A Sentence pronounc'd thro' the Interceſſion of Money is null and void *ipſo Jure* *: And ſo is a Sentence pronounc'd againſt a Contumacious Perſon before the Meſſenger or Apparitor has made his Certificate on the Return of the Citation. A Preſumption always lies for the Juſtice of a Sentence †; and this is not a Preſumption *of Law and*

‡ Gail. lib. 1. Obſ. 66. n. 1.
‖ Abb. in c. 8. x. 2. 14. n. 11.

* Abb. in c. 10. x. 3. 1. n. 7.

† Abb. in c. 7. x. 2. 27. n. 3 2.

by

by Law, but a Preſumption of Law only, it being deriv'd from a *Judicial* Authority *: And 'tis ſaid to be a Preſumption of Law, becauſe it admits of a legal Proof to the contrary. Nor is a Sentence preſum'd to be unjuſt from hence, *viz.* becauſe 'tis pronounc'd contrary to ſome Proofs, which are made in the Acts: Becauſe in giving Sentence the Judge does not always apply himſelf to one *Species* or ſort of Proof, for it depends on the Diſcretion of the Judge how much Faith and Credit he will give to Evidence produc'd. So that if the Judge prefers one ſort of Evidence before another, as Proof made by Witneſſes before Proof made by Inſtruments, he may read a juſt Sentence. When a Sentence appears to have been pronounc'd, all Things are preſum'd to have been rightly and ſolemnly proceeded in †; and 'tis his Duty to prove the contrary, that avers the ſame. As a Declaratory Sentence is valid in a *Real*; ſo is it alſo valid in a *Perſonal* Action‡, and a Sentence *inter alios* ſhall not prejudice a third Perſon.

* Abb. in c. 20. x. 2. 26. n. 32.

† Menoch. Præſump. 68. lib. 2. n. 6.

‡ Bart. in l. 21. D. 4. 8. 1. n. 1.

A Sentence pronounc'd by ſeveral Perſons is valid in that Point, wherein they have all given their Conſent. As for Inſtance, if one of the Judges or Arbitrators in ſuch a Sentence or Arbitration condemns a Man in Fifteen Pounds, another condemns in Ten Pounds, and a third in Five Pounds: Now in this Caſe that Sentence or Arbitration is valid and prevails, which condemns him in Five Pounds; they all ſeeming to agree in Five Pounds: And this Law is grounded on this Maxim, *viz. Plus ſemper in ſe continet quod eſt minus.* And 'tis the ſame if I am by a Sentence acquitted from a Demand made of a whole Eſtate: For I am hereby acquitted from a Demand made of every Part thereof. 'Tis likewiſe the ſame Thing if I am acquitted from an univerſal Petition or Demand: As for Example, If I am acquitted from a Demand made of an Inheritance, or an Executorſhip. And an Exception *Rei Judicatæ* hinders the Perſon claiming particular and individual Things, on the ſame Account; becauſe that *Plus continet in ſe minus:* But this Rule does not always hold. A Sentence may be pronounc'd in Part for the Plaintiff and in Part for the Defendant upon the Self-ſame Article or Poſition in the Libel: And three conformable Sentences are eſteem'd and held *pro Re Judicatâ.*

Now the Difference between a Sentence and what we call *Res Judicata* is this, *viz.* That that is ſtrictly and properly called a Sentence, when the ſame is appealable, or the Party Sentenc'd has the Power of appealing: But when there is no *Retractative* Remedy by an Appeal, it is called *Res Judicata*‖. For that is called *Res Judicata* when an end is put to the Suit or Matter in Controverſy either by the Judge's *Condemnatory* or *Abſolutory* Sentence without the Proſpect of an Appeal. For a Sentence (pending an Appeal) is not properly called *Res Judicata*; but if it be not appealed from ſuch a Sentence, it then takes the Name of *Res Judicata* *: Yet in a large Senſe a Sentence may be called *Res Judicata*, tho' it may be appeal'd from. The *Res Judicata* is one Thing, and the *Res Judicans* is another: For the *Res Judicans* is the very Sentence it ſelf, or the Act of pronouncing Sentence; and this puts an end to the Controverſy: But the *Res Judicata* is the Cauſe, which by the Sentence of the Judge receives an end of being controverted any further. And thus the Sentence is the *Res Judicans*; and the Cauſe is the *Res Judicata*: But ſometimes the one is put for the other. And hence it is, that by the *Civil-Law* they are couch'd under different Titles by themſelves, which they would not have been, unleſs they were different Things. A Sentence tacitly includes the Caſe expreſs'd in the Petition, and Acts of Court: And a Thing expreſs'd, pre-ſuppos'd or

‖ Abb. in Rubr. x. 2. 27. n. 3.

* Abb. in Rubr. x. 2. 27. n. 1.

neceſſarily underſtood, is the ſame Thing in a Sentence. The Province and Buſineſs of a Judge chiefly conſiſts in giving Sentence: And, therefore, when it appears, that he has Juriſdiction both of the Cauſe and of the Perſons *Litigant* from the Condition and Circumſtances thereof, having fully inſtructed himſelf in the *Judicial* Proceedings; and the Matter being ſo diſpos'd either by the *Litigants* themſelves, or their lawful Proctors, Advocates or Syndicks, and full Proof made of all the Matters before him in Judgment) he ought not to delay the pronouncing or giving of Sentence. If a Judge proceeds to give Sentence againſt an abſent Perſon not cited to appear *, unleſs it be in Matters notorious (for Things notorious do not require a Sentence † (at leaſt) a ſolemn one) or againſt a Perſon not convict or not confeſſing his Crime ‡, ſuch Sentence is null and void *ipſo Jure*: And a Sentence which is null and void *ab initio*, cannot be called a Sentence. A Sentence pronounc'd againſt a Perſon deceas'd or againſt a Perſon under ſuch a grievous Infirmity *, as he cannot appear to hear the ſame read, is null and void: But then ſuch Death or Sickneſs of the Perſon muſt appear to the Judge by the Means of a *Judicial* Allegation at the Time of pronouncing Sentence: For if he becomes acquainted with the Party's Death or Sickneſs only as a private Perſon, this does not hinder his pronouncing Sentence, if he pronounces a *diffinitive* Sentence without citing the Heir or Executor *de novo*. But if the Death of the Party be *Judicially* alledg'd after Publication of the Sentence, in the *Imperial* Chamber, a *Sentence* paſſes againſt the Heirs or Executors by way of *Interlocutory* ||. If it appears from the Acts of Court, that the Cauſe wherein the Judge is mov'd to pronounce Sentence, be falſe, ſuch *Sentence* is thereby render'd null and void *. Sometimes the Falſhood of the Cauſe conſiſts in ſome Fact and not in Law; ſometimes it conſiſts in Fact and Law both; and ſometimes in Law only. In the firſt Caſe if the Falſhood be notorious, then the *Sentence* is null and void: But if the Falſhood be not notorious, then the *Sentence* is valid. If there be two Cauſes expreſs'd in a *Sentence*, the one of which is true, and the other falſe in Law; yet the *Sentence* ſhall be ſupported by that which is true, becauſe the Law rather renders Things valid and ſubſiſting than deſtroys the ſame. But if one Cauſe be expreſs'd, and this being falſe cannot be ſupported by the other which appears from the Acts, the Sentence is null. A Sentence pronounc'd and given without expreſſing the Reaſon or the Cauſe thereof, is valid and binding.

A *Sentence* may be proved by Witneſſes, tho' they do not depoſe touching the Cauſes which mov'd the Judge to pronounce ſuch a *Sentence* †: Nor are the Witneſſes produc'd to prove, that ſuch a *Sentence* was given, or that it was ſo declared in the *Sentence*, oblig'd to depoſe touching all the Words pronounc'd by the Judge; but 'tis ſufficient if they recite the Effect and Tenor thereof. A *Sentence* pray'd or moved for on the Principal Matter in Queſtion ought to be certain; but on Acceſſorial Matters it may be uncertain. Thus ſuch a general and uncertain *Sentence* as this in reſpect of Expences of Suit, which are not the principal Thing in Queſtion, but only an Acceſſory, may be always pronounc'd in this general and uncertain manner, *viz.* *Condemnamus* I. S. *Ricardo Bennet ad expenſas, quas fecerit vel probatſe feciſſe* without any previous Taxation thereof ‡: For ſuch a Sentence is valid, tho' the Sum or Quantity of ſuch Expences be not therein declared and ſet forth, becauſe Expences are only Acceſſory to the principal Cauſe. Altho' a Sentence pronounc'd by an incompetent Judge be not valid, even tho' the Parties ſhould conſent thereunto ||; yet a Sentence pronounc'd by a Judge

* D. 49. 8. 1. 3. D 5. 1. 68.
† Abb. in c 3 x. 1. 7. n. 7.
‡ Abb. in c. 10 x. 1. 2. n. 11.
* C. 1. 18. 1. D. 2. 11. 2. 3.
|| Gail. lib. 1. obſ. 109. n. 5.
* Papienſ. prax. Tit. 20.
† X. 2. 27. 16.
‡ Abb. in c. 5. x. 2. 14. n. 8.
|| Paul. de Caſtr. in l. 1. C. 7. 48. n. 1.

Judge, who may be recus'd by a lawful Exception, is valid, if such an Exception has not been made and propounded, or if such Sentence shall not be oppos'd: And so is a Sentence pronounc'd upon a Matter not prov'd, if it be not appeal'd from. But a Sentence read in favour of a Madman, or the like, appearing in Judgment without a Curator is not valid.

A Sentence pronounc'd on the Depositions of Persons guilty of Perjury may be revoked, tho' it does *ex post facto* appear, that they were guily of such Perjury: For the Depositions of perjur'd Men ought not to have any Weight or Effect, if it does either before or after Sentence pronounc'd appear, that they were guilty of Perjury: For then the Sentence shall be revok'd, because it appears, that they on whose Depositions the Sentence was founded were guilty of Perjury; and this in the same manner as if the Sentence was pronounc'd thro' the Means of a reprobated Evidence. If a Sentence be pronounc'd on true and false Depositions, *viz.* Because there are two Witnesses that depose the Truth, and two depose that which is false; and the Judge is confounded by these Depositions or makes a mix'd Use of them. I say, in such a Case, that Sentence is valid, which is founded on the Authority of Truth.

A Sentence of Excommunication may be pronounc'd *sub Conditione extensivâ*; and not only for an Offence or a *Judicial* Contumacy, but also *pro interesse proximi**: As when a Man will not make Satisfaction to him, unto whom he is bound to do it within such a Time. And to the end that such conditional Sentence of Excommunication may be valid at this Day *mera Culpa debet præcedere aut offensa.* A Sentence of Excommunication, Suspension or Interdiction pronounc'd under some Condition is suspended by an Appeal, before the Event of such Condition be fulfilled. As for Example, A Judge pronounces Sentence in this manner, *viz.* unless *Titius* makes Satisfaction within twenty Days after *Michaelmas*, let him know himself suspended, excommunicated or interdicted: Now he, against whom such Sentence is pronounc'd, in the mean time appeals without making any Satisfaction at the Day prefix'd. And the Question being, whether he was excommunicated or not? It was answer'd, That this Appeal prevents and suspends the Force of the Sentence, because it was interpos'd before the Expiration of the aforesaid Term. A Sentence in Favour of an excommunicated Person, whether pronounc'd for him before or after his Excommunication, cannot be demanded to execution, before he has been absolv'd from his Excommunication. And thus an Exception of Excommunication shall be a bar to every Person moving for the execution of a Sentence. For an Exception may be objected to the Plaintiff tolerated in Judgment, and not repulsed by the Aid of this Exception before a Sentence pronounc'd for him, even at the Time of demanding Sentence to Execution. But then he ought to pray for Absolution before this Sentence be demanded to Execution.

* Abb. inc. 40. x. 1. 2. 29. n. 8.

In a criminal Cause a Sentence may be pronounc'd without any Contestation of Suit: But in such a Cause a Sentence cannot be retracted. For by pronouncing the same the Judge has acquitted and discharg'd himself; and so he cannot again resume the same. For whenever a Judge pronounces a Sentence upon the whole Cause or Business before him, his Office ceases as to that Cause or Business: But 'tis otherwise, if it be only on Part thereof: Nor is a Sentence in Civil Causes to be revers'd on Pretence of *Instruments* newly discovered and found out †. But in a Criminal Cause, if new Proofs and Evidences are discovered the Person condemn'd may have Relief by the special Favour of the Prince

† Paul. de Castr. in l. 4. C. 7. 52. n. 1.

Prince alone: And this is true as well in an afflictive Puniſhment of the Body, as in a Puniſhment that deprives a Man of his Honour, and in all Pecuniary Puniſhments. Nor ſhall a Sentence of Divorce be revers'd or retracted; becauſe the Perſon, in whoſe Favour it was pronounc'd, does aver it to be unjuſt; yet it does hereby induce a Preſumption: And the Reaſon why ſuch a Sentence ought not to be revers'd, is, becauſe it was pronounc'd upon a Foundation of Reaſon, and according to the Rules of Law, that is to ſay, *Legitime & rationabiliter*; which Words relate not to the Juſtice of the Sentence it ſelf, but to the Order and Method of the Judicial Proceeding.

It is a good Caution to appeal from a Sentence, not only becauſe it is unjuſt, but alſo becauſe of its Nullity: And, in a Cauſe of Appeal, when a Sentence is pronounc'd *ex noviter deductis*, that is to ſay, on Matters newly deduc'd, and which were not ſet forth in the firſt Inſtance, ſuch a Sentence ought to be pronounc'd *ſuper Jure deducto principali*, as is neither Confirmatory, nor Infirmatory *. When a ſecond Sentence does expreſly confirm the firſt, the ſecond Sentence ought to be demanded to Execution: But if it be only tacitly confirm'd by the ſecond Sentence, as by a lapſe of Inſtance, or by Reaſon of ſome Solemnity omitted, the firſt Sentence ſhall be demanded to execution. And if the ſecond Sentence be *expreſly* confirmatory of the firſt, then the ſecond ſhall be demanded to Execution by the Judge of the Appeal: But if it be only *tacitly* confirmatory of the firſt Sentence, then the Judge *a Quo* ſhall demand the firſt Sentence to Execution. One Judge may by Letters of Requeſt demand another Judge to execute his Sentence for him. Altho' a Sentence be pronounc'd upon divers Articles or Cauſes; yet it may be ſtill called one and the ſame Sentence.

* Abb in c. 6. x. 1. 9. n. 6.

When the Judge of an Appeal revokes the Sentence of an inferiour Judge, he is bound to ſhew the Reaſon of ſuch his Revocation: But if he confirms the former Sentence by adjudging it *bene judicatum & male appellatam*, it is not neceſſary ſo to do. If the Judge of an Appeal will confirm a Sentence in ſome Parts thereof, and reprobate it in others, he ought to form his Sentence by ſeparating every Head and Part thereof; ſaying, *upon ſuch a Head of a Sentence we pronounce it* bene judicatum, *and upon ſuch a Head* male judicatum: And then there will be as many Sentences as there are different Heads or Parts thereof: But one and the ſame Head as connected to itſelf cannot be approv'd of in Part and reprobated in Part, becauſe a Sentence is an individual Thing. A Sentence touching the Deſertion of an Appeal is an *Interlocutory*; and ſo is every Declaration made by the Judge after a *definitive Sentence* pronounc'd: But an *Interlocutory Sentence* is never meant or intended by the ſimple Name of *Sentence* without joining the Word *Interlocutory* to it. Altho' an *Interlocutory Sentence* may be revok'd at any Time, even in *Calculo diffinitivæ Sententiæ*, and by the Judge of an Appeal from a *diffinitive Sentence*; yet an *Interlocutory Sentence* confirm'd by two other *Sentences* cannot be revok'd.

A *Sentence* never paſſes *in Rem Judicatam*, whenever there is a *Conſtat* by an Evidence of Fact touching the Iniquity of ſuch *Sentence* †: Nor does a *Sentence* pronounc'd upon a preſumptive Proof, or againſt Matrimony ‡, ever paſs *in Rem Judicatam*, nor does a *Sentence* ever paſs *in Rem Judicatam*, that is pronounc'd upon privileg'd Proofs. A *Sentence* pronounc'd under an intrinſick Condition, and which is coherent to the principal Matter in Queſtion, is valid. As for Inſtance, *I condemn you unleſs you pay Twenty Pounds within ſuch Term, or if the Plaintiff proves his Intention.*

† Bald. in l. 1. C. 7. 50.

‡ X. 2. 27. 7.

tention: Or I *absolve the Defendant, if he shall swear*, &c. Because *to pay, to prove*, and *to swear*, do concern the principal Matter in Suit. Yea, a Sentence is also valid that is pronounced under an extrinsick Condition, tho' such Sentence be entirely remote from the principal Business in the Suit, and has nothing common with the Subject Matter thereof. As, *I absolve or condemn you, if such a Ship shall come from* Asia; and such a Sentence shall pass *in Rem Judicatam*, if it be not appeal'd from thence.

Of Sequestration, and the Species *thereof.*

A *Sequestration* is the Separation of a Thing in Controversy; and, by the way of Pledge, committing it to the Custody of another; and this is done by an Interdiction impos'd on the Possession of the Thing under Sequestration. For whilst such a Suit or Controversy is depending, neither of the Parties claiming the Thing sequestred can have the Possession of it *: But, it being thus committed to Sequestration, it ought (during the Pendency of such Suit or Controversy) to remain *apud Sequestrum*, that is to say, in the Hands and Custody of him unto whom it is thus committed. But 'tis urged, That a Possessor (pending Suit) ought not to be remov'd from his Possession; nor become liable to a Sequestration †; yea, that no one ought to be depriv'd of his Possession any otherwise than by a Sentence, unless (perchance) it be (as the Lawyers say) *Casualiter*; because all Sequestrations before a Sentence are odious in the Eye of the Law, and are all of them generally prohibited both by the *Civil* and *Canon-Law* ‡. And thus a Sequestration permitted *Casualiter* may be caus'd or made, as in the ensuing particular Cases: Wherein I shall first observe, that a Sequestration is Threefold, *viz. Casual, Necessary* and *Voluntary*.

* D. 1. 5. 4.

† C. 4. 4. 1. unic. & ibi. Gloss in v. *Sequest.*

‡ C. 4. 4. 1. unic. 2. X. 2. 13. Gloss in v. *Sequest.*

A *Casual* Sequestration is that which is permitted only in certain Cases immediately ensuing: But *Bartolus* takes no Notice of this *Casual* Sequestration; because it is not founded on any express Law, but only permitted by the Judge in some certain Cases. As, *First*, When 'tis fear'd from probable Suspicion, that the Possessor will waste and dilapidate the Goods (whether they be moveable or immoveable, touching which Goods there is a Suit or Controversy on foot) with the Fruits and Profits thereunto belonging, and from thence produc'd and growing: Because that the Person in Possession is not a Man of Frugality; but a meer Prodigal, Spendthrift, Gamester, and the like ‖. *Secondly*, When the Possessor is suspected of Flight or Running away. And he is said to be so suspected, when he has no immoveable Goods or Lands in that Jurisdiction where he is cited to appear; or about his House: Or if he has such, yet they are not equal or equivalent to the Goods in Suit and Controversy *. *Thirdly*, When any Suit or Question arises about Utensils and a moveable Estate; and the Person against whom Execution is awarded, does upon an Arrest appeal from such Execution. For in such a Case those Goods, becoming *litigious* or subject to the Suit, may

‖ X. 2. 17. 2. D 24. 3. 22. 7. D. 49. 1. 21. in fin. C. 7. 65. 5.

* D. 2. 8. 7. D. 1. 18. 16.

C. 7. 65. 5. be put under a Sequeſtration *. *Fourthly*, If the Husband ſhall by Gaming, ill Management, or by any other Misfortunes ariſing thro' his own Default or Neglect come to Want and Poverty; then, in Favour of his Wife, his Goods and Eſtate ſhall be liable to a Sequeſtration for the Conſervation of the Wife's Dowry or Jointure: Provided, ſufficient be left for
† D 24. 3. 22. the Husband to live on †. And in the like manner may the Husband's
7. C. 5. 12. 30. Goods and Eſtate be ſequeſtred in the Caſe of his Madneſs. *Fifthly*, When the Poſſeſſor is cited into Court; and he either through Abſence, or by hiding himſelf, contumaciouſly refuſes to appear or put in Bail for his lawful Appearance either by himſelf or his Proctor: For in this Caſe his Eſtate may be ſequeſtred, to compel him to his Duty of Obe-
‡ D. 37. 6. 1. 10. dience ‡. *Sixthly*, When the Wife deſerts and goes away from her Husband by Reaſon of his inſufferable Cruelty to her; and ſhe, having ſufficiently experienced his Cruelty, without any Hopes of better Uſage from him, cannot be perſwaded by any Means to return to him again, but rather deſires a Divorce. I ſay, in ſuch a Caſe his Wife ſhall be ſequeſtred and placed with her Parents or Friends. And this holds good in a more eſpecial manner, when the Husband cannot provide and give
‖ X. 2. 13. 13. ſufficient Security for a more gentle Treatment of her ‖. After the ſame manner a Woman, that is betroth'd or affianc'd unto a Man in Marriage, may be ſequeſtred where there is any fear of her being ſtollen and car-
* X. 4. 1. 14. ried away, or of her being deflower'd, and the like *. *Seventhly*, A Sequeſtration lies, when the Lord of any Fee or Fief will not acknowledge his Tenant for his Vaſſal; or elſe has a Conteſt with him about the Fee or Fief it ſelf: For then this Fee ſhall be ſubject to a Sequeſtration. *Eighthly*, A Sequeſtration lies, when the Party ſequeſtred conſents Conditionally thereunto; as when he ſays, *If I ſhall not pay you, or make Satisfaction for the Debt I owe you, by ſuch a Day prefix'd, then my Conſent and Will is, that my Eſtate and Goods be ſequeſtred.* *Ninthly*, When the Bailiff or Steward of a Mannor, or a Farmer, Husband, or other Uſufructuaries, deſire and endeavour to aſſume to themſelves the very Property of the Farm or Mannor it ſelf; ſo that a Suit or Controverſy ariſes on this Account: For in ſuch a Caſe the Fruits and Profits of ſuch an Eſtate ſhall be ſubject to a Sequeſtration. *Tenthly*, When Coheirs in Succeſſion, or by way of Inheritance, or in *aliqua domo mortuariâ*, cannot ſettle the Caution and aſcertain the Security to be accepted on one ſide, and to be given on the other, the Goods of the Deceas'd in this Caſe may be put under a Sequeſtration. But if a Sequeſtration be made of Goods which are ſoon periſhable, as Apples, Pears, and the like, or of Goods which cannot well be preſerv'd by keeping, the Judge may then order the ſame to be ſold, and decree the Money collected and ariſing from the Sale thereof to be brought into Court, or ſequeſtred. *Eleventhly*, A Sequeſtration may be granted, when any Danger of Contention is dreaded between the Parties, *viz.* leſt they ſhould fall out and ſquabble on the Account of ſuch Goods, and proceed to grievous Hatreds and Enmi-
† D. 7. 1. 13. 3. Spec. Tit. Sequeſt. Verſ. *ſed nunquid.* ties thereupon; or ſhould come to Arms and Bloodſhed †. For why ſhould a *Prætor* or Judge (ſays *Julian*) ſuffer Men to proceed to Arms and Scolding, when he may reſtrain them by his Juriſdiction. But, according to the Stile and Practice of *France*, the Laws only ſuffer Sequeſtrations to be made of ſuch Goods as have no certain Poſſeſſor; and about whoſe Poſſeſſion both Parties are at Law, and when both Parties are willing to collect the Profits of them. Nor do the Laws in *Caſual Sequeſtrations* any wiſe regard the *Extra-judicial* Broils and Squab-
‡ D. 7. 1. 13. 3. D. 7. 1. 35. blings of Parties: For each Party may feign or counterfeit a Quarrel, &c.

&c. to the end that by ſuch a Figment he may put his Adverſary out of Poſſeſſion, and in a crafty manner deprive him of the Fruits and Emoluments of his Eſtate. But when one is in Poſſeſſion, and the other is not, the Judge cannot then ſequeſter that Poſſeſſion, tho' he ſhould have evident Demonſtration, that the Parties would ſoon fall out and fight on that Acconnt, or come to Arms *. There are ſeveral other Caſes, wherein a Sequeſtration has been uſually granted: As when the Plaintiff is put into the Poſſeſſion of the Defendant or Debtor's Eſtate, to the end that the Debt or Thing in Demand may be preſerved and kept in ſafe Cuſtody; or that the Sum due may be more ſafe and ſecure. This is a Caſe of daily Uſe and Practice *in Curiâ Rotwilenſi*, which is a Chamber of Juſtice at *Rotwil*, a ſmall but free Imperial City of *Schwaben* in *Germany*, inſtituted for that whole Dutchy, where a Sequeſtration is decreed againſt a contumacious Debtor, whereby the Plaintiff is ſecur'd, that his Debtor's Goods ſhall not be waſted.

* D.7.1.13.13

A Sequeſtration may be granted in Eccleſiaſtical Affairs on ſeveral Accounts: As, *Firſt*, for Inſtance, when a *Spoliation* is brought to try which of the Clerks preſented is a right Parſon of the Church, 'tis uſual for the Judge at the Petition of either of them (ſetting forth that Oppoſition may be made in collecting the Profits) to decree that they ſhall be ſequeſtred †, and to order the Church-wardens to collect them; and this muſt be publiſh'd in the Church, and they are to give Bond not only to collect, but to keep the ſame for the uſe of him who ſhall be found to have the Right, and to account to him ‡; and the Judge uſually appoints ſome Miniſter to ſupply the Cure in the mean time, and appoints the Sequeſtrators to allow a certain Reward to that Miniſter as in a Sequeſtration on the Voidance of any Benefice. After the Suit is determin'd, the Sequeſtrators are to deliver the Profits, which they have collected, to him who has the Right; and this they muſt do either in *Specie*, or elſe according to the Value thereof, if they are ſold: And if they refuſe, they may be compelled hereunto by the Eccleſiaſtical Court; and if they delay to come to an Account, the Judge may aſſign the Bond to the Party aggriev'd, with a Letter of Attorney to ſue for the Penalty. *Secondly*, A Sequeſtration may be made in the Spiritual Court for not repairing the Church, Chancel or Parſonage-Houſe, as afore remember'd ||; and if the Impropriator or Incumbent ſhall, upon an Admonition, neglect to do it, then ſome of the Profits of his Living or Impropriation (as ſome ſay) may be ſequeſter'd for that Purpoſe: But it has been a Queſtion, Whether the Tithes of an Impropriation may be ſequeſter'd towards the Repairs of the Chancel? 'Tis certain they might, whilſt they were in the Poſſeſſion of the Monaſteries: But now they being made a Lay-Fee by a particular Act of Parliament, the Spiritual Court has no Juriſdiction (ſay our Common Lawyers) in that Matter; but the uſual Courſe in ſuch Caſes is by Citation; and in caſe of Contumacy to proceed by Excommunication; and this is allow'd by our Common Lawyers, tho' (I think) the other way is not expreſly or tacitly reſtrain'd by any Statute-Law. *Thirdly*, A Benefice is ſometimes ſequeſtred by virtue of ſome Proceſs out of the Courts at *Weſtminſter*: And this is, where a Judgment is obtain'd againſt a Clergyman; and upon a *Scire* or *fieri facias* directed to the Sheriff to levy the Debt and Damages, he returns, That the Defendant is *Clericus Beneficiatus non habens laicum Feodum in Belliva meâ* *: Whereupon another *Fieri facias* is directed to the Biſhop to levy the ſame *de bonis Eccleſiaſticis*; and by Virtue thereof the Tithes ſhall be ſequeſtred †. But, *Fourthly*, The moſt common Occaſion for ſequeſtring a Benefice is on the Vacancy of the Living: For during that time

† 11.Q.1.50.

‡ D.16.3.1.2. D.16.3.2 & 5.

|| Pag. 478.

* F.N.B.587.

† 2. Inſt. in 2. Weſtm. c.18.

time the Profits of the Church are in Abeyance (as the Common Lawyers phraſe it) and are therefore to be received by the Church-wardens by the Biſhop's Appointment under the Seal of the Court; and this is to provide for the Cure during the Vacancy; and the Sequeſtrators are accountable, as aforeſaid. But they cannot bring an Action in their own Name for the Tithes: Wherefore, the proper Remedy is to recover them by a Libel or Articles in the Spiritual Court.

Of Simony.

IN treating of *Simony*, which was Originally ſo called from *Simon Magus*, who was the firſt Author of this odious Crime, I ſhall diſcourſe of it, *Firſt*, according to its own Nature, and conſider what it really is. *Secondly*, I ſhall relate the ſeveral Ways and Means, whereby it may be committed according to the preſent Notion of it. *Thirdly*, I ſhall ſhew how, and after what manner it is puniſh'd. *Fourthly*, Who may accuſe a Perſon of *Simony* according to the *Canon-Law*. And, *laſtly*, I ſhall ſolve ſome Doubts relating thereunto. Now *Simony*, according to the *Canoniſts*, is defin'd to be a deliberate Act, or a premeditated Will and Deſire of Buying and Selling ſuch Things as are Spiritual, or of any Thing annex'd unto Spirituals, by giving ſomething of a Temporal Nature for the Purchaſe thereof; or, in other Terms, 'tis defin'd to be a Commutation of a Thing Spiritual, or annex'd unto Spirituals, by giving ſomething that is Temporal: But this was not the firſt Notion of *Simony*, as practiſed by *Simon Magus*; for he endeavour'd to purchaſe the Gifts of the Holy Ghoſt by the Means of Money given to the Apoſtles to ſell them again, which undoubtedly was an impious Attempt and Preſumption upon the Holy Spirit. And, therefore, *Simony* as here defin'd muſt be a Matter invented and entirely founded on the *Canon-Law*. *Firſt*, 'Tis called a *deliberate Act*, or a *premeditated Deſire* (by the *Canoniſts*) in order to exclude all wilful Motions, which have not been fully debated in the Mind, but proceed from a blameable Ignorance: For I here ſpeak of *Simony*, according to the Notion of the *Canoniſts*, which may be committed by the Will alone * ; and is, therefore, by them called *Mental Simony*, *quoad Forum Poli*. But in *foro fori* (as they phraſe it) *Simony* is not committed by any Act of the Will alone, ſince a Judge cannot take Cognizance of *Mental Simony*; the Church only pronouncing Judgment with Safety (they ſay) *ſuper Occultis*. For no one can undergo a temporal or external Puniſhment for his Intentions alone †. But we know of no ſuch Diſtinction among us as *Mental Simony*: And, therefore, *Simony* with us muſt conſiſt in the very Act of *Buying* and *Selling*; by which Words every Contract is ſignified and included, which is not *gratuitous*, whether it be a real *Bargain* and *Sale* or not, or *Permutation*, and the like. Again, 'tis ſaid in this Definition, by *giving ſomething that is Temporal*, or a Temporal Price: For if a Spiritual Thing be given for a Spiritual Thing, 'tis not *Simony* by the *Canon-Law*. Now a Price may be Threefold according to

* X. 5. 3. 34.

† D. 59. 19. 18.

to the *Canoniſts* *. The firſt is ſtiled *Pretium Muneris*, as Money, an Ox, Horſe, or any Thing elſe that is wont to be ſold. The ſecond they ſtile *Pretium Linguæ*; as the Defence of an Advocate, a Recommendation to a great Man's Favour, and the like. And the third they term *Pretium obſequii*, as any Miniſterial Service in Temporal Affairs. And, *laſtly*, 'tis ſaid to be given *for ſomething Spiritual*, or *ſomething annex'd thereunto* †; as Orders, the Right of Patronage, the Perpetuity of receiving the Fruits and Profits of the Church, and the like; becauſe a Thing merely Temporal is not the Object or Subject of *Simony*.

* 11. Q. 1. 3

† Abb. in c. 14. x. 5. 3.

The *Canoniſts* ſay, that no one can in ſufficient Terms expreſs their Hatred and Deteſtation of this Crime, it being ſo odious and contrary both to the Laws of God and Man, as they explain the Divine Law: And hence it is, that ſeveral Popes *have reckon'd it among the greater and more heinous Crimes. Among the Number of theſe pretended holy Men, Pope *Innocent* the Third reckons all other Crimes as nothing in Compariſon of *Simony*; making it equal to the moſt grievous Sin of Homicide. And ſome of the Fathers too have went ſuch a Length in Folly; that St. *Ambroſe* holds this Crime of *Simony* to be worſe than the Sin of Idolatry itſelf ‡. And *Gregory Nazienzen* calls it a Capital Crime ‖. And, therefore, 'tis no Wonder that *Baldus* *, *Roland a Valle* †, and other Creatures of the Papacy, ſhould make it equal to the Crime of High-Treaſon. *Panormitan* ſays, That the Peſt of *Simony*, in reſpect of its Magnitude, exceeds all other Diſtempers and Maladies of Vice whatſoever. I will not here defend the Crime of *Simony*, as we uſually define it; becauſe it is againſt the Laws of the Land, which ought to be maintain'd and preſerv'd as Originally made for wiſe Reaſons of State; but, ſurely, it cannot be ſo great a Crime as the *Canoniſts* will have it, barring the Oath taken in this Caſe ‡; becauſe 'tis no where forbidden by the Law of God: And as to the Law of Man, tho' it might be founded at firſt upon good Policy in the Church to exclude want of Merit in ſuch Perſons as are ordain'd to ſacred Orders; yet when it was at firſt extended to Benefices, it was rather deem'd an Argument of Prieſtcraft to acquire Livings in a *gratuitous* Manner; than of any great Good to Religion itſelf. For if the Biſhops only ordain'd fit Perſons to the Cure of Souls, ſome Preſent or Acknowledgment of Service to the Patron could not be of ſuch dangerous Conſequence to the Chriſtian Church, as ſome Men pretend it to be with private Views to themſelves.

* Paſchal, Lucius, &c.

† X. 5. 34. 6. ad fin.

‡ Cap. *cito Culpem.*

‖ 11. Q. 1. 11.

* Inſ. 31. C. 1. 3.

† Conſ. 31. n. 12. Vol. 3.

‡ Lindw. lib. 2. Tit. 6. c. 1.

The Twenty ſecond Apoſtolical Canon ordains, That if any Biſhop, Prieſt or Deacon ſhall obtain his Dignity by Money, he and the Perſon that ordain'd him ſhall be depos'd, and wholly cut off from the Communion of the Church, as *Simon Magus* was by *Peter*. The *Papiſts* to ſupport the Pope's Supremacy, and ſome who would have thoſe Canons to be made by the Apoſtles themſelves, ſay, *by me* Peter. But this Conſtitution extended no further than to Holy Orders, and not to Benefices (as aforeſaid). So that tho' Simony crept very early into the Church in reſpect of Orders; yet it went no further: For Men in thoſe Days were not ſo fond of the Cure of Souls, there being little Profit to be made by it; inſomuch, as ſuch as were ordain'd, or (at leaſt) many of them, were compell'd to take this Province on themſelves. Afterwards when Churches were well endow'd, he, that deſired to be ordain'd, had a greater Temptation to purchaſe Orders, than during the Primitive Times of Perſecution. But the Biſhop that ordain'd, was more liable to be tempted with Money then on this Occaſion, than at preſent, whilſt Biſhopricks were very poor; which is the preſent Caſe of the *Greek* Church, where Simony is ſaid to reign very much: And, therefore, was this Apoſtoli-

cal Canon enacted. And the ſame Sanction of a Law was afterwards eſtabliſh'd by the ſecond Canon of the Council of *Chalcedon* againſt the like Kind of Simony. But after the Clergy became more deſirous of Preferments rather for the ſake of filthy Lucre, than out of a Deſire of doing Service in the Church, the Papal Law chriſten'd the buying and ſelling of Benefices by the Name of *Simony*; and ſo it has continued to be called ever ſince. And thus Simony then became a Spiritual Traffick or Merchandize had for Eccleſiaſtical Benefices, making the Houſe of God a Houſe of Trade and Commerce: And then the *Canoniſts* diſtinguiſh'd it into *Mental* and *Conventional* Simony.

Conventional Simony is, when any Thing is either actually given; or when there is ſome Promiſe or Treaty intervening touching ſomething to be given hereafter *. *Mental* Simony, is, when no Act has interven'd, but the deprav'd Intention of the Giver and Receiver occurs †, as aforeſaid: And hence it is, that there are two *Species* of Simony. *Conventional* Simony may be committed by ſeveral Ways and Means according to the *Canon-Law*, as by not only actually receiving a Temporal for a Spiritual Thing ‡; but even by receiving a Bond or Obligation for the Payment of ſome Temporality ‖: And by that Law it is alſo committed, not only when Money it ſelf is given or received for a Thing Sacred, or when ſome *expreſs* or *tacit* Covenant has been made about paying or receiving *; but even when the Patron requires ſome Office or Service from the Giver's Attendance, Tongue, and the like †. And ſo *vice verſâ* of a Perſon giving Spiritual Things. For a Perſon giving ſuch ought to exempt himſelf from the Demand of all Service and Duty; and this he is underſtood to do, when he requires no Gratuity at all for the Spiritual Things given by him. Simony is alſo committed, when any Thing is given or promiſed for obtaining any one Voice in an Election to an Eccleſiaſtical Preferment *. And hence *Romanus* in his *Conſilia* †, ſays, touching the Matter in Hand, that he incurs the Crime of *Simony* who has promis'd any Thing in order to obtain the Votes of any Patrons to Church-Livings or Dignities; and this is prov'd from the Books of the *Canon-Law* ‡. Therefore in a Caſe where a Clergyman promiſes the Pariſhioners, who are Patrons of the Church, to refund or pay them one Moiety of the Revenues of the Church for four Years or the like, in order to gain their Votes or Interceſſion for him with the Biſhop, he ſeems to incur the Crime of Simony. For tho' the Pariſhioners were not Patrons, nor had any Right in chuſing a Miniſter; yet their Conſent and Preſentation of him to the Biſhop by way of ſimple Petition or Recommendation is a Matter of great Weight, ſince a Biſhop is always ready and accuſtomed to gratify their Requeſt. Thus in the Court of *Rome* (as 'tis ſaid) if any one receives a Gift or Preſent in order to procure a Benefice for the Perſon giving the ſame, he thereby commits Simony. But, I fear, that this is often practis'd there without this Cenſure.

* X. 2.18.2. Abb. ibi.
† X. 5. 3. 46. 1. Q. 1. 9.
‡ X. 5. 3. 34.
‖ X. 5. 19. 5.
* X. 5 3. 1.
† X. 5. 3. 36.
* X. 2 18. 2.
† Conſ. 327.
‡ X. 1. 36. 9.

I have before obſerv'd, that Simony may now be committed either in reſpect of Orders, or elſe in regard to a Benefice. And whoever has given any Money, or other Temporal Thing, either by himſelf or any other Perſon, either to the Perſon that ordains him to ſuch Orders or Benefice, or to any other, ſo that he would not have been ordain'd or admitted to a Benefice without it, is guilty of Simony ‖: But 'tis otherwiſe, if he be not ordain'd or promoted to that Benefice; for then he is not a Simoniacal Perſon. Nor ſhall a Man be deem'd Simoniacal, if any other than the Perſon ordain'd ſhall give ſome Temporal Thing for ſuch End and Purpoſe, without the Knowlege and Privity of the Perſons thus ordained

‖ 1. Q. 1. 113.

ordain'd or promoted *. Simony is alſo committed by that Law, when not only a Right merely Spiritual is purchas'd by ſuch Means, (as Election, Inſtitution, *&c.* are Rights merely Spiritual) but alſo when a Right annex'd to Spirituals is thus purchas'd and obtain'd †: And ſuch a Right is that of a Preſentation, which the Patron of a Parochial Church makes to the Biſhop; and thus Simony may, according to the *Canon-Law* ‡, be committed in buying the Right of Patronage, tho' not by the Law of *England*. Simony by the Papal Law is not only induc'd by giving of Money, but even by Prayers and great Sollicitations, when they are made by a Perſon to be promoted to an Eccleſiaſtical Benefice or Dignity ‖; and ſuch Sollicitations do vitiate ſuch Preferments. But according to the Gloſs this only happens, when ſuch Sollicitations are made by an unworthy and diſqualified Perſon: But if they are interpos'd by a fit and worthy Perſon, they do not induce Simony; becauſe then the Perſon is not preſum'd to be an ambitious Man, but only ſollicits on the Account of Neceſſity; but if he extends his Prayers to obtain ſome Prelacy in the Church, 'tis otherwiſe. Again, if Prayers and Sollicitations are made by any other than the Party preferr'd, they being made for an unworthy Perſon, they ſhall vitiate the Preferment: But if they are made for a worthy Perſon, and thoſe Prayers are Spiritual, they do not then vitiate the Preferment. And if carnal Intreaties are made for a fit Perſon, they do not induce Simony, if they are not the principal Motive: But in a doubtful Caſe, they are preſum'd to be carnal and unlawful, if they are made by a Parent; and therefore they vitiate the Preferment, unleſs it appears they are made for a very worthy Perſon. If they are interpos'd for an *Extraneous* Perſon, they are preſum'd to be Spiritual, and rather made for a worthy than an unworthy Perſon.

* Abb. in c. 33. x. 5. 3. n. 1.

† X. 3. 38. 16.

‡ X. 5. 3. 15.

‖ Abb. in c. 10. x. 1. 14. n. 4.

Panormitan obſerves *, That in the Condemnation of Simony, it may be proceeded againſt *per ſigna ſola*; and in Hatred thereof Preſumptions are admitted as Evidence: And *Innocentius* before him declar'd the ſame Thing, ſaying, That in the Crime of Simony as well as Hereſy leſſer Proofs are ſufficient. For in the Crime of Simony clear and manifeſt Proofs cannot always be had, Simony being a Contract of a dark and ſecret Nature; and, therefore, according to the *Canon-Law* Simoniacal Perſons ſhall be incontinently remov'd from the Church, when any notable Signs and Tokens of Simony do appear againſt them †. And *Joh. Ananias* affirms, That tho' in other Crimes the Proofs ought to be clearer than the Light at Noon-day; yet in this of Simony Signs and Arguments are taken for full Proof. And *Lud. Gomez* proves the ſame Thing, ſaying, That ſince Simony is of ſuch a private Nature, that it is uſually committed in Secret, 'tis enough to prove the ſame by Preſumptions. And *Joh. Ananias* ſeems to be of the ſame Opinion, declaring, That Simony in an Election may be prov'd by Conjectures; and there he ſubjoins after what manner ſuch a Simoniacal Election may appear, *viz.* when the Electors do chuſe the Perſon that has preſented them with Money, and the like. But Note a particular Caſe, wherein an Election is not vitiated by Simony, *viz.* When Simony is committed in Fraud of him not expected to be choſen: And this Fraud may appear by Conjectures; as when he that oppoſes the Election, gave Money to be elected. But *Panormitan* ſays, That in Simony, when an Action is *civilly* brought or commenc'd therein, full Proof is neceſſarily requir'd ‡: So that 'tis not enough (as he himſelf there ſubjoins) to prove the ſame by one Witneſs, even with a Preſumption ariſing from the Averment of another Perſon to ſupport his Evidence, who was a *Particeps Criminis*: For, in a Cauſe of Simony, an Accomplice of the Crime,

* Abb. in c. 6. x. 5. 3. n.

† X. 5. 3. 6.

‡ Abb. in c. 6. x. 5. 3.

Crime, and a Partaker of the Gift made, cannot ſo much as be a Witneſs touching ſuch Matter of Simony. And as this is not a Cauſe of a light Nature, a ſuppletory Oath is not given in defect of other Proof: And this Gloſs of the *Abbots*, *Alciatus* aſſures us, is approv'd of by the Doctors. So that in the Crime of Simony one Witneſs with a concurrent Fame, is not enough to condemn a Man thereof, tho' it be ſufficient in a Civil Cauſe, becauſe Proof is one Thing in a Civil, and another Thing in a Criminal Cauſe. Thus no one can be puniſh'd as a Heretick on a vehement Preſumption of Hereſy; becauſe when the Proceſs is grounded on Preſumptions, we ought not eaſily to condemn a Man; nor does ſuch a Sentence paſs *in Rem Judicatam*, as already remember'd *. And that which we every where meet with in our Law-Books, is much in Aid of this latter Opinion, *viz. That in Crimes and Offences a Judge ought to have Proofs clearer than the Light at Noon-day.*

* Pag. 489.

Tho' Clergymen in the Primitive Church were only to be depos'd for common Immoralities; yet for Simony and not ſubmitting to Eccleſiaſtical Cenſures, Perſons were order'd to be cut off intirely from the Communion of the Church †, as already mention'd: But then Simony was not the ſame Thing as at preſent. Indeed it may be ſaid in caſe of ancient Simony, that he who obtain'd Orders by this Means, had his Orders made null and void *ab initio*; and, conſequently, there was no Puniſhment ſevere enough to be inflicted on the Delinquent but Excommunication: For if he, that was depos'd from his Orders would not ſubmit to that Cenſure, there was no Remedy left but a total Excommunication. This, therefore, was a Piece of Diſcipline abſolutely neceſſary: Nor could the Delinquent juſtly complain or alledge, that he was puniſh'd twice for one Crime, becauſe he was depos'd for Immorality, and excommunicated for his Obſtinacy in not ſubmitting to his former Puniſhment. *Lindwood* ſays, That a Simoniacal Perſon, and others mentioned in a Provincial Conſtitution ‡ are ſuſpended from the Execution of their Orders, till ſuch Time as they ſhall be lawfully diſpens'd with; and the Pope may lawfully diſpenſe with Simnoniacal Perſons in Orders, not only that they may adminiſter in the Orders they have thus receiv'd, but that they may alſo riſe to ſuperiour Orders, and lawfully officiate therein ‖: Yet ſometimes the Pope has hought fit not to diſpence with ſuch Perſons for certain Reaſons mentioned by *Hoſtienſis*, and others, tho' he might have gain'd largely by it. By a Set of Injunctions publiſh'd by King *Edward* the Sixth †, and others by Queen *Elizabeth* ‡, it is thus enacted, *viz.* To avoid the deteſtable Sin of Simony; becauſe buying and ſelling of Benefices is Execrable before God: Therefore, all ſuch Perſons as buy any Benefices, or come to them by Fraud and Deceit, ſhall be depriv'd thereof, and be made uncapable at any time after to receive any Spiritual Preferment. And ſuch as ſell them, or by any Colour beſtow them for their own Gain and Profit, ſhall loſe the Right and Title of Patronage and Preſentation for that Time; and the Gift thereof for that Turn ſhall go the King or Queen's Majeſty. And by a Statute of the ſaid Queen ‖, he that is found guilty of Simony in obtaining a Benefice is for ever render'd incapable of obtaining that Benefice for which he contracted; and *Hobart* ſays *, That the Words of that Statute ought to be expounded in a large Senſe: And he likewiſe tells you, that 'tis Simony to contract for the next Preſentation, whilſt the Incumbent is ſick and like to dye †. And tho' a Clerk preſented by Simony ſhould dye; yet the King's Turn is not thereby ſatisfied, as appears from *Winchcomb*'s Caſe in the ſame Reports ‡. By the Words of the aforeſaid Statute the Church unto which a Man is pre

† 22. Can. Apoſt.

‡ lib. 1. Tit. 4. c. 2. v. *Simoniacos*.

‖ X. 5. 3. 35.

† A.D. 1547.

‡ A. D. 1559.

‖ 31 Eliz. c. 6.

* Hob. Rep. p. 75.

† Hob. p. 165.

‡ p. 165, 166 167.

preſented, inſtituted and inducted upon a Simoniacal Contract, is ſo entirely void, that it becomes ſo without Deprivation or Sentence Declaratory: And, therefore, an Incumbent preſented by Simony cannot ſue his Pariſhioner for Tithes, and the like *. But the *Canon-Law* ſays, That he, who confeſſes himſelf in Law to be guilty of Simony, or is a Simoniacal Perſon, ought to be depriv'd *ab Officio & Beneficio* †: For by the *Canon-Law* Simony is a Matter of which the Eccleſiaſtical Court has the ſole Cognizance in *Popiſh* Countries‡. And the Reaſon which that Law gives why a Secular Judge cannot meddle herein, is, becauſe this Crime had its Origin from the Prohibitions of the Church; and is in all Places, where the Papal Law prevails, regulated according to the Inſtitutions and Laws thereof; and by the *Canoniſts* it is ſtiled no leſs than Hereſy ‖. *Wulfer* King of *Mercia* is tax'd by *Malmesbury* with the Scandal of Simony in ſelling to *Wina* the depriv'd Biſhop of *Winchester* the Biſhoprick of *London*; which, according to *Echard*'s Hiſtory †, if we may believe it, was the firſt time that Simony was known in *England*.

Tho' Simony ariſes from a Contract (as aforeſaid) yet every Contract does not make it Simony; for in Simony we muſt conſider the Nature of the Contract, whether it be *ex honeſtâ*, or *ex turpi Cauſâ*, and contrary to good Manners ‡. A conditional Obligation to reſign a Benefice upon a Requeſt or Demand made is good in ſome Caſes, and is no Simoniacal Condition, as it was affirm'd in a Judgment upon a Writ of *Error* in the Caſe of *Watſon* againſt *Baker* ‖: But it was ſaid by the Court, upon Evidence given, that if a Patron preſents one to his Advowſon, having taken an Obligation of the Preſentee, that he will reſign his Benefice when the Obligee ſhall after three Months time give Warning, this is Simony within the Statute *. If a Patron makes a Simoniacal Contract with one Perſon, and preſents another, this is not Simony within the Staute. Tho' the King pardons the Simony, yet the Preſentation remains void, and the King may preſent †. If the Statute of Simony had only made the Preſentation void, and not given it to the King, it would have return'd to the Patron, as in the Caſe of Inſtitution by Simony.

* Mar. Rep. p. 84.

† X. 5. 3. 11.

‡ Abb. in c. 8. x. 2. n. 2. 20.

‖ Abb. in c. 5. x. 5. 3.

† Pt. 1. p. 59.

‡ Hob. Rep. p. 167.

‖ Raym. Rep. p. 175.

* Noy. Rep. p. 22.

† Hob. Rep. p. 167.

Of Suſpenſion, and the ſeveral Diſtinctions thereof.

SUSPENSION taken in a proper Senſe is an Eccleſiaſtical Cenſure, whereby a Spiritual Perſon is either interdicted the Exerciſe of his Eccleſiaſtical Function, or hindred from receiving the Profits of his Benefice: And Suſpenſion may be either *ab Officio* or *Beneficio*; and ſometimes 'tis both. Again, Suſpenſion is either total or in Part; for ever, or for a Time only *: When 'tis for ever, it may be called *Deprivation*, or *Amotion*, as it often is in our Books; but when it is for a Time only, it is properly term'd *Suſpenſion*. 'Tis called a *Cenſure* by way of *Genus*; for herein Suſpenſion agrees with other Cenſures: And 'tis ſaid to be an *Eccleſiaſtical* Cenſure to diſtinguiſh it from Civil Prohibitions; and to ſhew the efficient Cauſe of Suſpen-

* Navar. c. 27. n. 151. Ugolin. tab. 4. c. 10.

ſion. For a Suſpenſion ought to be pronounc'd by an Eccleſiaſtical Perſon having Juriſdiction *in Foro externo:* Wherefore, in the *Romiſh* Church, when the Pariſh-Prieſt or Confeſſor commands the Penitent to abſtain from the Function of his Order, he is not properly ſaid to ſuſpend him; becauſe ſuch Prieſt wants Juriſdiction *in Foro externo*; and, therefore, a Perſon violating the Prohibitions of ſuch a Prieſt, does not incur the Pain of *Irregularity**. And 'tis ſaid in this Definition, *whereby a Spiritual Perſon, &c.* to ſhew the Subject of this Cenſure: For properly ſpeaking Laymen do not incur this Cenſure of Suſpenſion, but only Eccleſiaſticks, who are hereby depriv'd of ſome Spiritual Benefice, or interdicted the Exerciſe of ſome Spiritual Office. But a Layman may be depriv'd of the Power of obtaining an Eccleſiaſtical Office or Benefice *in futurum*; and a Privation of this Power or Liberty is a Suſpenſion. Thus Clerks alone are not the Subject of this Cenſure. But to this Objection I anſwer, by denying the minor Propoſition: For the Deprivation of this Power or Liberty is a kind of Incapacity or Diſability, and not a Suſpenſion properly underſtood; ſince Suſpenſion is an Impediment to the Uſe of that Power which any one has already acquir'd. And herein Suſpenſion differs from Irregularity, which does not only toll the Uſe of that Power and Faculty, which a Man has, but it alſo hinders him the Aſſecution of ſuch a Power or Faculty. And 'tis ſaid in this Definition *in totum*, or *in part*; *for ever*, or *for a Time only*, to advertiſe us of the Latitude of Suſpenſion: But, in ſtrictneſs of Speech, he is ſaid to be ſuſpended, who is ſuſpended from his Office or Benefice, or from both as it happens, for a Time only, and not for ever. And thus, according to the Opinion of ſome Lawyers, there is the like Difference between *Deprivation* and *Suſpenſion* in the *Canon-Law*, as there is between *Deportation* which is perpetual, and *Relegation* which is only for a Time, in the *Civil-Law*.

* Navar. c. 27. n. 151.

Suſpenſion is manifold, according to the aforeſaid Definition: For, *Firſt*, There is one kind of Suſpenſion which is only *ab Officio*, whether it be an Office of Orders, or an Office of Juriſdiction it matters not. *Secondly*, There is another kind of Suſpenſion which is only *a Beneficio*, whether the Benefice be a Dignity, Canonry, or a *ſimple* Benefice, *&c.* And a *third* kind of Suſpenſion is that, which is *ab Officio & Beneficio ſimul* †. Again, there is one ſort of Suſpenſion *in totum*, whereby a Perſon is depriv'd of the whole Uſe and entire Exerciſe of his Office; and the other is a partial Suſpenſion from his Office: And ſuch is that, according to the Papal Law, whereby a Perſon is ſuſpended from receiving Confeſſions, and the like; or from from any particular Branch of his Office, according to our Law. There is alſo a *Penal* Suſpenſion, and a *Medicinal* Suſpenſion. The firſt is that, whereby ſome Offence is aveng'd and puniſh'd; and this is pronouc'd *in pœnam & vindictam delicti*: As happens, when any one is ſuſpended for a Crime merely gone and paſt. But this Kind of Suſpenſion is not pronounc'd by way of Cenſure, but by way of Puniſhment alone. The ſecond is that, whereby the good and future Amendment of the Party ſuſpended is intended; and this is properly a Cenſure ‡. There is alſo a Suſpenſion made by the Law, and a Suſpenſion made by the Act of Man. The Doctors have introduc'd other Diſtinctions, as thoſe of the *greater* and *leſſer* Suſpenſion; but this Diviſion is not commonly received by them, becauſe it has no ſufficient Foundation in Law. But I call the *greater* Suſpenſion that which ſuſpends a Man *ab omnibus*, that is to ſay, from Office and Benefice both together: And I term that the *leſſer* Suſpenſion, which is only pronounc'd in regard to ſome particular Effect. Suſpenſion *ab Officio & Beneficio* is ſometimes

† Sylveſt. v. *Suſpenſio.* Quæſt. 2.

‡ Bonacin. tom. 1. p. 423.

times decreed *abſolutely* and *ſimply*, and ſometimes 'tis determin'd by that Time which is given for making Satisfaction or Reſtitution. Thus if a Perſon ſhall be ſuſpended by the Judge's Sentence, till ſuch Time as he ſhall make Satisfaction, he ſhall in this Caſe recover his Office and Benefice immediately after he has made proper Satisfaction. But a ſpecial Abſolution from the Suſpenſion is herein neceſſary after Satisfaction made; otherwiſe (perhaps) it might be ſaid, that he had not made full and proper Satisfaction *. But herein we ought to diſtinguiſh, whether Suſpenſion proceeds from the Act of Man, or from the Sentence of the Law †: For when a Suſpenſion of this Nature proceeds from the Judge's Sentence an Abſolution is entirely neceſſary; but not ſo, when it comes from the Judgment of the Law, becauſe then there is no one who can deny or gainſay ſuch full and proper Satisfaction ‡. Suſpenſion ſometimes is only *ab Officio*; and then it is ſometimes decreed either *ſimply* and *abſolutely*, or elſe ſometimes only for a Year, and ſometimes for three Years, *&c.* Suſpenſion is alſo *a Beneficio* only; and then 'tis ſometimes *ſimply* decreed, and ſometimes 'tis limited to ſix Months; and ſometimes to three Years, *&c.* This Suſpenſion is alſo made *a Beneficio obtinendo*, as well as *a Beneficio adepto*, ſo that the Perſon thus ſuſpended cannot obtain a Benefice during the Time of ſuch Suſpenſion.

* Othob. Con. Tit. 6. v. *Ultionem Canonicam.*

† VI. 2. 14. 1. 3. VI. 5. 11. 17. 1.

‡ Clem. 5. 8. 1. in fin.

I have already hinted touching a Perſon ſuſpended *ab Officio* only, that he may execute his Office in ſeveral Reſpects, if he be not totally ſuſpended ‖: Wherefore, it may become a Queſtion from what Act or Acts a Man partially ſuſpended is reſtrain'd. Now tho' ſuch a Perſon cannot do thoſe Things which relate to his Spiritual Office as a Paſtor, as celebrating Divine Service, and the like; yet he is not hereby prevented doing thoſe Things which are Matters of Juriſdiction: But a Perſon ſuſpended *ab omni Officio* is ſuſpended from all ordinary Power. A Perſon thus ſuſpended can neither be an Elector, nor can he be elected *. Nor can he give Inſtitution, Induction, Inveſtiture, grant a Prebend †, and the like; nor excommunicate a Perſon, *&c.* And, according to ſome, 'tis the ſame Thing in a Perſon ſuſpended *ab Officio* only. And this is true in reſpect of him that is ſuſpended by a *declaratory* Sentence, or even by the Canon it ſelf, if he be publickly denounced: But 'tis otherwiſe in a Perſon ſuſpended by the Canon, and not publickly denounc'd, he being ſuffered to continue *in Statu quo*, till he is denounc'd; and then what he does is valid. That a Perſon ſuſpended *ab Officio* only, cannot grant a Prebend, ſome contradict; for a Biſhop ſuſpended *ab Officio* only (ſay they) may collate to a Prebend, tho' a Canon of a Church cannot do it: And the Reaſon of this Difference is, becauſe a Biſhop has to do with ſome Matters relating to Orders, and ſome relating to Juriſdiction. Hence it is, that tho' a Perſon be ſuſpended from one of theſe, *viz.* from giving Orders; yet he is not ſuſpended from the other, *viz.* from exerciſing Juriſdiction: But Canons having no Juriſdiction, cannot collate to Benefices. Clergymen, who are *publick* Fornicators, are by the *Canon-Law* ſuſpended *ipſo facto*; and ſo are Hereticks and Schiſmaticks: But then this Suſpenſion being perpetual, is the ſame as Deprivation. But when Clergymen are ſuſpended for applying themſelves too greedily to the getting of filthy Lucre and ſordid Gains (as they may be); or are ſuſpended for Contumacy and Diſobedience to the lawful Commands of their Superiours, this Suſpenſion is only for a Time; and Abſolution follows when they yield Obedience thereunto.

‖ Othon. Con. Tit. 2. v. *a Miſſarum ſolemniis.*

* X. 1. 4. 8.

† X. 5. 27. 10.

Of

Of Tithes, and the ſeveral Kinds of them, &c.

ACCORDING to the ancient Law of the *Jews*, the tenth Part of all Fruits was due from the People to the Tribe of *Levi*, or the *Levitical* Tribe, as ſometimes called; and out of theſe Tenths the *Levites*, or the inferiour Degree of Miniſters in the *Jewiſh* Diſpenſation, again paid Tithes to the Prieſts. There were other Tithes, which every one of the *Iſraelites* ſeparated in their Barns, that they might eat the ſame when they went into the Temple at *Jeruſalem*; inviting the Prieſts aud *Levites* to this Entertainment which they made in the Porch of the Temple *. And there were alſo other Tithes, which they laid up out of their Stock to ſupply the Neceſſities of the Poor. But the *Firſt-Fruits*, which they offered up out of the Fruits of the Earth, were not defined or ſtiled by any particular Name; nor were they aſcertain'd to any ſpecial Uſe and Purpoſe, but were left to the Diſcretion of thoſe that offer'd them up. And theſe *Firſt-Fruits* were thoſe Portions of Things, which firſt grew and were gather'd from the Fruits of the Earth; and being collected were dedicated and offer'd unto God, the Beneficent Giver of all Things, before they were appropriated to Human Uſe, that they might honour and worſhip God with the Acknowledgment of ſome firſt Gift. And not only thoſe, who had a Knowlege of the true God, did thus offer their Firſt-Fruits, but even the Heathens themſelves did by the Law of Nature make theſe Oblations: For *Pliny* tells us*, That the old *Romans* would not taſte of their Wines, or their new Fruits, before the Prieſts had offer'd up the Firſt-Fruits as a Sacrifice to the Giver of them. But I ſhall here in the firſt Place ſpeak of Tithes, being the chief Support of the Clergy; and with which I am more immediately concerned.

* X. 3. 30. 1.

* lib. 18. c. 2.

Now Tithe, as here to be conſider'd, is a certain *Quota* or Portion of Moveable Goods lawfully acquir'd unto the Clergy for the Service of a Parochial Miniſter in the Church †: And, according to ſome Perſons, this Right is not only founded on the Law of Man; but alſo on the Law of God ‡. I ſay, a *Quota* or certain Portion; becauſe Tithe is not in all Places the tenth Part, but various and uncertain, according to the Cuſtom of Pariſhes. Therefore, whenever a Judge takes Cognizance of this *Quota*, he ought to conſider the Cuſtom of the Place †. Nor can any Certainty of this Portion (ſay the *Canoniſts*) be expreſly declared; ſince a Cuſtom is a Matter of Fact; and a Fact is deem'd various and uncertain ‖. By the fifth Canon of the ſecond Council of *Maſcon* in *France*, the Payment of Tithes was inſiſted and commanded there *, and being founded on the Law of God, and the ancient Cuſtom of the Church, which is thereby reinforced: *Unde Statuimus & decernimus, ut mos antiquus reparetur.* So that in this Canon there was only a renewing of an ancient Cuſtom, which had obtained in the Church, but was now grown into Diſuſe. For this Council of *Maſcon* was called on Purpoſe to reſtore what they found too much declihing

† X. 3. 30. 13.

‡ 16. Q. 1. 47.

† X. 3. 30. 20. & 32.

‖ Dd. in l. 9. D. 12. 1.

* A. D. 585.

declining as to the State of the Church in *France*. So that there can be no Doubt of the Cuſtom of paying Tithes in *France* from the Time of their receiving Chriſtianity: And their Hiſtorians add, that this Cuſtom declin'd as their Religion did. In the Council of *Nantz* † Tithes and Oblations are mentioned together †, as making up the Churches Revenue, which was to be divided into four Parts, as already remember'd ‡: The firſt was given to the Biſhop, the ſecond to his Clergy, the third for Repairs, and the fourth to the Poor. But the main legal Support of the Parochial Clergy conſiſted in Tithes: And, therefore, I ſhall in the next Place conſider upon what Foundation they ſtand in Law with us here in *England*, and how they had their Beginning.

* An. 658.
† Can. 10.
‡ Pag. 394.

And firſt as to the Foundation they ſtand upon in Point of Law, my Lord *Coke* not only ſays †, That the Parochial Right of Tithes is eſtabliſh'd by divers Acts of Parliament, but he alſo mentions the *Saxon* Laws before the Conqueſt for the Payment of Tithes, *viz.* the Laws of *Edward* and *Guthrun*, *Athelſtan*, *Edmund*, *Canutus* the *Dane*, and thoſe of King *Edward* confirm'd by *William* the Firſt. A modern Hiſtorian from *Simon* of *Durham* and *Malmesbury* informs us ‖, That Tithes were firſt order'd to be paid in *England* at a Synod or a Council called by King *Osfa*, and held at *Calcuith* about the Year 777; where, among other Canons, the Payment of Tithes was decreed as one; and alſo declared to be by Divine Right. And ſo the *Canon-Law* declares, ſaying, That God commanded Tithes to be paid him as a Token of his being Lord and Proprietor of all Things *; and in his Stead (ſays that Law) he has deputed the Clergy to receive them for him, tho' this Commiſſion (I think) is no where to be found in the New Teſtament, whatever it may be in the Old: And, therefore, by the *Canon-Law* Laymen cannot receive Tithes in reſpect of any Cuſtom whatever, tho' it ſhould be on a Cuſtom founded on Preſcription *. I ſhall not here enter into any Controverſy about the Divine Right of Tithes due to the Clergy, but conſider them as given to the Church by Human Laws for the Maintenance of ſuch as ſerve at the Altar, the Labourer being worthy of his Hire ‡: But yet it muſt be obſerv'd, that if they were of Divine Right, the Prieſthood was depriv'd thereof by the Laity for ſome hundred Years after *Chriſt*. Indeed, the Law of God ſays thus, *viz. Thou ſhalt not delay to offer the firſt of thy ripe Fruits*, &c. †. And again, *Concerning the Tithe of the Herd, of the Flock, even of whatſoever paſſeth under the Rod; the Tenth ſhall be Holy unto the Lord* ‡. But this was a Law unto the *Jews* alone on the Account of Sacrifices and other Offerings, according to the Ceremonial Law, which was aboliſh'd, when Chriſtianity came into the World: But ſurely the Clergy have a Right to ſomething according to St. *Paul*, who ſays, *If we have ſown unto you Spiritual Things, is it a great Thing that we ſhall reap your Carnal Things* ‖? And again, *Who planteth a Vineyard, and eateth not of the Fruit thereof? Or who feedeth a Flock, and eateth not of the Milk of the Flock* *? But St. *Paul* ſpeaks *theſe Things as a Man; and does not the Law ſay the ſame Thing alſo* †? So that tho' the Apoſtle does not pretend to ſpeak theſe Things from God; yet he does it from the Law of Nature, or right Reaſon it ſelf. *Hobart* tells us, That Tithes were Things of *Common Right* belonging to the Church before the Council of *Lateran*, tho' not to any Spiritual Perſon in certain till then ‡, that is to ſay, they are by right Reaſon and the common Law of the Church, as founded thereon, given unto the Church; and ſince Pariſhes are erected, they are due to the Parſon or Vicar of the Pariſh, except in ſome Spiritual Regular Caſes as directed

† 2. Inſt. p. 642.
‖ Echard's Hiſt Vol. 1ſt. p. 59.
* X. 3.30.26.
* X. 2.26.7.
‡ 1. Tim. c. 5. v. 18.
† Exod. c. 22. v. 29.
‡ Lev. cap. 27. v. 32.
‖ 1. Cor. cap. 9. v. 11.
* Ver. 7. cap. cod.
† Ver. 8. ibi.
‡ Hob. Rep. p. 296.

by the Papal Law. *Dyer* ſays, that Tithes can never be extinguiſh'd, becauſe they are due of *Common Right*; and the ſame is ſaid by *Dodderidge* in the Caſe of *Foſſe* and *Parker* *: But I ſuppoſe they only mean a Maintenance due to the Clergy from the Laity; for, doubtleſs, the Laws which gave them Tithes may give them any other Portion or Subſiſtence in lieu of Tithes. And in *Prieddle* and *Napper*'s Caſe, Tithes are ſaid to be an Eccleſiaſtical Inheritance Collateral to the Eſtate in Land; and of their own Nature due to an Eccleſiaſtical Perſon †: And that all Lands of *Common Right* are to pay Tithes; and, therefore, none can be diſcharged of the Right of Tithes, tho' they may be diſcharg'd of the actual Payment of them *. Of which by and by.

* 3. Bulſt. Rep. p. 242.

‡ Cok. 11. Rep. fol. 8.

* Hob. Rep. p. 44. 297. 298.

Now there are two, or (as others ſay) three general *Species* of Eccleſiaſtical Tithes, which are paid to Perſons attending the Miniſtry of the Church, *viz. Predial*, *Perſonal* and *Mixt*. The firſt are thoſe which accrue and grow *ex ipſis prædiis* from the Fruits and Profits of Lands themſelves, as Corn, Hay, Wine, and the like; and which depend on the Fruits and Profits of ſuch Lands, as from Wool, the Profits of Wind-Mills and Water-Mills †, *&c.* For under the Appellation of *Fruits*, in *Latin* ſtiled *Fructus*, we may here reckon all thoſe Things which relate to Tithes‡. And, *Secondly*, under this Appellation we may alſo include ſuch Things as concern the *Glebe* of the Church: And, in this laſt Senſe, they are ſo ſtiled; whether they are Fruits acquir'd by Induſtry, or Fruits produc'd by Nature only †. 'Tis likewiſe to be obſerv'd in reſpect of Tithes, that under the Name of *Fruits* thoſe Things are alſo contain'd, which are gather'd during the Vintage, as well as thoſe which are gather'd during the Time of Harveſt: And thus under this Term we may comprehend Corn, Hay, Herbs, and all Things of this Kind ariſing from a Man's landed Eſtate; alſo the Wool of Sheep, the Young of Cattle, and (by the *Canon-Law*) Penſions of Houſes and Predial Eſtates, and (according to the *Canoniſts*) the Labour of Servants, and other Animals; and alſo all Mines of Gold, Silver, Stone, Iron, Chalk, and the like, if they produce a Yearly Increaſe ‡. In the ſame manner Revenues or Returns made by Fiſhing, Fowling and Hunting come under the Name of Fruits ‖; and ſo do Trees or Coppice Wood, in *Latin* called *Sylva Cædua* *. But *perſonal* Tithes, which are the ſecond *Species* of Tithes, and paid out of the clear Lucre and Profit acquir'd by the Induſtry of a Man's Perſon, or from Trade, Merchandize, and the like †, are not included under the Name of *Fruits*: becauſe in Trade or Traffick, *&c.* there is no ſuch Thing as Fruits. But in *England* we know no ſuch Thing as Perſonal Tithes, which are deducted out of the Profits of a Man's Labour, Skill, and Employment, *viz.* from Warfare, Traffick, Handicraft Trades, *&c.*‡ Theſe Perſonal Tithes are by the *Canon-Law* paid to that Church wherein a Perſon receives the Sacraments of the Church ‖, tho' this Lucre or Profit ariſes to him in ſome other Place. *Mixt* Tithes are thoſe which are due partly from Things *predial*, and partly from the Profits of Human Induſtry: But this *Species* of Tithes (I think) is comprehended under the other two; and rather follows the Nature thereof. I have ſaid that Perſonal Tithes are due from Trade and Traffick *, *&c.* and do rather reſpect the Perſon than the Thing itſelf; and that they ought to be paid to the Church where the Merchant, Tradeſman, Soldier, and the like, do hear Divine Service, and receive the Sacraments. But the *Jews* are not oblig'd to pay this Sort of Tithes, becauſe they are not Perſonally incorporated into the Church †; nor ought the Church toreceive Tithes from them, leſt it ſhould ſeem to approve

† X. 3.30.23.

‡ Lindw. lib. 1. Tit. 3. c. 2. v. *Fructus*.

† C. 3.32.22.

‡ D. 24.3.7.

‖ D. 7.1.9.5.

* D. 24.3.7.

† Lind. lib. 1. Tit. 3. c. 1. *Decimarum Perſonalium.*

‡ Vid. 2. E. 6. c. 13.

‖ X. 3.30.22.

* X. 3.30.28.

† Dd. inc. 16. x. 3. 30.

approve of their Perſons. But if the *Jews* inhabit Places where *Chriſtians* have uſually dwelt, and paid Perſonal Tithes and Oblations, ſuch *Jews* ſhall in the like manner pay Perſonal Tithes, and render Oblations, leſt ſuch Churches as have been accuſtom'd to receive thoſe Tithes and Oblations from the Inhabitants of ſuch Places, ſhould be prejudic'd by the *Jews* dwelling there: And thus the *Canon-Law* digeſts and gets over this Scruple of receiving Tithes from the *Jews*.

Tithes ought to be paid *integraliter*, (as the *Canon-Law* * as well as one of our own Provincial Conſtitutions † phraſes it) that is to ſay, in an entire and perfect Manner, without the leaſt Diminution; otherwiſe they are not ſaid to be paid at all: For as a Man is not ſaid to faſt the forty Days of *Lent* (ſay the *Canoniſts*) unleſs he faſts every Day; ſo that he who pays leſs than the tenth Part is not ſaid to pay his Tithes. The holy Scriptures (ſay they) commands us to pay Tithes of all Things which the Ground produces, and which are of a Yearly Increaſe †; therefore, Tithes ought to be paid to the full due thereof without any Deduction of Expences for the Tillage of the Earth ‡; ſo that by that Law a Cuſtom is not valid, whereby leſs is paid than the Tenth of the Yearly Product. And St. *Auſtin*, a Champion for the *Romiſh* Church, ſays, That he, who would merit a Pardon for his Sins, muſt pay the Tenth to the Church; and give Alms out of the other nine Parts of his Eſtate *. And by a Provincial Conſtitution in *Lindwood* †, all ſuch Perſons as ſhall in any Popular Congregation endeavour to hinder and reſtrain the Devotion of the People in the Payment of their Tithes, or from making their Oblations, or ſhall unjuſtly convert the ſame to their own Uſe, are liable to the Sentence of the *greater* Excommunication, and ſhall not be abſolved from thence till ſuch Time as they have brought the People back from their Error, and have made Satisfaction to the Church; and this Abſolution ſhall be only made by the Dioceſan, except it be *in articulo Mortis*. And by the ſaid Conſtitution, as well as another there recorded ‡, the ſame Puniſhment is inflicted on all ſuch Perſons as ſhall refuſe to Eccleſiaſticks, to whom the Perception of Tithes belong, or their Servants, free Ingreſs and Egreſs on their Eſtates from whence Tithes are due, for collecting or looking after ſuch Tithes, and for carrying of them away when they pleaſe: But then their Pleaſure ought to be governed according to the Laws in Force. And by a Conſtitution of *Rob. Winchelſey* it is enjoin'd ||, That Tithes ſhall be uniformly paid all over the Province of *Canterbury*, of all Corn and Grain, without any Deduction of Expences for planting the ſame; and likewiſe of all Fruits of Trees, of Hay whereſoever growing within the Limits of the Pariſh, and of all Seeds and Garden Herbs there growing: But of Lambs and Milk according to a Rule or Standard therein mention'd. And, laſtly, by this *Canon* Tithes ſhall be paid out of the Profits ariſing from Mills and Paſtures. And ſuch Perſons as ſhall deny the Payment hereof, ſhall after three Admonitions ſtand excommunicated *: So that a Demand is neceſſary according to the Law, otherwiſe the Perſon not paying the ſame ſhall not be deemed *in morâ* †. But tho' it be ſaid in the aforegoing Conſtitution, that Tithes ſhall be paid uniformly; yet in reſpect of the Payment of Tithes, there are divers Cuſtoms to be obſerv'd, which conſiſt in a different way and manner of Tithing. For ſome pay their Tithes according to the Form of Corn, as it lies ſcatter'd up and down on the Lands, or thrown into the Furrows. Others pay according to the Shock as theſe Sheaves are collected and ſet up together in a Heap. Others do not ſet out their Tithes in the Field, but in their own Barns: And others carry the Tithes Home to the Parſon's Barn ‡.

* X, 3. 30. 5.
† Lindw. lib. 3. Tit. 16. c. 5.
† X. 3. 30. 14.
‡ X. 3. 30. 7.
* 16. Q. 1. 66. in fin.
† Lib. 3. Tit 16. c. 1.
‡ Lib. 3. Tit. 16. c. 2.
|| Lindw. lib. 3. Tit. 16. c. 5.
* X. 3 30. 5.
† Arg. X. 3. 30. 22.
‡ Lindw. at ſup. v. *Uniformis.*

So

So that in theſe and the like Caſes there cannot be one uniform Demand of Tithes, or (at leaſt) the ſame manner of rendring Tithes cannot be obſerv'd in all Places, tho' there be an Uniformity in this reſpect, *viz.* that the Tenth ſhould be paid entire without any Diminution *.

* X. 3. 30. 4. & 7.

But it has been a Queſtion among the *Canoniſts*, Whether the Parſon of a Pariſh can compound with his Pariſhioners in ſuch a manner as (perhaps) to receive leſs than the Tenth in reſpect of Tithe? And it ſeems by the *Canon-Law* that he cannot. For tho' ſuch a Compoſition among Clergymen is binding and well enough according to that Law †; yet between a Layman and a Clergyman it is in no wiſe valid ‡, according to the Doctrine of ſome Men, without the Pope's Authority: But (I think) the Biſhop's Conſent is ſufficient to eſtabliſh ſuch a Compoſition even by the *Canon-Law* itſelf ‖; and *Hoſtienſis* agrees with me in this Opinion *. For by the Text of the Law quoted in the Margin it appears, that a Compoſition touching Tithes may intervene between a Layman and a Clergyman, *viz.* that ſomething ſhould be Yearly paid in lieu thereof, eſpecially for ſmall Tithes as *Job Ananias* obſerves †. But tho' Laymen may lawfully compound for a paſt Subſtraction of Tithes: Yet for a Nonpayment of them hereafter a Compoſition made with Laymen is not valid without the Judge's Authority; nor does Cuſtom, nor Preſcription aid a Layman either to retain or to preſcribe to the receiving of Tithes ‡. Our Provincial Conſtitution allows of a Compoſition; *niſi Parochiani competentem fecerint Redemptionem pro talibus decimis*, ſays the Text, without making any Diſtinction between great and ſmall Tithes; nay (I think) it includes the greater Tithes under the Words *Talibus Decimis*, as may be ſeen from the Conſtitution itſelf ‖, tho' the Gloſs thereon is otherwiſe: But if a Parſon would bind his Succeſſor by ſuch a Compoſition, he muſt then have the Patron and Biſhop's Conſent hereunto.

† X. 3. 30. 3.
x. 1. 36 8.
‡ X. 1. 36. 2.
‖ Fern. in c. 2. x. 1. 36.
* Hoſt. in c. 2. x. 1. 36.
† X. 3. 30. 7.
‡ X. 2. 26. 7.
‖ Lindw. lib. 3. Tit. 16. c. 5.

It has been already remember'd, that Cuſtom ſometimes obtains in the Payment of Tithes *: But a Cuſtom for Non-payment, or for paying leſs than the Tenth is not valid, according to *Innocentius* and *Compoſtella* †. But this admits of a Diſtinction (ſay the *Canoniſts*). For tho' in real Tithes ſuch a Cuſtom of paying leſs does not avail; yet in Perſonal Tithes it is good enough: And thus Tithes are again divided into *Real* and *Perſonal* Tithes according to the *Canoniſts*. But (I think) this Diſtinction no wiſe differs from that of *Predial* and *Perſonal* Tithes: Therefore I ſhall here rather chuſe to divide them into great and ſmall Tithes, as they are commonly called with us.

* Dd. in c. 32. x. 3. 30.
† In c. 32. x. 3. 30. 16. Q. 7. 7. 1. x. 3. 30. 7.

Hoſtienſis obſerves †, that in *England* ſmall Tithes conſiſt in Wool, Milk, Cheeſe, Lambs, *&c.* For theſe Tithes do even conſiſt *in partu Animalium*, as Chicken, and the like are. The Tithes of the Fruits of Trees, Seeds and Garden-Herbs are reckoned among ſmall Tithes, and ſo are Millet, Mint, Rue and Cummin, according to what is ſaid in St. *Luke*'s Goſpel ‡, *Wo unto you Phariſees; for yee tithe Mint and Rue, and all manner of Herbs*, &c. Tithe of Honey and Wax are alſo reckon'd among ſmall Tithes; and ſo are Eggs. But what is here ſaid of paying Tithe of Cheeſe in its Seaſon, is to be underſtood when the Milk, of which the Cheeſe is made, has not been already tithed; for otherwiſe it would follow from hence, that Tithe would be paid twice of the ſame Fruit, which ought not to be *: For if a Perſon ſhall firſt pay Tithe of Milk, and afterwards make Cheeſe of the other nine Parts, the Cheeſe ſhall not be tithed; but if he ſhall ſell Cheeſe of this Kind, the Seller ſhall pay a Perſonal Tithe out of the Gain and Profit which he makes of ſuch Cheeſe ſold, where Perſonal Tithes are paid †. In Autumn and Winter, when Cheeſe is not uſually made, Tithe ſhall be

† In c. 3. x. 3 30. v. *minutis*
‡ Cap. 11. Ver. 22.
* VI. de reg. Jur. 83.
† X. 3. 30. 28.

be paid of the Milk of Cows, Sheep and Goats. Some Perſons do not pay Tithes of Ducks and Chicken, becauſe they pay Tithe of Eggs: But in ſome Places it is Cuſtomary to pay Tithes both of Eggs and Chicken.

Among Predial Tithes we may reckon Coppice-Wood, in *Latin* called *Sylva Cædua*, which ought to be demanded, after 'tis cut, of the Proprietor of the Coppice, and not of the Buyer or Purchaſer thereof: For the Provincial Conſtitution † rather ſpeaks of the Poſſeſſors of ſuch Copices themſelves, wherein ſuch Wood or Fewel is cut down, than of the Poſſeſſors of ſuch Wood or Fewel after 'tis cut. But if ſuch Wood ſhall be conſum'd in the Houſe for the Maintenance of Husbandry, no Tithe ſhall be paid thereof; becauſe the Parſon has *uberiores decimas.* ‖ *Furzes* pay a Predial Tithe, unleſs the Owner of the Soyl can be diſcharged by Cuſtom, upon Payment of Tithe Milk, or Calves of ſuch Cows which are depaſtur'd on that Ground where the Furzes grow. Tho' *Graſs* pays Predial Tithe; yet, if 'tis cut and carry'd to feed the Owner's Plough-Cattle, before 'tis made into Hay, not having ſufficient otherwiſe to keep them, no Tithe ought to be paid for it *; tho' the Gloſs on the Provincial Conſtitution declares otherwiſe ‡. Where the Cuſtom is not to the contrary, the Pariſhioner ought to make the Graſs into Hay: But in many Places the Tenth Graſs-cock is ſet out, and in ſuch Caſe the Parſon may, *de jure*, make it into Hay upon the Land where it grew, without alledging a Cuſtom for it †. A Preſcription to pay the Tenth Acre of Graſs ſtanding in lieu of all Tithe Hay, is good ‖. Hay pays a Predial Tithe as well in Orchards as in Meadows; but no Tithes ſhall be paid for that which grows on Head-lands, where the Plough-Cattle can have only room to turn: But then there muſt a Cuſtom be alledged to pay it, and the Party muſt aver, that the Head-land is only large enough to turn the Plough on it. ‡ And if once Tithes are paid for Hay, no Tithe ſhall be paid for the after-Paſture of the ſame Land, in the ſame Year. * As to the Manner of tithing it, the Cuſtom of the Place is to be regarded: For, in moſt Places, the Tenth Cock is ſet out after 'tis made into Hay, but where there is no Cuſtom, the Tenth Graſs-cock may be ſet out †: And, therefore, tho' the Tithes of Graſs ought, of Right, to be made into Hay; yet a whole Pariſh may preſcribe to pay the Tithe in Graſs-cocks before 'tis tedded, and this without any Conſideration given to the Parſon ‡. But if 'tis ſuggeſted, that the Owners of the Land have, Time out of Mind, found Straw to thatch the Body of the Church, and have therefore been diſcharged of all Tithes of Hay, this is not good, for the Parſon has no Benefit by it, becauſe the Pariſhioners are to repair the Church. * If there is a *Modus* for the Tithe of Hay, and the Meadow is converted into Tillage, the Parſon ſhall have the Tithe Corn; but when the Lands are again converted to Meadow, the *Modus* ſhall revive. † So in Conſideration that the Parſon and his Predeceſſors had, Time out of Mind, been ſeiz'd of a Meadow in the Pariſh, the People ſhall, in ſuch a Caſe, be diſcharged of all Tithe Hay; for it ſhall be intended, that the Meadow was originally given to the Church, in diſcharge of the Tithes of the Pariſh ‖: But 'tis not a good *Modus*, that in Conſideration he had ſpent all his Hay in feeding Plough-cattle, that the Pariſhioner ſhould be diſcharged of Tithe Hay *.

Hemp pays a Predial Tithe, and becauſe there are various ways of tithing it, thereby by a late Act of Parliament †, a conſtant yearly Sum of five Shillings *per* Acre ſhall be paid for Hemp-land before 'tis carry'd off the Ground, and ſo in Proportion. *Hops* alſo pays a Predial

† Lindw. l. 3. Tit. 16. c. 3.

‖ Ventr. Rep. pt. 1. p. 75.

* 1 Roll. Abr. p. 645.

‡ Lindw. l. 3. Tit. 16 c. 5. v. *Lanas.*

† 1. Roll. Ab. p. 643.

‖ Ibid. p. 648.

‡ Ibid. 646.

* Ib. 640.

† Ibid. p. 644.

‡ Ib. 647.

* Cro. Eliz. p. 276.

† Godb. Rep. p. 194.

‖ Roll's pt. 1. p. 649.

* Ib. 650.

† 11th and 12th. W. 3.

Tithe; but the manner of tithing them is likewiſe various, according to the Cuſtom of the Place: And of this Opinion was Judge *Twiſden*, who lived in *Kent*, and affirmed they might be tithed by the Hills, by the Pole, or by the Buſhel; and if ſo, then the tenth Part may be ſet out before they are dried; and this agrees with the Caſe reported by *Hutton* *. But *Rolls* tells us, they ought not to be tithed before they are dried †; and this ſeems to be the better Opinion. But a Preſcription cannot be ſuggeſted Time out of Time to pay a *Modus* for Tithe Hops, becauſe they were not known in *England* 'till Queen *Elizabeth*'s time, being then firſt brought out of *Holland*, tho' Beer is mention'd in a Statute of *Henry* the IVth; and therefore a Prohibition was granted to the Eccleſiaſtical Court to ſtay a Suit there commenc'd by a Vicar on a Suggeſtion *, *That they had paid for all Tithe-Hops, ſo much an Acre to the Parſon Time out of Mind*; becauſe there could be no ſuch Compoſition Time out of Mind for the Reaſons aforeſaid. But the Court ſaid, That perhaps the Vicaridge was Endow'd Time immemorial of ſmall Tithes, of which Nature Hops are: And then a Preſcription of paying a *Modus* to the Parſon ſhall not take them from the Vicar; for it ſhall be taken to have commenced ſince the Endowment †.

* Rep. p. 77. Sid. Rep. 283. † Abr. p. 144.

* Sid. Rep. p. 443.

† Vent. Rep. pt. 1. p. 61.

I come in the next Place, to ſpeak of Tithes in reſpect to Cattle: Now thoſe which are bred for the Plough and Cart, pay no Tithe for their Paſture, becauſe the Parſon has the Benefit of the Labour of Plough-cattle by tilling the Ground; and Tithe-milk for ſuch as are bred for the Pail: But in the firſt Caſe it cannot be alledged, that the Cattle were uſed to Manure the Ground in that very Pariſh ‖. If ſuch Cattle are bred or bought to ſell again, and accordingly are ſold before they are uſed, Tithes ſhall be paid for them: But not if they are killed and ſpent in the Houſe. If ſuch Cattle are paſt their Labour, and the Cows are Barren, and afterwards fatted in order to ſell, they ſhall pay Tithes during the time of their fatting; for the Reaſon of the Diſcharge ceaſeth *. If a Man ſows his Land to feed his Horſes uſed for Tillage, there ſhall be no Tithe paid for ſuch Paſture; but if he keeps Horſes thereon to ſell, and accordingly ſells them, he ſhall pay Tithes. Cattle feeding on large Waſtes, not known to be in any particular Pariſh, ſhall pay Tithes to the Parſon of that Pariſh where the Owner lives; and if fed in ſeveral Pariſhes, they ſhall pay Tithes *pro Rata temporis*, ſo as they continue above a Month, or Thirty Days in each Pariſh. For there being heretofore, great Diſputes between the Rectors of Pariſhes, about the Tithes and Agiſtment of Cattle, on Account of removing them to depaſture in ſeveral Pariſhes at different Seaſons of the Year; it was therefore Enacted by a Provincial Conſtitution in *Lindwood* †. That the Tithes of Sheep ſhall intirely belong to him, in whoſe Pariſh or Territory they ſhall feed, from Shearing-time to the Eleventh of *November*, being couchant there for the whole time; but ſhall be only due *pro Ratâ*, if they depaſture there but part of the time. But if they are fed in one Pariſh, and are couchant or folded in another, then the Tithe (according to this Conſtitution) ought to be equally divided between the two Parſons. But the Tithes of other Animals ſhall be paid according to the Place and Time, where they fall and are bred. But if Sheep, after St. *Martin*'s Day ‖, ſhall be drove to other Paſtures, and be fed till Shearing-time in one, or in ſeveral Pariſhes, then the Paſturage of them ſhall be rated according to the Number of Sheep, and the Tithes ſhall be demanded of the Owners of them, according to the Rate of their Paſturage. Lambs, Calves Colts,

‖ Crok. 430. 2. Crok. 575. 1. Roll. Rep. 62.

* 1 Roll. Abr. p. 647.

† Lib. 3. Tit. 6. c. 6.

‖ 11th. Nov.

Colts and the like, paying Tithe, ſhall be particularly, or in Proportion, tithed with a Reſpect had to the ſeveral Places, where they are engendred, do fall and are bred; and according to the time they continue therein. The Tenth Calf is due to the Parſon when 'tis weaned *, and he is not bound to take it before; but if the Number of Calves does not come up to ten in one Year, the Parſon cannot have Tithes in Kind for that Year, without a ſpecial Cuſtom, but may take it ſo in the next Year †, accounting both Years together; or tithe *pro Ratâ*, if there be any Cuſtom for it. But 'tis a good *Modus* to pay one Calf, if he has ſeven in one Year; and if under ſeven, then an Half-penny for every Calf for the Tithes of all Calves in that Year; and if he ſells a Calf, then to pay a Tenth of the Value. Lambs pay a mixt Tithe, but that Payment is uſually guided by Cuſtom. If a Pariſhioner has ſix Lambs or under, he ſhall pay an Half-penny for every Lamb; and if he has above that Number, then to pay one Lamb is a good Cuſtom when ſuch Lamb is weaned ‖. A Preſcription to pay an Half-penny for every Lamb which he ſhall ſell before *May-day*, without any other Tithe for them, and he ſells them all before *May-day*, this is not good, becauſe 'tis a meer Fraud *. They are called Lambs 'till they come to be one Year of Age †: But in this Reſpect, the Cuſtom of every Place is to be conſidered; for in ſome Places they are deem'd as Sheep, when they come to be ſhorn ‖. What I have ſaid of Lambs, may likewiſe be underſtood of Kids, for they are alſo in *fructu Animalium* *.

I proceed in the next Place, to diſcourſe of Tithes for Fiſh: And here I ſhall conſider the Method of paying thereof: And 'tis uſually ſaid, that Fiſh taken in the Sea are not titheable *de Jure*, becauſe they are not only *feræ Naturæ*, but the Sea is not properly in any Pariſh †: But if that be a good Reaſon, then they ſhould pay Tithes when caught in a River, becauſe moſt Rivers are in ſome Pariſh, and yet Fiſh caught in a common River pay no Tithes ‖. 'Tis true, the Court was divided upon this Point in the Ninth of King *Charles*; but yet they granted a Prohibition to try the Right. But Tithes may be paid by Cuſtom for Fiſh taken in the Sea and in Rivers; and in ſome Places of *Cornwall*, they pay Tithes of Fiſh caught in the Sea to the Parſon of that Pariſh wherein they are landed: And ſo at *Yarmouth*, they pay Tithes for Herrings, but not the tenth Fiſh, but ſo much Money; for this is a Perſonal Tithe, and therefore the Tenth ſhall be paid in *Specie*, unleſs it be by Cuſtom *. If a Man ſuggeſts a Cuſtom, that all the Fiſh in a Ship ſhould be divided into Ten Doles, after the Owners Part is ſeparated for the Uſe of his Ship, and that the Tenth Dole is then to be divided, one Moiety to the Parſon, and the other to the Town of *Yarmouth*, this was held to be good. But if Fiſh are taken in a Pond, or other incloſ'd Place within a certain Pariſh, they ſhall be paid to that Church then as a Predial Tithe: ‡ But if the Place where Fiſh are taken be not incloſ'd, but is a Place where Fiſh may paſs from one Pariſh to another, as in a publick River, they ſhall be paid as Tithe to that Church where the Fiſher-man hears Divine Service, and receives the holy Sacraments †. And this is true, where a Foreign Pariſhioner has the Liberty of Fiſhing in ſuch a River; but if he has not this Liberty there, but pays a certain Price or Portion of Fiſh thereunto, then the Tithe ſhall be paid out of ſuch Price or Portion of Fiſh to that Church, within which Pariſh the Fiſh are taken *. But tho' theſe ſeem to be Perſonal Tithes, yet *Bernard* ‖ ſeems to think, that the Tithes of Fiſhes taken in the Sea (for they are titheable by the *Canon* Law) are Predial Tithes.

* Joh. An. in c. 7. x. 3. 30.

† Lind. lib. 3. Tit. 16. c. 5. v. *Expellat.*

‖ Roll. Abr. p. 648.

* Lindw. lib. 3. Tit. 16. c. 5. v. *ſeptimus Agnus.*

† Roll. Abr. p. 652.

‖ D. 32. 1. 6c. in pr in.

* D. 32. 1. 65. 7.

† l. 2. 1. 37

‖ Crok. Car. p. 339.

* Roll. Abr. p. 656.

‡ Lindw. l. 3. Tit. 16. c. 7 v. *vivariorum. & ſtagnorum.*

† Lindw. l. 3. Tit. 3. 16. c. 5 v. *deb. to Modo.*

* Dd. in c. 22. x. 3. 30.

‖ In c. 3. X 2. 9. Gloſſ. Fin.

Beaſts

Beaſts and Birds which are *feræ Naturæ*, are not titheable of *common Right*, tho' they may become ſo by Cuſtom ‡: But Rabbits in a Warren, and Pidgeons in a Dove-houſe are not properly *feræ Naturæ*, becauſe they are kept under Cuſtody, and by that Means are reduced to be the Property of particular Perſons. Pidgeons and Rabbits ought to pay Tithes *de Jure* if they are ſold, but not if they are ſpent in the Owner's Houſe *: And the Reaſon is, becauſe they are a Proviſion to ſupport him in his Labour about other Affairs, for which the Parſon may have Tithes †: But this ſeems to be a weak Reaſon, becauſe in Tithing, the Nature of the Thing is to be conſider'd, and not where it is ſpent. Now if the Place where Pidgeons or Rabbits are ſpent, would make them not titheable, when in their own Nature they ought to pay Tithes, then Corn, Pigs and Calves, *&c*, ſpent in the Owner's Houſe, ſtand on the ſame Bottom, and no Tithes wou'd be paid for them, which would be of miſchievous Conſequence to the Clergy, if this Reaſon were allow'd to be Law. But if Partridges and Pheaſants are kept in a Wood incloſ'd, and their Wings are cut ſo as they cannot fly out, and they lay Eggs and hatch young ones, no Tithes ſhall be paid for them, becauſe, tho' under a Reſtraint, yet they are *feræ Naturæ*, and are not reclaim'd; for if their Wings were not clipt, they wou'd fly out of the Incloſure. In reſpect of young Swans taken out of the Neſt, I think, a Predial Tithe ought to be paid (for ſo 'tis termed) becauſe they are hatcht in a certain Place, and are taken out from thence: But I ſhould be of another Opinion, if Swans were taken flying from an uncertain Place, as has been already ſaid of Fiſhes paſſing from one Place to another ‖. Domeſtick Fowl pay Tithe of Eggs or Chicken in their ſeveral Kinds; but where they pay Tithe of Eggs, there ſhall be no Tithes paid of Chicken: But in ſome Places 'tis cuſtomary to pay Tithes both of Eggs and Chicken (as aforeſaid.)

‡ D d in c. 6. x. 3. 30.

* Hetl. Rep. p. 147.

† Roll. Rep. p. 2.

‖ Ut ſuper v. *debito modo.*

Fruit of Trees, as Apples, Pears, Plums, *&c.* pay a Predial Tithe *, as ſoon as gather'd; and an Action will lie upon the Statute † for Subſtracting ſuch Tithes, or for not ſetting them out. *Maſt* of Oak or Beech, in *Latin* call'd *Pannagium*, ought to be paid according to the Tenth of its Value, if the ſame be given to be eaten by Hogs; but if Sold, then the tenth Penny is due for Tithes ‖. *Flax* pays a Predial Tithe like Hemp, and 'tis reckon'd among ſmall Tithes: And ſo does Saffron, which is alſo accounted among ſmall Tithes. Therefore, tho' 'tis Enacted by the Statute of *Edward* the VIth. That Tithes ſhall be paid as uſual for Forty Years laſt paſt before the making that Act; yet if Corn has been ſown in a Field for Forty Years, and the Parſon had the Tithes, and the Field ſhould afterwards be ſowed with Saffron, the Vicar ſhall in ſuch a Caſe have the Tithes *. *Corn* pays a Predial Tithe, and ought of *Common Right*, to be cut down by the Owner, and prepar'd for the Parſon to carry away; and it muſt be tithed by the Tenth Cock, Sheave or Shock; and if the Pariſhioner refuſes to do it, the Parſon may ſue him in the Spiritual Court, but it muſt be ſpecially for not ſetting it out in Cocks, *&c.* and not generally for not ſetting out the Tithes †. But the Pariſhioner is not bound to put the Parſon's Sheaves into Shocks, unleſs it be by Cuſtom. If he does not ſet out his Tithes, he is liable to be ſued in an Action of Debt, upon the *Statute* ‖ for treble Damages; and if he ſets them out and afterwards carries them away, the like Action may be brought againſt him, becauſe the ſetting out, was with a fraudulent Deſign to cheat the Parſon. But tho' 'tis clear that an Action of Treſpaſs lies againſt him; or elſe he may be ſued in the Spiritual Court, as was always practis'd 'till this Statute: Yet if a Stranger takes them away, he muſt be ſu'd in an Action of Treſpaſs at the *Common-Law*.

* X. 3. 30. 20.

† 2 & 3. E. 6. c. 13.

‖ Lindw. l. 3. Tit. 16. c. 7. v. *ſi vendantur.*

* Crok. Eliz. 476. Owen. Rep. 72. Moor Rep. 909.

† Latch Rep. 125. Sid. Rep. 183.

‖ 2 & 3. E. 6. c. 13.

A Preſcription to pay the Parſon the tenth Sheave *as it falls out*, or tenth *Swarth* is not good *: But a Preſcription to be diſcharged of Tithes in that Year wherein the Field was fallow, in Conſideration he had ſet the Sheaves into Shocks, when the Field was ſowed, is good and valid †. *Fallow Ground* pays no Tithes for the Paſture in that Year in which it lies fallow, unleſs it remains beyond the Courſe of Husbandry; for it makes the Land more fruitful the third Year ‡.

* 1. Rolls Ab. 643.

† 1. Rolls Ab. 649.

‡ 1. Rolls Ab. 642.

The *Canon-Law* ſays, that Tithes ought to be paid of the Profits of Wind-mills and Water-mills †: But as there are various Sorts of Mills, ſo the Tithes of them are different. As for Inſtance, the Tithe of Corn-mills are Predial; but the Tithe of Fulling or Paper-mills are Perſonal, even according to our Law ‖. For there are ſeveral Sorts of Mills, as *Copper*, *Corn*, *Fulling*, *Iron*, *Lead*, *Paper*, *Plate*, *Powder*, *Rape*, *Saw*, *Stamping* and *Tin* Mills: And of theſe only Corn Mills pay Tithes in Kind as Mills, which is the tenth Toll-diſh, and Corn-Mills built before the Statute ‡ of *Edward* the Second are Tithe-free. Therefore, where a Suit is brought for Tithes of an ancient Mill, the Defendant muſt ſuggeſt that the Mill is very ancient, and has never paid Tithes; and he muſt make Oath of the Truth of this Suggeſtion: For all new Mills pay Tithes *. If a Corn Mill ſhould be built on any Land diſcharged of Tithes by any *Modus*, the Mill ſhall likewiſe be diſcharged thereof †. But this Caſe ſeems to be unreaſonable; and, therefore, 'tis not Law: For the Profits of Lands, and of ſome Mills are of different Natures, the one paying a Predial, and other a Perſonal Tithe; and ſo they are charged not in reſpect of their real Value as Lands are, but in reſpect to the Labour of Men. And therefore all Mills except Corn-Mills pay Tithes not as Mills, for they are only Engines of ſeveral Occupations, and the Perſons uſing them pay Perſonal Tithes if they have been paid for forty Years next before the Act of *Edward* the Sixth ‡.) But Corn-Mills pay a Predial Tithe, as aforeſaid. If a *Modus* of Six Shillings and Eight Pence is paid for the Tithe of an ancient Corn-Mill, and the Mill-ſtream ſhould change its Courſe by Accident, and not by the Act of the Party, and the Owner pulls down his Mill, and rebuilds it to the Stream, the *Modus* ſhall ſtill continue: But if he had diverted the Stream himſelf, and then rebuilt the Mill to it, he ought to pay as for a new Mill *.

† X. 3. 30. 5. & 23.

‖ 1. Rolls. Ab. 656.

‡ 3. E. 2. c. 5.

* 2. Crok. p. 429.

† 1. Rolls. Ab. 652.

‡ 2. E. 6. c. 13

§ 2. Crok. p. 5 3.

2 Rolls. Rep. 34.

* 1. Rolls. Ab. 641. 652.

Wood likewiſe pays a Predial Tithe, and ſometimes 'tis reckon'd *inter minores decimas*: As for Inſtance, if a Vicaridge be endowed with ſmall Tithes, and the Vicar always had the Tithe of Wood, in ſuch a Caſe it ſhall be deem'd a ſmall Tithe; but 'tis generally eſteem'd to be a great Tithe. But 'tis not titheable, if ſpent in the Owner's Houſe, tho' it may be ſo by Cuſtom; for 'tis not diſcharg'd by the Law †. Yet if the Defendant ſuggeſts, that it was burnt in his Dwelling-Houſe, by Reaſon whereof the Parſon had *uberiores decimas*, this is good ‡. Nor ought Tithes to be paid for it, when 'tis uſed for Fencing of Corn or Hedging; nor when 'tis cut and burnt for making of Bricks to repair or enlarge the Owner's Houſe. But then ſuch Enlargement muſt be not only for his Pleaſure, nor more than is neceſſary for the Habitation of his Family: For if 'tis not ſo alledg'd in the Suggeſtion, it will be difficult to get a Prohibition; becauſe a general Suggeſtion that the Wood was burnt in making Bricks for the enlargement of his Houſe would be ſo inconvenient, that it might deprive the Parſon of his Tithes, ſince the Perſon might build a Palace ‖. If Wood-Grounds have likewiſe Timber-Trees growing on them; and conſiſt for the moſt Part of ſuch Trees, only ſome ſmall Buſhes and Underwoods intermixt, the Trees

† Crok. Car. p. 113. Hetl. Rep. 110.

‡ Vent. Rep. p. 75.

‖ 1. Roll. Ab. p. 645.

ſhall privilege the whole: But if ſuch Trees grow *Sparſim*, and the Underwood is the greateſt Part, then it muſt pay Tithe for the whole. 'Tis to be obſerv'd, that Wood is only titheable by Cuſtom or a Provincial Conſtitution *; for till Archbiſhop *Stratford* made a Canon that it ſhould pay Tithes, before it paid none: And as it was titheable by Cuſtom, ſo it may be exempted from the Payment of Tithes: For Preſcriptions are allow'd in *Non-decimando* for Wood in the *Weld* of *Kent* and *Suſſex*; but ſuch a Preſcription was never allow'd for Corn, becauſe that pays Tithes *de Jure*. A Cuſtom that the Parſon has enjoy'd ſuch a Wood Parcel of the Mannor, *&c.* in Satisfaction of all Tithe-Wood within that Pariſh, is good †. So a Preſcription to pay the tenth Acre ſtanding, is a good Preſcription. *Lastly*, the manner of tithing Wood is by the Pole or Perch, or by the tenth Faggot or Billet, according to the Cuſtom of the Place; and all Underwood commonly in *Latin* called *Sylva Cædua*, which being under twenty Years Growth, and being cut renews from the ſame Stock or Root, pays a Predial Tithe, except, as before excepted. But *Rolls* ſays, that Tithe ſhall be paid of Beeches, Hazle, Willows, Holly, Alder, Maple and Birches, even after twenty Years; becauſe they are not Timber. But in ſome Countries where Timber is ſcarce Beech is uſed for Building; and ſo we are told 'tis in *Buckinghamſhire*: And in ſuch Caſe, if above twenty Years Growth, 'tis privileged by the Statute of *Edward* the Third ‡. But 'tis Neceſſity, and not the Nature of the Tree which makes it Timber; for wherever other Timber may be had there Beech is not uſed for Building, and ſo becomes titheable. Cherry-Trees in *Buckinghamſhire* have alſo been adjudg'd Timber, and therefore Tithe-free. Tho' under the Appellation of the Word *Lignum*, in a general Senſe, we may reckon all Trees cut and fell'd ‖; yet properly ſpeaking this Word does not denote Timber or Materials for Building or Repairs, but only ſuch as is fit for Fewel or Burning: But touching this Matter, according to the Law juſt now quoted we ought to conſider the Cuſtom of the Country, *viz.* What is included under the Word *Lignum* in the Canon. *Bartolus* obſerves, that Trees bearing Fruits are not reckon'd among Coppice-Wood. It has been agreed, that if a Man cuts Trees for Houſeboot, Hedgeboot, Cartboot, Ploughboot and Fireboot, Tithes ſhall not be paid of them. Lops of Trees above twenty Years Growth pay no Tithes; for the Branch is privileg'd as well as the Body of the Tree *: And ſo 'tis if the Tree was not privileged at firſt lopping; yet if 'tis afterwards lopp'd, no Tithe ſhall be paid †. And 'tis the ſame Thing if the Tree becomes rotten, and only fit for the Fire, becauſe it was once privileged ‡; but *Croke*, who reports the ſame Caſe, ſays the Court was divided in their Opinion ‖.

* Lindw. lib. 3. Tit. 16. c. 3.

† 1. Roll. Rep. p. 555.

‡ 45. E. 3. c. 3.

‖ D. 32. l. 55. 2.

* Moor Rep. 768. 908.
† Brownl. Rep. 33.
‡ Moor Rep.
‖ Crok. Eliz. p. 100.

Wool pays a Predial Tithe; and in Proportion to the time the Sheep are in the Pariſh: As for Inſtance, if forty Sheep yield eighty Pounds of Wool, and are depaſtur'd in one Pariſh for a whole Year, the Parſon ſhall have eight Pounds of Wool; and conſequently but four if fed there only for half a Year, and ſo two Pounds for three Months, and but the tenth of the twelfth Part of the Wool if they are fed there for one Month and no longer *. And 'tis to be obſerv'd, that the Tithe-Wool ought to be paid on the Day of ſhearing the Sheep †: There are ſeveral Preſcriptions relating to Tithe-Wool; as when there are only ſix Fleeces of Wool, then the Parſon ſhall have only a Half-penny for each Fleece according to *Lindwood* ‡; but if there are ſeven, then he ſhall have the ſeventh Fleece, paying back the Half-pence; or elſe wait for the ſeventh till another Year. Again, if a Man has under ten Fleeces, then to pay a Penny for each Fleece; andif more

* Lindw. l. 3. Tit. 16. c. 6. v. *vatâ temporis.*

† ut ſupr. v. *decima lanæ.*

more then to pay the tenth Part *ſine viſu & tactu* of the Parſon: But this ſeems to be an unreaſonable Preſcription. Nor is it a good *Modus* to pay the tenth Pound of Wool for Tithes, if he does not ſhew that he is to pay ſomething for Tithe, if under ten Pound; becauſe otherwiſe, as to what is under ten Pound, is a *Modus in non decimando* *. But 'tis a good *Modus*, that in conſideration he did wind the Wool into a Fleece, to be diſcharg'd of Neck-Wool ſhorn from the Neck of the Sheep a Fortnight before and after *Michaelmas*; becauſe 'tis plain ſuch Shearing could not be for the Gain of the Wool alone, but to preſerve the Sheep from Vermin †. So a Suggeſtion to pay the tenth Part of Wool *of all the Sheep* he had before *Lady-Day*, and which he ſheared or fold, and that it was to be in Satisfaction *of all the Wool* of ſuch Sheep as ſhould be brought into the Pariſh after *Lady-Day*, is good ‡. So 'tis a good *Modus* that in Conſideration that a Pariſhioner has Time out of Mind paid Tithe-Wool of all the Sheep at the Shearing, as well as thoſe which *he bought* but two Days before the Shearing, as thoſe that were kept all the Year in the Pariſh, he ſhould be diſcharged of the Tithes of thoſe he *ſhould ſell* but two Days before the Shearing ‖. If Sheep dye of the Rot, the Wool is not titheable but by Cuſtom. So likewiſe if killed and ſpent in the Owner's Houſe, the Skins are not titheable, but the Wool is: But if the Wool has not paid Tithe, Tithes ought to be paid of Wool-fells. Under the Word *Lana* in the Canon is comprehended the Down of Geeſe, the Fur of Hares and Rabbits, and the Shearings of Goats, as well as thoſe of Sheep.

* 1. Rolls Ab. p. 648.

† 1. Rolls Ab. p. 649.

‡ Ibid.

‖ Ibid. 648.

According to *Speculator* the Perſon to whom Tithes are due, may forbid the Owner of the Eſtate either to collect or carry away the Fruits thereof till ſuch time the Tithes are ſet out either in the Preſence of the Perſon to whom they are due, or elſe in the Preſence of his Agent or Servant, if he be afraid of being defrauded: And thus, according to *Auſrerius*, it has been adjudg'd in the Parliament of *Thouloufe* in *France*. And *Hobart* tells us *, that a Cuſtom for Pariſhioners to pay their Tithes without the View of the Parſon is not good; for no Man may be his own Judge and Divider: And, therefore, for a Pariſhioner who is in the Nature of an Adverſary to the Parſon in this Caſe, to ſet forth a Part for the Tenth (which he affirms to be juſt) is to give himſelf the meer Power of Tithing as he pleaſes. And a Preſcription would be altogether as reaſonable to ſay, that he might ſet out what Tithe he pleaſed. It is a weak Anſwer hereunto to ſay that if it be not a juſt Tenth he may refuſe it, and ſue for his Due. For, *Firſt*, he has no Means to be aſſur'd whether it be a juſt Tenth or not; and ſo his Suit may be Cauſeleſs, and he may be ſure it will be fruitleſs. But the Law was not provided to engender, but to prevent Suits; and therefore provides that Things be done by indifferent Methods and Perſons, that there be no Suſpicion of indirect dealing. Touching this Matter we meet with two Edicts or Conſtitutions of *Francis* the Firſt King of *France*, in the firſt † ordaining, that no Owners or Occupiers of Lands do preſume to gather or carry away the Fruits of ſuch their Land out of the Fields, till they have paid their Tithes and Firſt-Fruits according to ancient Cuſtom: And hereby they are enjoyn'd to give Notice to all ſuch Perſons as have Right of Tithes, touching the time of ſetting them forth, before they carry them away, under the Pain of forfeiting all Fruits thus ſubſtracted (the Tenths and Firſt-Fruits being firſt deducted) unleſs they have firſt agreed with the Perſons to whom they are due. And by the Second ‡, all Proprietors and Occupiers of Predial Eſtates, are forbid to cut or mow ſuch Fruits as pay Tithes, 'till they have given

* Hob. Rep. p. 107

† A.D. 1545.

‡ A.D. 1547.

ven Notice in the Church of the Day and Time of cutting and mowing the ſame, that the Perſon who has the Right of Tithes may be appriz'd thereof, and be preſent (if he pleaſes) either by himſelf or Agent, at the ſetting them out, under the Pain aforeſaid.

I have already obſerv'd, that no one can be diſcharg'd from Tithes, tho' he may be diſcharg'd from the actual Payment of them* ; therefore, if a Perſon will diſcharge himſelf from a juſt Demand of them, he ought to ſhew and ſatisfy the Court, touching the Grounds of ſuch Diſcharge by ſome good Plea or other. Therefore, in conſidering the ſeveral Ways whereby Perſons are exempted from the actual Payment of them, I ſhall firſt conſider the Perſons capable of them, and next the Means how they came to be ſo. Now the Perſons or Bodies capable of receiving them, are *Firſt*, ſuch as are Spiritual: And, *Secondly*, By the Laws of *England* ſuch as are Temporal. Indeed, by the *Canon* Law, Lay-men are not capable of receiving Tithes in reſpect of the Adminiſtration of Divine Worſhip, becauſe Tithe is a Right meerly Spiritual by that Law: But, according to *Anchoranus* ‡, Lay-men may receive Tithes by Virtue of a Privilege, when they are paid (as the *Canoniſts* ſay) in *Signum Dominii* to the Lord of the Mannor by way of Acknowledgment, or as a Quit-Rent, and theſe were ſtiled *Feudal Tithes*. And thus tho' Lay-men were not capable of receiving Tithes in their own Right by the Laws of the Church †, yet they might receive them by the Pope's Grant: But Spiritual Perſons do not only receive them in their own Right, but are alſo actually priviledg'd and diſcharged from the Payment of them ‖; as the *Ciſtercians*, *Templars* and *Hoſpitallers*, were not bound to pay Tithes out of their Eſtates, which they held in their own Hands, and Manur'd at their own proper Coſts ‡. And here 'tis to be noted, that theſe priviledg'd Perſons, as they were Spiritual, had four extraordinary Ways of being diſcharged from the Payment of Tithes, *viz.* *Firſt*, By ſome Papal Bull. *Secondly*, By real Compoſition. *Thirdly*, By Preſcription, and theſe were abſolute. And, *Laſtly*, By being of ſome religious Order, and that was Conditional, or limited ſo long as the Land continued in the Manurance of the Religious Perſons themſelves; and theſe Orders were the *Ciſtercians*, *Templars* and *Hoſpitallers* of *Jeruſalem*, as aforeſaid. But Unity of Poſſeſſion of the Parſonage Appropriate, was antiently no Diſcharge of the Tithe; nor was it held ſo at the Common Law. But this Practice began (as we are told) in the *Norman* Times; the Separation of Tithes from Churches being not known in *England* till then: For the *Norman* Nobility took little Notice of the *Saxon* Laws about Tithes; but finding Tithes paid out of the Lands within their Mannors, they thought they did well enough, if they gave the whole Tithes, or ſuch a Portion and Share of them as they thought fit, to ſome Monaſtery, either abroad or at home. *William* the Firſt, gave ſeveral Churches with their Tithes to *Battle-Abbey*. *William Rufus* added more ‖. In the like manner, *Henry* the Firſt, gave to the Monaſtery of *Reading* ſeveral Churches; and *Henry* the Second gave more*. *Hugh*, Earl of *Cheſter*, gave the Tithes of ſeveral Mannors to the Monaſtery of St. *Werburgh*, in the time of *William* the Firſt: And it were endleſs to give an Account of the Appropriations made by the *Normans*; for the *Monaſticon* is full of them †. There is a Bull extant in the Collection of Pope *Innocent*'s Epiſtles to exempt the *Præmonſtratenſes* from the Tithes of *Lands in their own Hands*; but this was granted in the firſt Year of *Innocent* the Third, ſome time before the *Lateran* Council, and they might enjoy the ſame Privileges with the *Ciſtercians*, if it could be prov'd that they were generally receiv'd, which has not yet been done.

* vid. p. 506. Hob. Rep. p. 44. 297. 298.

‡ In c. 26. x. 3. 30.

† X. 5. 33. 3.

‖ X. 3. 30. 15. & 17.

‡ X. 3. 30. 10.

‖ Mon. Vol. 1. p. 31.

* P. 417.

† P. 202.

Of

Of Vicars, Vicaridges, their Beginning, &c.

THE Word *Vicar*, in *Latin*, *Vicarius*, is a general Term, and comprehends every Perſon, *qui vicem alterius gerit* *; and hence, in the *Civil* Law, even a Servant may be ſaid to be a *Vicar* †: But I ſhall here uſe it in the common Acceptation of the *Canon* Law; and of theſe kind of Vicars there are four ſorts in our Law-Books. *Firſt*, There are ſome which are in *Latin* ſtiled *Vicarii mercenarii* *; and in this Senſe the Rector's *Con-Vicars*, which he aſſumes and makes uſe of for a Time only, are called the Rector's *temporal Vicars*; becauſe they are Conductitious Perſons; and as they are only hired for a Seaſon, and may be aſſum'd without the Biſhop's Licence, the Rector may remove and part with them at pleaſure, according to the *Canon* Law: And as ſuch they may rightly adminiſter the Sacraments, and perform all other divine Offices in the place and ſtead of the Rectors ‖; for a good Rector, ſays that Law, ought to be attended with a Vicar; and theſe are called in *Lindwood* by the Name of *Stipendiary Prieſts* and *Capellani Parochiales*, as already remembred. Yea, a perpetual Vicar of this kind, hereafter mention'd, may have a Temporal *Con-Vicar* to aid and aſſiſt him in his Office *: And this without the Biſhop's Licence, provided there be no Provincial or Synodal Conſtitution, which hinders and forbids the ſame. A Second ſort of Vicars taken notice of in the *Canon* Law, are ſaid to be thoſe, which the Pope appoints for the Government of ſome certain Province; and theſe Vicars have as much Power as their Commiſſional Letters do import, and no more †. A third ſort of Vicars are thoſe, which the Biſhop does by a general Commiſſion conſtitute and appoint in his Dioceſs for the diſpatch of Matters Spiritual relating to his Office; and theſe are ſaid to have their Power from the Law *: But how and in what manner theſe Vicars-general in Spirituals differ from principal Officials, who hold the ſame Conſiſtory with the Biſhop himſelf †; I have already related under the Title of *Chancellors*. But, in brief, the Principal Official has a general Cognizance of all Cauſes committed to him throughout the Dioceſs; tho' he has not the Power of Inquiſition, Correction, Puniſhing of Exceſſes, or of Removing a Perſon from his Benefice, nor even of collating or giving Inſtitution to Benefices, unleſs theſe Matters are ſpecially granted to him by his Patent or Commiſſion: But a Vicar-general in Spirituals may do all the aforeſaid Acts by virtue of his Office, except collating or given Inſtitution unto Benefices ‖. A fourth ſort of Vicars, are called *perpetual Vicars*; and as they are appointed for Parochial Churches and the Cure of Souls, they are inſtall'd, inſtituted, and intituled hereunto *: And of theſe Perpetual Vicars is the Word, *Vicar*, in Propriety of Speech rightly predicated. And thus there are four ſorts of Vicars, *viz.* *Perpetual* Vicars, which are conſtituted for Parochial Churches. *2dly*, *Temporal* Vicars, which are much the ſame with our Curates as we now call them; and theſe are conſtituted for ſome particular Acts and Seaſons. And *3dly*, Some which are ſpecial, and not *ad curam Animarum*; and theſe are conſtituted for a certain Act, Place, or Article †. And, *laſtly*,

* D. 50. 17. 13.
† D. 15. 1. 4.
* Joh. de Ath. in Othon. conſ. Tit. 10. v. *Vicariorum.*
‖ 16 Q. 1. 19. Arg. 23. Diſt. 29.
* 7 Q. 1. 15 & 16.
† 98 Diſt. 3. X. 5. 33. 8.
* vi. 1. 13. 3. vi. 3. 4. 3.
† vi. 2. 15. 3.
‖ vi. 1. 13. 2 & 3.
* X. 1128. 5.
† X. 1. 28. 3.

There are ſome which are called *Vicars-general*, which are neither Perpetual, nor are they made *ad curam*, nor deputed to any certain Act or Article whatever, and ſuch are Vicars in the Biſhop's Courts. The firſt of theſe ſerve the Church *Nomine proprio*, in their own proper Name, and on their own Account. And the ſecond are ſuch as ſerve the Church *alieno Nomine*, in the Name and on the Account of ſome other Perſon; and have no Title or Inſtitution into the Benefice, as the former have, but are Mercenary, Conductitious, and Removeable at Pleaſure (as aforeſaid) unleſs they have the Biſhop's Licence, and the Parſon will not ſerve the Church himſelf.

Vicaridges, with Cure of Souls, had their firſt Riſe chiefly from the Appropriation of Churches *: For the Rectory being annex'd to ſome Religious Houſe, or Collegiate Church, the Cure was ſerved from thence for a while by ſome Member thereof, with a competent Allowance to ſubſiſt on, till ſuch Time as theſe Bodies of Men began to curtail their Chaplain's Maintenance, iſſuing out of the Revenues of the Benefice, and to apply it to their own luxurious way of Life; and then the poor Prieſt either begg'd for a Livelihood, or return'd to the greater Church or Monaſtery, and left his Flock to ſhift for themſelves. But as an Affluence of Wealth and other temporal Goods often diſtracts and draws ſome great Churchmen from the Duty of their Office committed to them; ſo Poverty renders others very unhappy in the Circumſtances of their Lives, and obliges them either to beg, or elſe to uſe mean Artifices to gain, perhaps, a bare Subſiſtence in the World: And, therefore, a new way was invented to ſupport theſe Hirelings, who were only temporal Vicars at firſt, whilſt the Monaſteries and greater Churches ſwallow'd the Profits of the Parochial Benefices; and that was by Maſſes, Prayers for the dead, and the like. And as theſe poor Vicars had no Property in themſelves, they entirely depended on the Alms and Good-will of others, and on their own Arts and Tricks of getting Money, to the great Diſhonour of their Houſes, and to the Diſparagement of the Clergy themſelves: And, therefore, a Law was introduced to make them perpetual by a Title and Inſtitution had into the Church it ſelf; and to give them an Allowance out of the Revenues of the Pariſh Church †: and this was called the Vicar's Portion or Endowment; which was either ſettled at the time of founding the Vicaridge, or, at leaſt, before the Vicar receiv'd Inſtitution into the Church itſelf *. And ſome obſerve; that, according to the antient Law, this Allocation or Aſſignation of an Income to the Vicar, ought to be firſt made by the Rector or Patron himſelf, and if he did not within ſix Months aſſign a competent or ſuitable Proviſion for the Vicar, the Biſhop might then do it by his own Authority at the Time of granting Inſtitution ‡. But *Hoſtienſis* aſſures us ||, that this Aſſignation of the Biſhop at the Time of Inſtitution was not practis'd in his Time, becauſe if the Preſentee be a fit Perſon, the Biſhop is bound to admit him before the Term of ſix Months expires; but then he might, after the Determination of a convenient Term, by him limited for this end to the Rector or Patron of the Church, aſſign the Vicar a ſufficient Portion, if ſuch Patron or Rector refus'd or neglected to do it *. This Endowment at firſt, generally conſiſted either in ſmall Tithes, or elſe in a certain Sum of Money to be paid out of the Profits of the Church †: And hence it is decreed * by an antient Conſtitution in *Lindwood* †, That a Revenue or Endowment of five Marks, at leaſt, ſhould be allotted to a Perpetual Vicar, unleſs, perchance, in thoſe Parts of *Wales*, where Vicars are, by reaſon of the ſmallneſs of the Churches Income, content with a leſſer Stipend. And hereupon *Lindwood* || very well obſerves, that though

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* Othobon. Conſt. Tit. 22. X. 3. 5. 12 & 30.

† X. 1. 28. 3.

* X. 3. 5. 12.

‡ X. 1. 10. 2.
|| In c. 12. X. 3. 5. v. *aſſignatum.*

* Cl. 5. 12. 1.
† Joh. de Athon. in Tit. 12. Othon. v. *vel vicarias.*
* A.D. 1222.
† Lib. 1. Tit. 12. cap. 2.
|| Ut ſupr. v. *ad minus.*

a leſſer Sum than this ought not to be aſſign'd the Vicar (unleſs as hereafter provided): yet it was lawful, and expedient too, in many Caſes to augment the ſame; eſpecially, according to the riſe of Things in their Price and Value. And, therefore, *Simon Iſlip*, Archbiſhop of *Canterbury*, did afterwards * by another Provincial Conſtitution †, increaſe this Sum in reſpect of ſuch as had the Cure of Souls, yea, tho' they were only Temporal Vicars, *viz.* Prieſts under Rectors or *Parochial Vicars*, as *Lindwood* calls them, who are the ſame with our preſent *Curates*; and this Sum he extended to ſix Marks ‖. But at length the Value of all Neceſſaries for human Subſiſtence growing dearer, under Archbiſhop *Sudbury* *, it was augmented even in reſpect of ſuch Temporal Vicars unto eight Marks, or otherwiſe to four Marks *cum Cibariis* †; And this appears from their ſeveral Conſtitutions. And *Lindwood* there remarks, that if we conſider the Increaſe of Things in their Value in thoſe reſpective Times, this Augmentation from five to eight Marks was but a juſt and wiſe Inſtitution. But yet, ſays he, theſe Parochial Prieſts in ſeveral Places were not in his Time ſatisfy'd with ſuch Salary, but deſired to have the ſame advanced to ten Marks, at leaſt. But if eight Marks in *Lindwood*'s Days, which, according to the preſent Rate of Things, and Value of Money, is, as *Spelman* very well obſerves ‖, ſomething upwards of 60*l.* in theſe Times, was not then thought a ſufficient Maintenance for a poor Vicar; what will 20*l.* or 30*l.* be deem'd now, in reſpect of a poor Curate's Allowance, and but few Clergymen pay their Hirelings more than this laſt Sum?

* A.D. 1362.
† Lindw. lib. 3. Tit. 23. c. 10.
‖ Lindw. Lib. 1. Tit. 12. c. 1. v. *Quinq; Marcas.*
* A.D. 1378.
† Lindw. lib. 3. Tit. 23. c. 11.
‖ Pag. 153. of Tythes.

But it will be anſwer'd hereunto, That in ſettling the Vicar's Allowance, great regard was then had to the Incumbrances, which the Laws of the Church laid upon ſuch Benefices; and theſe were various and ſeveral, ſome of which are ſaid to be Epiſcopal, and among theſe are reckon'd the *Synodaticum*, *Cathedraticum*, the Fourth of all Tithings and Mortuaries, when they are due by Cuſtom; and alſo Procurations, the Charge of entertaining the Pope's Meſſengers, and the *Subſidium Caritativum*, *&c.* A Beneficiary will ſay, perhaps, now, that theſe were heavy Duties upon the poor Vicar, which his Curate is not at preſent charg'd with. But is he not charg'd with Reſidence and other Acts of Duty; and, in ſome meaſure, Hoſpitality is expected from him, if he would live well with his Pariſhioners? But *Lindwood* further ſays, we ought not only to conſider the Sufficiency of a Benefice in point of the Revenues and Incumbrances, which hang over the ſame; but alſo the Competency thereof in reſpect to the Perſons that ſerve it, as their Learning, Quality, and other Merits. But *Lindwood* puts this Matter out of all doubt, ſaying, That the Vicar's Portion ought to be five Marks *de claro*, after all Charges and Incumbrances are deducted; *becauſe his Allowance ought to be ſuch*, ſays he, *as is ſufficient to ſupport himſelf and Family, not only in a narrow and penurious way of Living, but as it becomes him and his Family:* And with *Lindwood*, the *Canon* Law entirely agrees *, as well as the Interpreters thereon †. And *Lindwood* likewiſe concludes, that the Vicar's Portion ought to be ſo ample, as that he may maintain himſelf and one, at leaſt, or more Pariſh Clerks, or *Clerks aſſiſtant*, according to the Quality and Extent of the Pariſh, both in Meat and Apparel ‖.

* Arg. 31. Diſt. 11.
† Paul in c. 1. Cl. 5. 12. v. *Congruam.*
‖ Lib. 1. Tit. 12. c. 2. v. firmam. X. 3. 1. 3.

Sometimes the Endowment was expreſs'd, as at the Founding or Appropriating of Churches; and at other Times it was reſerv'd in the Biſhop's power to do it as he ſaw cauſe. But the Biſhops were either ſo remiſs in thoſe Times, or the Monks ſo powerful at *Rome*, that the poor Vicars fared ſo hardly, that in *Henry* the IId's Time, Pope *Alexander* the

the IIId. ſent a Reprimand to the Biſhops for favouring the Monks too much, and the ſecular Clergy too little *, (a ſtrange Thing in a Pope to do!): And, therefore, requir'd the Biſhops to take care that the Vicar had a competent Subſiſtence, ſo as to be able to bear the Burden of his Place, and to keep Hoſpitality. This *Decretal* was directed to the Biſhop of *Worceſter*; for it ſeems ſo long ſince the poor Vicars were hardly provided for. And yet there are ſeveral Forms of Appropriations made here by the Biſhops after the Conqueſt, wherein there is a twofold *Salvo*; one for the Biſhop's Right, and another for a ſufficient Maintenance for the Curate, tho' the Church was appropriated *ad communem uſum Monachorum*, as of *Wolſtan*, *Roger*, and of *William* in *Henry* the IId's Time, when *Alexander* the IIId. liv'd; and of *Walter de Grey*, *Sylveſter*, *&c.* † But it ſeems where a competent Subſiſtence had been decreed, the Monks took the firſt opportunity to leſſen it, which occaſion'd another *Decretal* in the *Canon* Law ‖, wherein any ſuch Thing is forbidden without the Biſhop's Conſent. In other Places, they pleaded Cuſtom for it: And from thence came another Decree of the *Lateran* Council *, to void all ſuch Cuſtoms, by whomſoever introduc'd, where there was not a competent Subſiſtence for him that ſerv'd the Cure. The Monks were ſtill refractory in this Matter; and becauſe the Biſhops had power to refuſe any Perſon preſented by the Monks, unleſs they conſented to ſuch a reaſonable Allowance as the Biſhop thought fit †; they, therefore, grew ſullen, and would not preſent: In which Caſe, another *Decretal* was made to give the Biſhop power to preſent ‖. And after all, Pope *Clement* the Vth reinforced the former *Decretals*, and enjoin'd the Dioceſans in the ſtricteſt manner, not to admit any Perſon preſented to a Cure, where the Church was appropriated, unleſs ſufficient Allowance was made by the Biſhop's Conſent and Approbation, and all Cuſtoms and Privileges to the contrary are declar'd to be void *. But how far does this hold among us, ſince the Appropriations are become Lay-Fees, and the Biſhops Power is not mention'd in the Statute of Diſſolutions? To this I ſhall give a clear, tho' (perhaps) not a ſatisfactory Anſwer to all Perſons concern'd: For as Neceſſity and Power, ſo ſome Mens Intereſt and Reaſon live very near each other.

* X. 3. 5. 12.

† Stilling. Eccleſ. caſ. vol. 1. p. 201.

‖ X. 3. 5. 10.

* X. 3. 5. 30.

† X. 3. 5. 12.

‖ X. 1. 10. 2.

* Cl. 5. 12. 1.

First, The Statute of Diſſolution leaves all Matters of Right as to Perſons intereſted juſt as they were before: For by the ſurrender, the King was to have the Monaſteries and Tithes in as ample a manner as the Abbots then had them in right of their Houſes, and in the ſame State and Condition as they then were, or of Right ought to have been †: And ſo *Res tranſit cum ſuo onere*. But this is not all: For there is an expreſs *Saving* of all Rights, Claims, Intereſts, *&c.* of all Perſons and Bodies Politick. So that if by the Law of *England* there was an *Antecedent* Right in the Vicar to his Allowance, and in the Biſhop to aſſign it, 'tis not taken away by this or any other Statute. 2*dly*, By the Law of *England*, the Biſhop had a Right to provide a competent Maintenance for ſupplying the Cure upon an Appropriation: And we are told by an undoubted Authority, in point of Law, that this Matter was brought before the *King's-Bench* in the Caſe of *Thornburgh* and *Hithcot* ‖. The Vicar complain'd, that the Church was appropriated, and that he wanted a competent Maintenance: Whereupon a Prohibition was pray'd, but deny'd on this Reaſon, *viz.* *That the Vicar had Cauſe for his Suit*, and that the Ordinary might compel the Impropriator to make a greater Allowance; becauſe in all Appropriations that Power was reſerv'd to the Ordinary. And ſo in the Year-Books 'tis ſaid *, *That the Ordinary may increaſe or diminiſh the Vicar's Portion*. 3*dly*, The Law of *England*, as to a competent Subſiſtence for Vicars

† 31 H. 8. cap. 13.

‖ 2. Rolls. p. 337. 9 Car. 1.

* 40 E. 3. cal. 15. fol. 28.

Vicars or Curates in appropriated Churches, is founded on very good Reaſon: For the Tithes were originally given for the Service of the Pariſh Church †, and not for the Uſe of Monaſteries. And, therefore, when Biſhops grew negligent of the Parochial Clergy, and began to favour the Monks for private ends to themſelves, there was a certain Portion of the Tithes ſet apart from the Monaſtery; and, being given *in perpetuum* to the Vicar for his Maintenance, this was called an Endowment *expreſs'd*, which was uſually made at the Time of appropriating any Church (as aforeſaid). This was a hard Point for the Monks to get over, ſince the Tithes were given for the Maintenance of the Clergy; and ſo they ought to go: But as the Monks were none of the Clergy, how came they to have a right to the Tithes? 'Tis certain, that the State of the Clergy, and the Monaſtick State were different; and the Offices of the Clergy and of the Monks were inconſiſtent, if they held to their Rules: And, therefore, ſurely the Monks ought not to have that Maintenance, which belong'd to the ſecular Clergy for other Offices; ſince there is no Colour or Pretence for it, the Monks, by the Canons of the Church, being forbidden to meddle in Parochial Offices of *Preaching*, *Baptizing*, *Viſiting the Sick*, *&c.* *. So that it might bear a Queſtion in Law, whether a Monaſtery were capable of an Appropriation, ſince by the Eccleſiaſtical Law they are not an Eccleſiaſtical Body.

† X. 3. 30. 29. X. 3. 29. 5.

* 55 Diſt. 1. 16 Q. 1. 4. 5. 6. 8. 10. & 11.

But the Remiſſneſs of the Biſhops was ſo great and ſcandalous in reſpect of their Care of the poor Vicar upon Appropriations, that tho' there were ſome Endowments of Vicaridges by Tithes in caſe of Appropriations, even before the ſeveral Statutes for endowing the ſame; yet theſe Endowments were but very few, and ſcanty too, where the Endowment proceeded entirely from the Monaſtery: And, therefore, was the Statute of *Richard* the IId made †, as I have before remembred under the Title of *Appropriations*. But one Statute was not enough, and, therefore, another was enacted in *Henry* the IVth's Reign ‖: For they eluded the former by appointing Vicars out of their own Body, but the latter Statute requires, That the Vicar ſhould be a ſecular Perſon, and made a ſpiritual Vicar; and have ſuch an Endowment as the Ordinary ſhould think fit, otherwiſe the Appropriation to be void. But theſe Statutes only regarded Perpetual Vicars; for as to Temporal Vicars (and many there were of them, even in thoſe days, contrary to the Canon, *viz. That a Vicar cannot have a Vicar* †) theſe poor Wretches were left to the Good-will and Diſcretion of the Biſhop, and to the Bounty of the Parſon of the Pariſh for their Wages, after the Price of Things came to encreaſe, and ſo they are ſtill; which is the Reaſon, that ſeveral of them live ſuch uncomfortable Lives (whilſt the Rectors live in Idleneſs and Splendor) if they are not a Scandal to their Holy Profeſſion: And, therefore, it is much to be wiſh'd, that ſome good Law was made to compel the Parſon to allow them according to the Value of his Living, if he will not do the Duty himſelf; as he ought in Conſcience to do.

† 15 R. 2. c. 6.

‖ 4 H. 4. c. 12.

† X. 1. 28. 4.

By a Legatine Conſtitution in *Lindwood* *, no one could be admitted to a Vicaridge, unleſs he was at the Time of his Admiſſion in Prieſts Orders, or (at leaſt) in Deacons to be ordain'd a Prieſt at the next Ordination; or unleſs upon reſigning his other Benefices, if he had any with Cure of Souls, he took an Oath to live thereon, and to obſerve a conſtant corporal Reſidence; and if he acted contrary hereunto, his Inſtitution was deem'd null and void, and ſuch Vicaridge was to be conferr'd on ſome other Perſon, and not on the ſame without another coming between. So that by this Conſtitution, a Vicar was not only ſworn to continual Reſidence, but could not have more Livings than one †. Though

* Otho. Tit. 19.

† X. 1. 28. 2.

Otho's Conſtitution obliges Vicars to perſonal Reſidence; yet it does not ſpeak of Miniſtration: But *Joh. de Athon* thereupon obſerves *, that this Reſidence is not enjoin'd them on the account of a conſtant Attendance and Service in adminiſtring the Sacraments, and doing other Sacramentals only; but likewiſe on the ſcore of maintaining Hoſpitality: for a perſonal Reſidence, implies a perſonal Duty of adminiſtring the Sacraments, and performing other Acts of Divine Worſhip in the Church. And hence 'tis, it ſeems, that a Vicar cannot aſſume to himſelf another Perſon for the Adminiſtration of the Sacraments, and other Sacramentals †.

* In Tit. 10. Othon. v. *Reſidentiam.*

† Cl. 1. 7. 1.

Of Viſitations Provincial, Epiſcopal, &c.

THE Word *Viſitatio*, in our Law-Books, ſometimes ſignifies a Right of Power and Juriſdiction over Things and Perſons; and ſometimes it imports only a bare Right of Adminiſtration: But, according to *Baldus* *, he, who has the Right of Adminiſtration, has alſo the Right and Power of Viſitation. But with him I cannot agree; eſpecially, if we conſider the Term in the common Acceptation of it, as it denotes that Act or Office of the Biſhop, or of ſome other Ordinary, going his Circuit throughout his Dioceſs or Diſtrict, with a full Power of inquiring into ſuch Matters as relate to the Government and Diſcipline of the Church, and ſometimes of correcting Abuſes, and puniſhing Exceſſes committed by his Subjects, *&c.* For though every Viſitor is in this reſpect an Adminiſtrator; yet every Adminiſtrator, properly ſpeaking, is not a Viſitor, ſince Proctors, Syndicks, Stewards of Churches, are deem'd Adminiſtrators in Law, and ſo likewiſe are all ſuch Perſons as have any Office in the Church without a Juriſdiction annex'd to it. But a *Viſitation*, as we would uſe the Word here, implies ſome Act of Juriſdiction and *coercive* Authority; and generally ſpeaking has a Cognizance of Cauſes annex'd to it: But in all Viſitations, the Viſitor may ſummon ‖ and enquire *, tho' ſometimes he cannot correct and puniſh by hearing of Cauſes; as in the Caſe of ſome Archdeacons, and the like, who are only *ſimple Scrutators*, and muſt report the Matter preſented to them unto the Biſhop for his Cognizance. And hence 'tis, that the Law diſtinguiſhes Viſitors into *general* and *ſimple* Viſitors. The firſt are thoſe, that have a full Viſitatorial Power of inquiring into all Cauſes and Things that want Reformation and Amendment; and of puniſhing the Offenders if they ſee reaſon: And ſuch a Power has an Archbiſhop all over his Province †; and a Biſhop throughout his Dioceſs ‖. But a *ſimple* Viſitor has only a limited Juriſdiction, and can only enquire and take Cognizance *de levibus Delictis*; and that (perhaps) only within ſome certain Place of the Dioceſs: which of *Common Right*, Archdeacons could only do heretofore, tho' ſince, ſome of them have had a larger Power granted them from the Biſhop; and are thus become Ordinary Viſitors as well as the Biſhop himſelf; and ſo are Deans of Churches, Abbots, and other Religious Prelates within their own Precincts and Juriſdictions. But a Vicar-General in Spirituals has not, by virtue of his general Office and Commiſſion, the Power and Office of Viſiting and Correcting, tho' he has the Cognizance of Cauſes transferr'd on him; and

* Conſ. 158.

‖ Cl. 3. 10. 2.

* 10 Q. 1. 11.

† vi. 3. 20. 1. 1.

‖ 10 Q. 1. 9 & 10.

and consequently cannot, in virtue of such Commission, deprive any one of his Benefice, because he has not thereby the Power and Office of visiting and correcting Offenders: But in a Case where the Power of correcting is given to a Visitor, the Power of depriving his Subjects of their Benefices, if their Crimes require it, is *eo intuitu*, included in his Commission by way of Accessory; because, according to this Maxim in Law, *concesso uno videntur concedi omnia ad illud accessoria* *. And this is particularly true, if the Person delegating has the Power himself of depriving Persons of their Benefices: But otherwise not. * X. 1. 29. 21.

It has already been remark'd under another Title, that an Archbishop, who is willing to visit his Province, ought in the first place to visit his own proper Church, City or Diocess, and the Clergy and Laity thereof in a full and ample manner †: And after he has visited his own proper Diocess, he may either in part, or in the whole, visit all the Cities and Diocesses of or within his Province, and exercise the Office of a Visitor, *Jure ordinario*, over his Suffragans and their Subjects ‖; and visit the Chapters of Cathedrals, and other Churches, and all Monasteries, Churches, and Religious Houses, and Places of Charity and Piety. And if he cannot conveniently and without a great deal of Difficulty go to every Church and Diocess within his Province, he may call the Clergy and Laity together from their several respective Places, to some one convenient and agreeable Place *: And all our Bishops, taking the Hint from this Usage or Custom, have since drop'd their Parochial Visitations; and do now only summon their Clergy to meet them at some convenient Place within the Rural Deanery. And the Order, which Archbishops and the like ought to observe in their Visitations, is prescrib'd in *Boniface*'s Decretals †, *viz. First*, They ought to preach the Word of God, by giving the Congregation a Sermon. *2dly*, They ought to enquire into the Lives and Conversations of such as minister in the Church, and into all other Things belonging to the Office of a Parish Priest, *&c.* and punish notorious Crimes and Offences. But in this respect, Religious Persons are to follow their own Customs and Institutions. And after an Archbishop has once visited all the Diocesses of his Province, he shall not repeat or renew his Visitation of the same without the Advice of his Suffragans: But if there are any Churches and the like, which he has not visited in his former Visitations, he may visit them afterwards even without the Consent of his Suffragans. A Bishop may visit his Diocess either in his own proper Person, or else by other grave and discreet Persons, if he be hindred by Sickness and the like from going himself ‖: But every Visitor, before he begins his Visitation, ought to issue out a Premonition or Summons to call his Clergy and People together *, otherwise he cannot punish their Contempts in not appearing; and when they are assembled, the Bishop ought, by a Charge given, which is in *Latin* called *Allocutio* or *Admonitio Episcopi*, to inform them of their Duty, and to exhort them to perform it †; for in respect of the Clergy, the two principal Parts of a Visitation was a *Charge* deliver'd, and an *Enquiry* made. The *Enquiry* was made according to certain Articles drawn out of the *Canons*, unto which the *Juratores Synodi*, or the *Testes Synodales* (as the *Canonists* call them ‖) were to give in their Answers upon Oath; which was therefore stiled *Juramentum Synodale*, the Bishop's Visitation being accounted an *Episcopal Synod*: For after the Bishop himself had in his Synod made a fit and proper Speech or Charge to his Clergy, he was wont to call out seven or more Persons among the People of his Diocess (as he thought fit) and to these, being all Men of mature Age, and eminent Honesty and Veracity, he ad-

† vi. 3. 20. 1.

‖ Innoc. in Nov.

* vi. 3. 20. 1.

† vi. 3. 20. 1, 5.

‖ 10 Q. 1. 10 & 11.

* Cl. 3. 10. 2.

† Regin. Collect. Can. lib. 2. p. 205.

‖ Regin. Collect. lib. 2. p. 204. 35 Q. 6. 7.

adminiſtred an Oath, called the *Synodal Oath* (as aforeſaid) *viz. That they would, according to the beſt of their Knowledge, upon enquiry into the Crimes and Exceſſes committed by Perſons within his Dioceſs, diſcover and preſent them to the Biſhop for his Cognizance thereof:* And their Detection was term'd a Preſentment. Theſe Perſons are in our Law-Books called *publick Witneſſes*; and, therefore, they might on the Account of *Infamy* be ſet aſide from giving their Evidence, if they became infamous after they were admitted into their Office: but they could not be reprobated, if they only err'd (perhaps) in giving their Teſtimony, and corrected themſelves immediately, and did not do this with an Intent of Deceiving; tho' 'tis otherwiſe, if they corrected themſelves after ſome Interval of Time *. Church-Wardens with us are in the Place of theſe *Synodal Witneſſes*.

* X. 2. 21. 7.

Viſitors in their Viſitations, ought not to behave themſelves with Pride and Cruelty over their Subjects †, nor to be burdenſome to them in point of Expences, but only to demand ſuch as are moderate and reaſonable ||: And a Biſhop is oblig'd by the *Canon* Law, to viſit his Dioceſs once every Year (at leaſt) *; and in his Viſitation he ought to make a more particular enquiry into the Lives and Behaviour of his Clergy, that they give no Offence to the Laity; and ought likewiſe to be very careful in his inquiry into the State and Condition of the Edifices belonging to the Church, and the Repairs thereof, if they are decay'd and want mending †. And Viſitors how ſummary ſoever their Juriſdiction be (for they ought to proceed in a ſummary way) yea, though it be even *ſine figurâ Judicii*; yet they ought to hear the Party, and to admit of all legal Defences ||. And this alſo proceeds in ſuch as are Viſitors of Religious Houſes and Orders of Men: For a Monk, that is *de facto* deſpoil'd of his Place wherein he is a Profeſſed, without being heard or admitted to his legal Defence, may ſue for Reſtitution *. But there are ſome Religious Houſes, which are exempt from the Biſhop's Juriſdiction, and theſe are only viſitable by the Pope's Legates or Commiſſioners †. Viſitors deputed to viſit in ſome certain Place, as a College and the like, cannot expedite their Viſitation in any other Place, tho' they may hear private and particular Complaints elſewhere in order to ground a general Viſitation thereon, and well enough do all Acts that are *preparatory* to a Viſitation; but they cannot do any Acts, that are of the Subſtance of a Viſitation (according to *Federicus de Senis* ||, and the reſt of the Doctors) out of the Place deputed. See my *State of the Univerſity of* Oxford †.

† 10 Q. 3. 7.

|| 10 Q. 3. 9.

* 10 Q. 1. 9 & 10.

† 10 Q. 1. 11.

|| Fed de Sen. conſ. 55.

* Fed. de Sen. ut ſupr.

† Joh. de Ath. in Tit. 22. Othob. Conſ. v. *Ciſtercienſes.*

|| Conſ. ut ſupr.

† Pt. 2d. cap. 3.

Of the Union, or Conſolidation of Benefices, &c.

I ſhall next treat of the Union or Conſolidation of Benefices; for Churches may be united, according to the *Canon* Law, upon ſeveral Accounts. As *Firſt*, To the end that ſuch Churches may be again united, which were before illegally divided. 2*dly*, Benefices may be united by that Law on the ſcore of Hoſpitality *, which is not permitted with us in *England*. 3*dly*, On the Account of the Vicinity or Neighbourhood of Pariſhes †. 4*thly*, Through a defect or want of Pariſhioners ||. And, 5*thly*,

* 25 Q. 2. 21. 2.

† Arg. X. 3. 5. 8.

|| 10 Q. 3. 3.

5*thly*, They may ſometimes be united on the ſcore of their Poverty, or the Smallneſs of their Revenues *: which ſeems to be the beſt Reaſon given, if they lie contiguous or near each other. But this Union of Benefices, which was antiently introduced for good Ends and Purpoſes, was, in proceſs of Time, made uſe of to palliate Pluralities and a ſcandalous Non-Reſidence. For Union of Benefices was firſt practis'd, either when a Church was deſtroy'd; or elſe when the Revenues were ſeiz'd upon by Uſurpation, and very little remain'd to ſubſiſt the Curate thereon: in which laſt Caſe the Remainder, together with the Cure of Souls, was transferr'd to the next Church, and all made one Benefice. But the Induſtry of the Courtiers at *Rome* found out; that beſides theſe Reſpects, there might be ſeveral other good Reaſons for uniting Benefices; ſo that by a Collation thereof, much Advantage might accrue to that Court; and thus in favour of ſome Cardinal, or other great Perſonage, under a Pretence of Hoſpitality, thirty or forty Benefices were in divers Places of Chriſtendom united together, as we may read in Father *Paul*'s Hiſtory of the Council of *Trent* †: But an Inconveniency aroſe, becauſe the number of Benefices decreas'd, and the Favour done to one was afterwards done to many without any Demand of Merit at all, to the great Damage of that Court and its *Chancery*. And this was remedy'd with a ſubtle and witty Invention of uniting as many Benefices, as the Pope pleas'd, only during the life-time of him on whom they were conferr'd: By whoſe Death the Union was underſtood to be diſſolv'd *ipſo facto*, and the Benefices return'd to their firſt State. So they ſhew'd the World their excellent Inventions by conferring of Benefices, which were but one in Shew, but many in Fact and Deed: As one confeſs'd, that he had ſtolen a Bridle, concealing that it was upon a Horſe's Head which he had ſtolen with it.

* X. 1. 14. 4. X. 3. 5. 26. Cl. 3. 10. 1.

† Lib. 2. p. 235.

The Union of Churches may be made three ſeveral ways according to the *Canon* Law. *Firſt*, When one and the ſame Perſon is ſet over two different Churches *, which gave the riſe to Pluralities. 2*dly*, When one Church is united to another upon the Account of its great Vicinity, Poverty, or want of a Congregation; the Pariſhioners being driven from their Habitations either by ſome hoſtile Incurſion, or elſe diminiſh'd thro' the Rage and Havock of ſome Diſeaſe and the like: in which Caſe, the Church, that is united, loſes its Right, and makes uſe of the Right of that Church unto which it is united †; the Right of the Biſhop ſtill remaining untouched ‖. 3*dly*, An Union may be made, when two Churches are united together without the one's being in ſubjection to the other; and then that, which is the better of the two, is retain'd and ſerv'd by the *Pluraliſt*: But (I think) this to be a very unwarrantable way of Union in point of Conſcience, whatever it may be in reſpect of the *Canon* Law; ſince it implies an abſolute Non Reſidence on one of the Livings. And to theſe three ways of Union, we may refer all thoſe that are ſo largely enumerated by *Gothofred* and *Hoſtienſis*. Churches annex'd, generally ſpeaking, are deem'd to be the ſame with them to which they are are annex'd: So that in the granting or obtaining of a Benefice, it matters not (according to the *Canoniſts* *) whether the Rights of Churches annex'd, be added or expreſs'd in the Grant of ſuch Benefice or not; provided, the Principal or Mother Church be expreſs'd therein, and the true Value of the Church is annex'd †: For if an Union be founded on the Poverty of another Benefice, the true Value of each Living ought to be expreſs'd in the Union thereof; and all Perſons who have an Intereſt and Concern therein, ought to be ſummon'd to ſhew Cauſe why ſuch Union ſhould not be compleated; otherwiſe ſuch Union ſhall not be valid. For a Biſhop cannot unite Benefices without the

* 16 Q. 1. 48.

† X. 3. 35. 3.

‖ X. 3. 36. 2.

* 16 Q. 1. 48.

† X. 3. 36.

Conſent of his Chapter, and the Patron of the Church unto whom the ‖ X. 3. 24. 7. ſame belongs ‖: But the Pope may do it without the Conſent of either, *propter Magnum Bonum Eccleſiæ*, as the Papal Law ſtiles it.

When an Union is only for the Life-time of the Perſon, the Benefice *revives* (as the Phraſe is) after the Death of the Incumbent *, and returns to its antient State, and its own proper Nature; becauſe ſuch Temporal Union is extinguiſh'd by Time. In the Court of *Rome*, theſe Temporal Unions were call'd Prerogative Unions *ad vitam*, which are very ſcandalous, and own'd by the beſt *Canoniſts* † to be deſtructive of all Order; and invented only to defeat the Canons againſt *Pluralities*. But the only Unions which our Law allows, are thoſe where two diſtinct Benefices are made one for a competent Subſiſtence; and then if the Union be reaſonable, the Diſpenſation within due diſtance is ſo too; provided the Living be under ſuch a Value: But (I think) our Law does not permit a perpetual Union, but only ſo long as the Biſhop ſees Cauſe, having the Patron's conſent hereunto; which is rather a Diſpenſation than an Union; for with us the Rights continue diſtinct. This is by the Common Law of *England* ‖, as well as by the *Canon* Law itſelf, called *a Conſolidation of Benefices*, the Word being made uſe of by each Law, to ſignify the Uniting of two Benefices in one: And the Term is borrow'd from the *Civil* Law; where the Word *Conſolidatio*, properly ſignifies an uniting of the Poſſeſſion or Profit with the Property it ſelf *. As for Example, if a Man by way of Legacy has the *Uſufruct*, and he afterwards buys the Property or Fee-ſimple thereof of the Heir; in this Caſe there is ſaid to be a *Conſolidation* of the *Uſufruct* and the *Property* †, which in our common Books is called an Unity of Poſſeſſion.

* Gomeſ. *de* Reg. *poſſeſſ.* Q. 8.

† Compeg. *de Union.* n. 1. S. 10, &c. Flam. Paris. *de Reſign.* lib. 12. c. 3. N. 49.

‖ Brook's Tit. *Union.* 37 H. 8. c. 21.

* D. 7. 2. 3. 2.

† D. 7. 2. 6. 1.

And as Benefices cannot be united without the Biſhop's Act, and the Patron's Conſent, according to the *Canon* Law; ſo neither can they be divided without ſuch a Concurrence: For a Biſhop may, *ex cauſâ probatâ*, ‖ X. 3. 5. 26. divide a Prebend, Church or Dignity ‖. He may divide, change or diminiſh the ſame, where Benefices of this kind are endow'd by the Biſhop and Chapter only *: But if they are endow'd by other Perſons, tho' by Laymen, they may not then be divided, changed or diminiſh'd by the Biſhop without their Conſent †; tho', by the Papal Law, 'tis otherwiſe in ſuch a Diviſion as his Holineſs is pleaſed to make thereof; for in ſuch a Caſe, the Oppoſition given hereunto by a ſecular Perſon availeth nothing *propter Magnum Bonum Eccleſiæ*; becauſe the Pope, who is *Lex animata in terris* (according to the *Canoniſts*) has determin'd to have it ſo. But in a Diviſion or Union of this kind, 'tis not neceſſary that the Church ſhould be void, or that the ſurviving Rector's Conſent ſhould be had; tho', heretofore, the Doctors doubted about this Matter. But to the end that ſuch a Diviſion ſhould be binding, four Things are neceſſary. *Firſt*, The Conſent of thoſe to whom the Church belongs ‖. *2dly*, That they do intend to increaſe the Number and Benefices *. *3dly*, That there be a reaſonable Cauſe for ſuch Diviſion †. And *4thly*, That it be a fat Benefice, and ſufficient to maintain two or more Clergymen from the Income thereof ‖. By a *Legatine* Conſtitution in *Lindwood* *, there ought to be but one Prieſt or Rector in one and the ſame Church, who ought to be in full Orders, of a holy Life, perfect in Learning, and of ſound Doctrine; And therefore, this Canon forbids a Church to be divided into ſeveral Rectories or Vicaridges without the Biſhop's Conſent had thereunto, and a ſuitable Allowance ſettled on each Parſon who was to have the Cure of Souls annex'd to his Portion; and to reſide on his Living. But in thoſe Days (I think) Laws againſt ſplitting of Benefices were needleſs, unleſs it were to reſtrain Patrons as this was made; for ſcarce any one Living was large enough for the Avarice of one Man at that Time.

* X. 5. 31. 8.

† 16 Q. 7. 33 & 34. Inn. & Compoſt. in c. 8. X. 1. 2.

‖ X. 3. 5. 25. 1.

* Arg. X. 3. 5. 25. v. *propter quod inſtitutionem.*

† 10 Diſt. 1. 1.

‖ X. 3. 5. 26.

* Othon. Tit. 11.

Of

Of the Voidance, or Vacancy of Church-Benefices, &c.

HAVING under the foregoing Title diſcours'd of the Union and Diviſion of Benefices, I ſhall here ſay ſomething of the Voidance of Benefices; leſt a Beneficiary ſhould falſly uſurp to himſelf a Title without any Foundation in Law. Now the Voidance of a Benefice, is, when the ſame becomes deſtitute of the Clerk that held it by way of Title, or *in Commendam*; or, in other Terms, it is a ſeparation of ſuch Clerk from his Benefice: And, in this Senſe, the Lawyer *Martianus* *, calls a Widow by the Name of *Vacans mulier*. Benefices are ſaid to be void or vacant ſeveral Ways, according to *Andreas* on the *Canon* Law †, *viz.* By Death, Reſignation, Deprivation, Tranſlation and Permutation: But for a fuller Account hereof, in reſpect of Tranſlation and Permutation, the Reader may conſult the Archdeacon's Comment on the Law, quoted in the Margin ‖; for, according to him, Benefices are always ſaid to be void whenever they want their proper Miniſters *. And a Church is alſo void (ſays *Compoſtella*) that has an Heretical Paſtor or Teacher belonging to it †: But (I think) ſuch Benefice is only Voidable, and not void *ipſo Jure*, as ſome of the *Canoniſts* would have it; for a declaratory Sentence is neceſſary hereunto. And laſtly, a Benefice is ſaid to be void by the Aſſecution of a ſecond Benefice which is incompatible with the firſt ‖; and this our Common Lawyers call *Ceſſion*.

* D. 48. 6. 5. 2.

† vi. 1. 3. 10. v. *vacabunt.*

‖ v. *vacabunt.*

* Arch. in c. 4. vi. 1. 6. v. *vacant.*

† Bern. in c. 1. X. 5. 13. v. *firmitate.*

‖ X. 3. 5. 28.

But for the clearer underſtanding of this Matter, 'tis to be obſerv'd, That Benefices are ſaid to be void either, 1*ſt*, *Ipſo Facto tantùm*; or, 2*dly*, *Ipſo Jure*; or, 3*dly*, By a Sentence; or, laſtly, *Ipſo Facto & Jure ſimul.* A Benefice is void *ipſo Facto tantùm*, (as we ſay) and not *ipſo Jure*, when any one ſhall quit a Benefice, being driven thereunto either thro' Force or Fear, or elſe is diſturb'd in the Poſſeſſion thereof: For ſuch a Benefice is not really and truly vacant *. Alſo when a Benefice is collated on or given to an abſent Perſon, who does not accept of ſuch Benefice †: For, according to *Boerius* *, ſuch a Benefice is only void *de facto* and not *de jure*. A Benefice is ſaid to be loſt and void *ipſo jure*, when any one is, *eo ipſo*, depriv'd thereof by a Conſtitution of Law, for that he has done ſomething which he ought not to have done; and when he forfeits the ſame without any Sentence of Deprivation on the Account of the Fact itſelf committed ‖. And 'tis the ſame Thing, when any does not do that which he is oblig'd to do, if the Law makes it void by its own Declaration: And then ſuch Benefice may be collated to either by the Biſhop, or conferr'd by any other Perſon that has a Right of diſpoſing of the ſame, tho' the Perſon who is, *ipſo jure*, depriv'd, may be *de facto* in poſſeſſion of ſuch Benefice, but he cannot be depriv'd of the real Detention without a Summons *, as in the Caſe of Non-Reſidence. For a Benefice is void *ipſo jure*, either *ex delicto*, or elſe *ex quaſi delicto Titularii*. And firſt, 'tis void *ex quaſi delicto*, when any one that has a Benefice with the Cure of Souls obtains a ſecond Benefice without a Diſpenſation, having alſo the Cure of Souls annex'd to it; for in ſuch a Caſe, the firſt Benefice ſhall be void *ipſo jure*, not only by the *Canon* Law without any

* X. 1. 40. 3 & 4.

† vi. 3. 4. 17.

* Deciſ. 2. N. 41.

‖ Dd. in c. 10. X. 2. 24. Gloſs. in c. 35. vi. 1. 6. v. *ipſo impedimento.*

* vi. 3. 4. 28.

regard

† vi. 3. 4. 2. X. 3. 5. 8. X. 3. 8. 6. * 21 H. 8. c. 13. || X. 1. 6. 54. † vi. 1. 6. 14. & 35. * 13 & 14 Car. 2. c. 4. §. 41. † vi. 1. 6. 6. extra. 1. de elect. c. 2. || vi. 1. 6. 6. † X. 1. 6. 7.

regard had to the Value of either Benefice †, but even by a Statute of this Realm, if ſuch Benefice be of the yearly Value of eight Pounds or upwards *: But 'tis otherwiſe by both Laws if he has a Diſpenſation ||. *2dly*, After the ſame manner a Benefice becomes void, according to the *Canon* Law, if the Perſon, who obtains the ſame, be not promoted to Prieſts Orders within a Year after he has had quiet poſſeſſion thereof, unleſs he be hindred by ſome lawful Impediment; for by that Law, after the Year is expir'd, the Benefice is void *ipſo jure*, and it may be granted to another †. By the Law of *England*, a Perſon promoted to an Eccleſiaſtical Benefice ought to be in Prieſts Orders at the time of his Inſtitution *; and ſo the *Canon* Law does not take place in this Particular with us. *3dly*, If a Perſon elected to a Benefice does not conſent to ſuch Election tendred him within a Month, or within a Term prefix'd him for that end, ſuch Election is void *ipſo Jure* †. Or, *4thly*, If he ſhall not within three Months, after ſuch Conſent given, ſue for Confirmation of his Election ||; and within three Months after Confirmation ſue for Conſecration †. In the *Romiſh* Church, Marriage of the Prieſt, or entring into a Religious Order, vacates a Benefice; and ſo does ſeveral other Things, too tedious here to enumerate. The ſecond Point I have handled under the Title of *Deprivation*.

Again, 'tis to be obſerv'd, that a Benefice is ſometimes ſaid to be void *de facto & jure*, as by Death and by all other ways of voiding the ſame, when the Title thereunto ceaſes, and, as the *Canoniſts* phraſe it, *ubi non eſt dare perſonam incumbentem poſſeſſioni ejuſdem*, when 'tis not poſſible for a Perſon to be incumbent on the Poſſeſſion thereof: But where a Perſon is *de facto*, incumbent on the Poſſeſſion of a Benefice, without any good Title thereunto, it is then ſaid to be void *de jure*, and not *de facto*. But it is ſaid to be void *de facto*, and not *de jure*, when the Poſſeſſion is loſt, but the Property is retain'd; as in the Caſe of a Reſignation made, but not admitted by him into whoſe Hands ſuch Reſignation is made; ſo that tho' the Perſon reſigning the ſame be not incumbent on the Poſſeſſion, yet he has a Right thereunto, till the Ordinary accepts of his Reſignation ||. A Benefice is alſo void *de facto*, and not *de jure*, when Rector or Parſon thereof becomes unfit to ſerve the Cure, or attend the ſame *. If a Perſon having a Prebend or Dignity, be admitted to another Prebend or Dignity, either in the ſame or any other Church, the firſt Prebend or Dignity is void according to the *Canon* Law, even tho' the ſame ſhould be confirm'd unto him by his Superior: But this Law is not obſerv'd among our Dignitaries here in *England*.

|| X. 1. 9. 4. * X. 1. 7. 2. & Dd. ibi.

By a *Legatine* Conſtitution in *Lindwood*, to prevent any Injuſtice done to an abſent Perſon, 'tis decreed, that no Perſon having the Right of Preſentation, ſhall preſume to preſent any one to a Church †, without a juſt and probable Knowledge of the Voidance of ſuch Church; nor ſhall any Biſhop grant Inſtitution to a Perſon preſented by the Patron, before he is certify'd of the Death or Ceſſion of the laſt Incumbent, either by Letters under an *authentick* Seal, or elſe by the Oath of proper Witneſſes; or, laſtly, by the Preſence of the Perſon voiding ſuch Benefice by Ceſſion. And if any one ſhall intrude or receive Inſtitution contrary hereunto, he ſhall not only be depriv'd of ſuch Benefice, but be for ever render'd incapable of obtaining the ſame. And if there be a plain and open *Conſtat*, that the Incumbent is living, both the Perſon granting Inſtitution, and the Clerk inſtituted, ſhall make good the Damages and Expences to the Perſon thus extruded; and the Perſon granting Inſtitution, ſhall be ſuſpended *ab Officio & Beneficio*, as well as the Perſon inſtituted puniſh'd, who ſuffers Deprivation hereby.

† Othon. con. Tit. 11.

Of

Of Uſury, Perjury, and Idolatry; and the Puniſhments thereof.

IT appears by the Authority of divers Parliaments, that *Uſury*, as well as *Perjury* and *Idolatry*, are puniſhable in the Eccleſiaſtical Courts: But becauſe theſe Crimes are ſeldom impleaded and puniſh'd there, (the two former eſpecially, being of a mix'd Juriſdiction) I ſhall not allow them diſtinct places in this Work; but throwing them together under this Title of *Uſury*, treat of them aſunder in the Order I have above rang'd them. And firſt of *Uſury*, 'tis ſaid, *That the King and his Temporal Courts ſhall have the Cognizanze of Uſurers, when dead; and the Ordinaries of holy Church ſhall have the Cognizance of Uſurers, when alive, as to them it appertains to make Compulſion by the Cenſures of holy Church for the Sin of Uſury, and to make Reſtitution of Uſuries taken, againſt the Laws of holy Church* *. But this Act is repeal'd. And by another later Act made againſt Uſury, *There are reſerv'd to the ſpiritual Juriſdiction their lawful Puniſhments in every Cauſe of Uſury* †. This Act is alſo repealed And ſo 'tis alſo mention'd in the Statute *de Excommunicato Capiendo* ‖. But the Juriſdiction of the Eccleſiaſtical Court is ſince reſtrain'd in ſome reſpects, becauſe Uſury cannot now be puniſh'd or corrected thereby, except it reaches above the Rate of ten Pounds in the Hundred *per Ann.* according to a Statute in Queen *Elizabeth*'s Time *; or rather five *per Cent.* by a Statute made in Queen *Ann*'s Reign.

* 15 E. 3. c. 5.
† 11 H. 7. c. 8.
‖ 5 Eliz. c. 25.
* 13 Eliz. c. 8.

But, according to the general Definition or Notion of Uſury given in the Books of the *Civil* and *Canon* Law, it is ſaid to be that Sum of Money, or whatever elſe, the Borrower pays unto the Lender beyond the principal Sum lent him, upon the account of ſuch Loan ‖: And 'tis called *Uſury* in reſpect of the *Uſe* of ſuch Loan, and among the more correct and polite Authors in the *Latin* Tongue, 'tis called *Uſus ipſe*, or Uſe it ſelf, as being often taken for that Advantage which a Man receives from the Uſe of Money lent. For, according to the common Opinion of the Doctors, Intereſt or Uſury does not properly accrue, unleſs it be on the account of ſome Loan made, and this has reſpect to the Form of the Contract, which, by the *Civil* Law, makes Uſury either Criminal or not ſo. And thus Uſury is ſometimes by the *Civilians* ſtiled *Lucrum ſine damno*, and *Lucrum non ſine damno*, in reſpect of that Damage which the Lender ſuſtains from the Uſe which another Perſon reaps from the Loan of his Money. The *Canoniſts*, who diſtinguiſh Uſury into what they call *lucratory* and *mental* Uſury, (for in reſpect of a deprav'd Intention, any Profit or Lucre conceiv'd in the Mind, they deem *mental* Uſury) ſtile this *lucratory* Intereſt; and this firſt kind of *lucratory* Intereſt is forbidden both by the *Civil* † and *Canon* ‖ Law, as it was alſo heretofore by the Law of God given unto the *Jews* by *Moſes* *. But by the *Civil* Law, Intereſt or Uſury is ſometimes given *in Pœnam*, by way of Penalty; becauſe one Man retains another's Goods or Money contrary to the Will of the Proprietor: For if the Borrower ſhall delay Payment, or defer making Reſtitution of the Money borrow'd, he may be ſued in an Action, as well to make good the *Lucrum Ceſſans*, as to repair the *emergent Damage*. And from hence I infer, that

‖ D. 2. 14. 17. in prin. D. 12. 1. 11. 1. X. 5. 19. 1 & 2.
† Bart. poſt. Gloſs. in l. 1. c. 1. 1. n. 5. Jaſ. ibi. n. 47.
‖ X. 5. 19. 10. X. 5. 19. 3. 4. 14.
* Exod. c. 12. Lev. c. 15. Ezech. c. 18.

that there are two *Species*, or different Kinds of *Uſury*, according to the *Civil* Law. The firſt relates to that, which is odious in the Eye of the Law, and is prohibited (as aforeſaid) upon the account of Humanity: And as to the ſecond, it is permitted even by the *Canon* Law †; for *Panormitan* ſays, that ſomething may be demanded, even by the *Canon* Law, beyond the Principal, not only in reſpect of the Damage that happens, but alſo from the Profit which ceaſes to ariſe from the Principal; and ſo Damage in this Caſe is not deem'd as *Uſury*, but as an Amend or Satisfaction made for the *Lucrum Ceſſans*, or the *emergent Damage*: which ſeems to me to be a very nice Diſtinction to palliate the groſſeſt Uſury, where the Intereſt is not limited by ſome Law, as it is not by the *Canon* Law. For by this Law, a Perſon, who ſays, that the Crime of Uſury is lawful, is an Enemy to the Law of God; and aſſerts two Contradictories to be true at one and the ſame time, contrary to the Rules of good *Logick, viz.* A Crime, and a Thing lawful. And, according to that Law, he, who believes it to be lawful, is deem'd a Heretick, becauſe he is guilty of an Error (ſay the *Canoniſts*) in a certain Article of Faith, as not believing the Goſpel ‖, nor the Scripture of the *Old Teſtament*. *Manifeſt* Uſurers by the *Canon* Law, ought not to be admitted to the Communion of the Altar, nor to make any Oblation thereunto; nor ſhall they receive Church-Burial; and ſuch of the Clergy as ſhall admit them thereunto, or give them ſuch Burial, ſhall ſtand ſuſpended from the Execution of their Office till they make Satisfaction for their Offence *ad arbitrium Epiſcopi* *. But becauſe this is a Crime of a *mix'd* Juriſdiction, *viz.* In ſome reſpects of a Temporal, and in others, of Eccleſiaſtical Cognizance, 'tis probable that frequent Prohibitions would come to the Spiritual Courts, if they ſhould pretend to determine what are *uſurious* Contracts: And therefore, Suits are ſeldom or never in theſe Days commenc'd there for Uſury.

† X. 3. 22. 2. Gloſs. in c. 8. X. 5. 19. v. *de Feudo.*

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Secondly, In reſpect of *Perjury* or the *Breach of an Oath*, by the *Canoniſts* ſometimes in *Latin* called *læſio Fidei*, 'tis affirm'd by ſeveral Laws, that the Eccleſiaſtical Court has alſo Cognizance of this Matter. For in the Statute of *circumſpectè agatis* † (amongſt divers other Matters) the Breach of an Oath is mention'd as one: and in the end of the Statute it is thus added, *viz. In all Caſes before rehears'd, the Spiritual Judge ſhall have Power to take Cognizance, notwithſtanding the King's Prohibition.* And by the aforeſaid Statute of *Elizabeth*, *De excommunicato Capiendo* ‖ (among ſundry other Crimes and Offences) *Perjury in the Eccleſiaſtical Court is reckon'd to be of Eccleſiaſtical Juriſdiction.* And ſo 'tis by a *Proviſo* in the Statute againſt Perjury made in the ſame Reign *. By the Books of the Common Law, I find two Caſes to be determin'd by the Temporal and not by the Spiritual Court, wherein the Breach of an Oath is called *læſio Fidei*, ſuch Oath being taken voluntarily either before an Eccleſiaſtical Judge (as was much uſed in thoſe Days) or elſe in a private manner: As the Vicar of *Saltaſh*'s Caſe (already remembred) † wherein a Prohibition went forth, and no Conſultation could be obtain'd; becauſe a Man ſhall not be ſued before the Ordinary for *Perjury*, unleſs it be where the principal Matter whereon the Perjury grew be a Spiritual Matter, or the Oath taken in the Spiritual Court and the like: And the Reaſon there alledg'd was ‖, becauſe if he ſhould there be found guilty of Perjury, the Spiritual Court would immediately award or compel him to perform the Oath whereon ſuch Perjury grew, and whereof he is attainted; and ſo, though it were to pay Debts, yet he would be there compelled to pay them, and thus ouſt the Temporal Courts of their Juriſdiction, and Lay-Con-

† 13 Edw. 1.

‖ 5 Eliz. c. 23.

* 5 Eliz. c. 9.

† Pag. 215.

‖ M. 2. H. 4. 15. Dr. & Stud. lib. 2. c. 24.

Contracts would be there determin'd contrary to the Laws of the Realm. And it would be the same Thing in the Case of a *Feoffment*, as it once was ‖, if Persons were allow'd to sue generally in the Spiritual Court *pro læsione Fidei*. For we read, that a Person having sworn or taken an Oath to make a *Feoffment* of his Land, was sued in the Court Christian for Perjury, in not performing his Oath; and because the Suit was in order to compel him to perform a Thing which did concern Land and Inheritance, it was adjudg'd in such a manner, as if he had sued there for the Principal; and a Prohibition went out accordingly. So if a Man and his Wife do alienate the Wife's Right, the Wife being sworn that she will not sue the *cui in vitâ*; and yet after her Husband's Death brings this Writ, and the other sues her in the Court *Christian* for Breach of her Oath, she shall have a Prohibition *. In pursuance hereof we have a Judgment given long since, *viz.* When one sued another in the Spiritual Court *pro læsione Fidei*; the Oath arising on a temporal Contract or Cause: And *Bracton*, who wrote at that Time, says †, *In placito quod pertinet ad coronam & dignitatem regis, etsi fides fuerit apposita in contractu, non propter hoc pertinebit cognitio super Principali ad judicium Ecclesiasticum.* And in another place of the same Book he assigns a Reason for it; because, says he, *Jurisdictionem regiam non mutat fidei interpositio, Sacramentum præstitum, nec spontanea renunciatio partium* ‖. But when *Faith* is made touching a matter Spiritual, then the Breach thereof shall be punish'd in the Spiritual Court: As when one swears to pay me his Tithes truly, or a Woman swears to marry with me †. And thus we are told by a Treatise of the *Common Law*, printed in *Henry* the VIIIth's Time against *the Bishop of* Rome's *Supremacy here, by the Laws of the Realm* *; "That in most Cases of Perjury, the King and his Courts have had the "Punishment, and in some Cases, the Clergy and their Courts have had "the Punishment by the Custom of the Realm only, *viz.* Such as has "arose on Spiritual Causes." Now Perjury, according to *Julius Clarus*, is defin'd to be a Lye confirm'd by the Force of an Oath: And as to the Punishment thereof, according to the *Civil* and *Canon* Law, the guilty Person is first render'd *infamous*; tho', by the *Civil* Law, a perjur'd Man is not made infamous *ipso Jure*, unless it be in the Case mention'd in the Law here quoted †. But according to the common Opinion of the Doctors, a perjur'd Man is not render'd infamous by an *Infamy of Law*, as *Felinus* observes in his Treatise of Witnesses. But to the end that any one should incur *Infamy* on the score of Perjury, 'tis necessary he should contravene his Oath and Promise; for if he only contravenes his Oath, he is not render'd infamous by the Gloss on the *Civil* Law ‖. See *Cagnol* in Lib. 21. Cap. 2. 4. And, therefore, whenever any one asserts a Thing *de præterito* or *de præsenti* with an Oath, and that thing is false, he becomes infamous by such Perjury committed on the score of that *assertory* Oath: But if he shall by an Oath promise any thing *de futuro*, and shall not do it, then by such Perjury committed on a *promissory* Oath, he shall become infamous immediately, according to the Doctors; and thus the aforesaid Gloss distinguishes in favour of the *Canon* Law *. Though a Clerk may be depriv'd of a Benefice, which he has obtain'd, on the score of Perjury; yet, according to the more receiv'd Opinion of the Lawyers †, he shall not be depriv'd *ipso Jure*: for *Felinus* and *Ripa* do both agree, that he ought to be decreed *privandum fore*. See *Sylva*, *de Beneficiis* ‖, and *Rebuffus*, *de pacific. Possess.* *. But if a Clerk guilty of Perjury be afterwards instituted into a Benefice, such Institution is void *ipso Jure*, according to *Lambert*, *de Jure Patron.*†; and this is the common Opinion of all the Doctors: But then this ought not to be understood,

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* Fitzh. Tit. Pron. 12. ex Reg.

† Lib. 5. c. 2.

‖ Lib. 5. c. 9.

† M. 20. E. 4. 10.

* Cap. 1.

† C. 2. 4. 41.

‖ D. 3. 2. 21. v. *debet autem.*

* X. 2. 19. 11.

† Gomes. in §. 37. J. 4. 6.

‖ Fol. 137. n. 7 & 8.

* Fol. 37.

† Part 1. lib. 2. Q. Art. 15.

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‖ Fol. 137. n. 7 & 8.

* Fol. 37.

† Part 1. lib. 2. Q. Art. 15.

derſtood, ſays *Lambert*, when he is become infamous for Perjury. *Sed Quære.* Perjury may be committed three ways, according to the *Canoniſts* †, *viz. Firſt*, By taking an Oath againſt a Man's Conſcience; and ſuch an Oath God will ſurely avenge hereafter. *2dly*, By taking an unlawful Oath. And *3dly*, By acting againſt, or contrary to the Oath a Man has taken. And as a perjur'd Man is both by the *Civil* and *Canon* Law ſet aſide from bringing his Action, or of being Plaintiff in a Cauſe; ſo, according to the Commentators, he is repelled from giving Evidence, and being a Witneſs in a Court of Judicature.

† Lindw. lib. 1. Tit. 11. c. 1. v. *Perjurio.*

Laſtly, In reſpect of Idolatry it appears by the Statute *de excommunicato capiendo* † before quoted, that the ſame is puniſhable in the Eccleſiaſtical Court: But as we have no ſuch hardned Perſons in their Ignorance and Superſtition, but the *Papiſts*, among us, whom we can charge with Idolatry, and thoſe too, as they ſay, do only profeſs a relative Worſhip of Images; I ſhall not here inſiſt upon this Branch of my Diviſion of this Title.

† 5 Eliz. c. 23.

Of Laſt Wills and Teſtaments, Codicils, &c.

THERE are two ſorts of Succeſſion to the Eſtates of Men deceas'd, *viz.* Succeſſion by Laſt Will and Teſtament, and that which the *Civilians* call *Inteſtate Succeſſion*. I have already treated of the latter; and, therefore, I ſhall only here ſpeak of that which is made by a Laſt Will or Teſtament duly made and executed. Now a Teſtament is ſo called, according to *Juſtinian*, from theſe two *Latin* Words, *viz. Teſtatio Mentis* *, becauſe the Perſon making the ſame, does thereby declare and teſtify his Mind touching what he would have done with his Eſtate after his deceaſe. But *Valla* † rejects this Etymology on the Authority of *Aulus Gellius* ‖, ſaying, that *Ornamentum*, *Veſtimentum*, *Calceamentum*, and other Words of the like kind, may as well be deriv'd from the Word *Mens*, as that of Teſtament: But this cannot be, for ſeveral Reaſons. But the word Teſtament, according to *Viglius* *, is deriv'd from *Teſtatio* only, as *Donation* is from the Verb *Dono*; and the Addition is for Declaration ſake: Tho' *Theophilus* thinks this Word to be compounded of *Teſtatio* and *Mens* for *Emphaſis* ſake, in order to ſhew a greater Manifeſtation of the Mind: But this *Emphaſis* not appearing in the word *Velamentum*, *Calceamentum*, *Veſtimentum*, *&c.* theſe are therefore Primitives †. From what has been ſaid,

* J. 1. 10. 1. in prin.

† Lib. 6. Eleg. c. 36.

‖ Lib. 6. c. 12.

* In l. 35. D. 39. 6.

† Oldenb. lex.

A Teſtament, according to *Ulpian* ‖, is defin'd to be a juſt Sentence or Declaration of a Man's Mind or Will, touching that which he would have done with his Eſtate after his death. The Word *Sentence* in this Definition, is a generical Term, including every kind of Will; and the Words *Voluntatis noſtræ*, which *Ulpian* makes uſe of in his Definition, are there added to exclude Bondmen, Children in the power of the Father, Perſons not arriv'd at Puberty, Madmen, Prodigals, and the like *; becauſe theſe Perſons have not the free Power and Government of their own Will: Wherefore, their Sentence or Declaration is not deem'd to be a Will in Law †. I here call it a *Teſtament*; becauſe, according to the Doctors,

‖ In l. 1. D. 29. 3.

* J. 2. 12. 1, 2, 3, &c.

† Ut ſupr.

Doctors, a Teſtament, in Propriety of Speech, differs from a Laſt Will; ſince only that is properly call'd a *Teſtament*, when 'tis made with all the Solemnities neceſſary thereunto, and not otherwiſe: But it may be ſtiled a *Laſt Will*, though it be not perfect and conſummate in every reſpect *; and in this Senſe, a Donation *mortis cauſâ* may be term'd a *Laſt Will*, but not a *Teſtament* †; and ſo may a *Codicil*, according to *Ancharanus*, be taken for a Laſt Will; for as *Bartolus* obſerves ‖, an imperfect Teſtament proves the Will of the deceas'd. And conſequently whenever any Solemnity is wanting, which the Law requires, it may from hence be ſtiled a *Laſt Will*, tho' there be a *Conſtat* of the Diſpoſition of Lands and Goods made in a defective Manner, if ſuch Diſpoſition be afterwards chang'd. But Laſt Wills and Teſtaments may be underſtood either *conjunctively* or *disjunctively*: Conjunctively, for one and the ſame Thing; becauſe the Teſtator's Laſt Will being ſometimes ſuperadded by way of *Codicil* to the Teſtament firſt made, the ſame is proved together with a perfect Teſtament without changing the Teſtament. So that this Monoſyllable (*et* or *and*) whoſe Property it is to conjoin, ſometimes ſtands *disjunctively*, and makes a Laſt Will and Teſtament ſometimes to be the ſame, and ſometimes to be different Things in our Law-Books: And thus it often happens, whereas otherwiſe a Diſpoſition of Law would be repugnant unto itſelf *. Therefore, that we may know, when the Conjunctive (*and*) is put disjunctively, we muſt conſider; That a Copulative is ſometimes placed between two Contraries, and Things incompatible; and then 'tis reſolv'd into a Disjunctive †. Sometimes 'tis put between ſuch Things as are in ſome reſpect the ſame; and then if one Thing be neceſſarily inherent to the other, the *Copula* is thrown away and reſolv'd into an *Adjective*, as *Placitum & Conſenſus* for *Placitus Conſenſus*: And thus theſe two Words, *Teſtament* and *Will*, may be here taken for a Teſtamentary Will. A Teſtament is a ſolemn Laſt Will; and a Laſt Will is an unſolemn Teſtament: Therefore, I ſhall in the next place conſider, what it is that makes a ſolemn Will; and the Validity thereof. And,

* In l. 51. D. 40. 5. in l. 2. C. 6. 42.
† D. 39. 6.
‖ In l. 51. D. 40. 5.

To the Validity of a ſolemn Will theſe following Things are required, according to the *Civil* Law, *viz.* *Firſt*, That it ſhould be written either by the Teſtator himſelf, or by ſome other Perſon through his Order, in Letters and Words at Length *; and that an Heir, whom we call an Executor, be appointed in expreſs Terms. † *2dly*, That it ſhould be ſubſcrib'd or ſign'd by the Teſtator himſelf, or by ſome other Perſon in his Name, and on his Account; and this in the Teſtator's Preſence, and before ſeven Witneſſes that are *Roman* Citizens, being particularly requeſted hereunto in regard to the Solemnity thereof *. And *3dly*, 'Tis neceſſary that theſe Witneſſes ſhould either ſubſcribe themſelves in their own Perſons † (if they can write) or elſe one Witneſs may ſubſcribe for another, if there ſhall be found ſo many Perſons that can write ‖. And moreover theſe Witneſſes ought to ſign the Will either with their own Seals; or with the Seals of other Men, if they have none of their own *. If any other Perſon than the Teſtator wrote the Will, then the Teſtator was to ſubſcribe it himſelf †: But if he himſelf wrote it with his own Hand, and therein declares the ſame; then it was not neceſſary, that the Teſtator ſhould ſubſcribe his Name *; and if the Teſtator had ſo little Learning that he could not write, then an eighth Witneſs ſubſcrib'd in his Name †. And ſo careful were the antient *Romans* to prevent the Forgery of Laſt Wills and Teſtaments, that (beſides theſe ſeven Witneſſes) they had the Faith of a Notary Publick to atteſt the ſolemn Ordination of them ‖. But tho', regularly ſpeaking, all Wills ought to have the Atteſtation of ſeven Witneſſes and a Notary: Yet a leſs Number of Witneſſes was

* D. 28. 1. 21. 1.
† C. 6. 23. 19. & l. 21.
* C. 6. 23. 19.
† C. 6. 23. 21.
* D. 28. 1. 22. 2. C. 6. 23. 12.
† C. 6. 23. 29.
* C. 6. 23. 18.
† C. 6. 23. 21.
‖ C. 6. 23. 21.

ſufficient in ſome Caſes; for a Will made by a Father *inter Liberos*, does not require the Solemnities of the *Civil* Law, but only thoſe of the Law of Nations*; and by the Law of Nations, two Witneſſes are ſufficient. So likewiſe by the Law of Nations, a Woman may be a Witneſs unto a Will, which ſhe cannot be by the *Civil* Law †: Nor is it neceſſary by the Law of Nations, that Witneſſes ſhould be ask'd. And in the ſame manner a leſſer number of Witneſſes are ſufficient, if the Will be regiſtred or engroſs'd as the Act of Court ‖, though it be done in a private manner*; and 'tis the ſame Thing, if ſuch Will be made in the Time of War, or of any Peſtilence and the like †. And by the *Canon* Law, in reſpect of Wills made *ad pias Cauſas*, a leſs number of Witneſſes are ſufficient ‖. But in foreign Countries, govern'd by the *Civil* Law, two Witneſſes, with the Credit of a publick Notary, are enough at this Day; and in *England* two Witneſſes without a Notary Publick (unleſs it be in the Caſe of Lands devis'd, where three are required *,) are ſufficient; becauſe all our Wills are military Teſtaments.

* C. 6. 23. 21. 1.
† J. 2. 10. 6.
‖ C. 6. 23. 19.
* C. 6. 23. 21.
† Alex. conſ. 70 & 177. vol. 2.
‖ X. 3. 26. 10.
* 29 Car. 2. c. 3.

A Teſtator made his Laſt Will and Teſtament in a Country, where it was ſufficient to make the ſame in the Preſence of a Notary Publick and two Witneſſes, as in *Holland*; *Quære*, Whether ſuch a Will ſhall be deem'd valid even in thoſe Places and Countries, where ſeven Witneſſes, and the greateſt Solemnity is required, as in *Zealand*, where they follow the Rules of the *Roman* Civil Law herein? The Commentators on the firſt Law of the Code *de Trinitate* † do in common affirm the Validity of ſuch a Will: And according to this Opinion, it has been often adjudg'd *; yet ſome are of a contrary Mind, thinking we ought to diſtinguiſh on the Queſtion propos'd in this manner, *viz.* That this common Opinion ought to be admitted as Law in reſpect of Debts and Things moveable. But in reſpect of things immoveable and fix'd to the Soil, we ought to conſider the Law of the Place where they are ſituated. For things moveable, becauſe they may be carry'd to any place whatever as depending on the Will and Pleaſure of the Owner, ought to follow the Owner's Perſon, and not the Laws of any certain Place: But Things immoveable, whoſe Situation is certain and perpetual, ought to be govern'd according to the *local* Conſtitutions of the Country where the Poſſeſſion lies †. Tho' the Laſt Will of a Teſtator ought to be obſerv'd, regularly ſpeaking, as a Law; yet this does not proceed and take Place, if he orders and diſpoſes of any thing contrary to Law and Equity, for a Teſtator cannot Decree and Ordain, That the Laws ſhould not take place in his Teſtament *. For all Precepts inſerted in a Laſt Will and Teſtament in fraud of the Law, are invalid: For the Precepts of a Teſtator are to be underſtood to have been founded upon Juſtice, and not upon Injuſtice. A publick Will made by the Hand of a Notary with ſeven Witneſſes is fully prov'd, tho' the Witneſſes be all of them dead.

† C. 1. 1. 1.
* Guid. Pap. Dec. 262. Mynſ. 5. Obſ. 19 & 20. Gail. 2. Obſ. 123.
† X. 3. 26. 16.
* X. 3. 26. 15.

There were heretofore among the *Romans* three ſorts of Wills in uſe, one of which was made in the general Diet or Aſſembly of the People in Times of Peace; another was made *in Procinctu* (as the ſaying was) *viz.* when Men were ſummon'd to go into Wars; and a third ſort was made *per Emancipationem familiæ* by the Means of the *Æs* and *Libra* †. But upon aboliſhing of theſe three Kinds of Wills, there ſucceeded in the place thereof, a twofold kind, *viz.* a *ſolemn* and a *nuncupative* Will, which are ſtill in uſe among ſome People. A *ſolemn* Will is, when the Teſtator reduces the laſt Order and Diſpoſition of his Will into Writing, by obſerving ſome due Solemnities of Law (as aforeſaid) and then offers the ſame to be corroborated by the Evidence of Witneſſes ‖. But a *nuncupative* Will, according to the *Civil* Law, is when the Teſtator declares his Mind or Will in the Preſence of ſeven Witneſſes, without reducing the ſame

† J. 2. 10. 1.
‖ J. 2. 10. 4.

ſame into writing *; and this is ſo called by that Law, whether the ſame be afterwards committed to writing or not. Tho' with us here in *England*, by the Statute for avoiding of Frauds and Perjuries ||, 'No nuncupative Will ſhall be valid, where the Eſtate bequeath'd exceeds 30 Pounds, 'which is not prov'd by the Oaths of three Witneſſes then and there preſent at the making thereof, nor unleſs the Teſtator bids them or ſome of 'them to bear Witneſs, That ſuch is his Will: nor unleſs it were made in 'the laſt Sickneſs of the deceas'd, or in his Dwelling-Houſe, or where he 'had been reſident ten Days or more, except where he was ſurpriz'd from 'his own Home, and died before his Return. And after ſix Months paſſed 'from the time of ſpeaking the pretended Teſtamentary Words, no Teſtimony ſhall be received of ſuch *nuncupative* Will, unleſs the ſaid Teſtimony was committed to Writing within ſix Days after making the ſaid 'Will.' For the *Romans* finding a *ſolemn* and *perfect* Will to be a matter of ſome Difficulty at ſome certain Seaſons, and in ſome Caſes, they, therefore introduced what they call'd a *nuncupative* Will *; and this kind of Will has been in frequent uſe among Men; eſpecially, when they fear that a *ſolemn* Will made as ſuch, wherein ſome of the Solemnities required by Law being omitted, will not be deem'd as valid; nor reckon'd as a *ſolemn* Will, becauſe that is not done which ought to be done; nor will it be taken for a Will *Jure Codicillorum*, becauſe that was not intended by it. In this laſt kind of Teſtament the Teſtator reveals his Will; and in the other he conceals it in writing: And this for two ſpecial Reaſons. *Firſt*, Leſt ſuch Perſons as hope to gain ſomething from the Will, ſhould be provoked to an unwarrantable Hatred of the Teſtator, in Caſe they find themſelves diſappointed. And, 2*dly*, Leſt ſuch as are named Executors, or have Legacies left them, ſhould contrive and procure the Teſtator's Death, either to hinder him from altering his Will, or to come at their Legacies and Expectations ſo much the ſooner. But,

* J. 2. 10. 14.

|| 29 Car. 2. c. 3.

* J. 2. 10. 14.

From what I have juſt now hinted it appears, that there is another Diviſion of Wills or Teſtaments, *viz.* into what we call a *perfect* and an *imperfect* Will or *Codicil:* And this Diviſion may be tolerated without any abſurdity; eſpecially, for the ſake of Inſtruction, the Law not rejecting the ſame as diſagreeable. That is called a *perfect* Will, which has an Executor named and appointed therein by expreſs Terms †: For without the Appointment of an Executor it is no Will at all properly ſpeaking *, but only a legal Diſpoſition; ſo that the Appointment of an Executor is the chief Foundation and Support of a Will or Teſtament ſtrictly ſo called: And ſuch a perfect Will may either be a ſolemn or unſolemn Will; and in writing or without writing, as a *nuncupative* Will is. *Plato*, in the ſecond Book of his Laws, enacts and eſtabliſhes this as one, *viz.* That he who makes a Teſtament ought in the firſt place to inſtitute and appoint one of his Children, whom he ſhall think fit, to be his Heir or Executor, as we ſay: And the *Civil* Law approves of the ſame Thing. For by this Law it becomes the Cauſe of a Perſon's dying *Inteſtate*, if a Teſtator does, *de facto*, paſs by his Son or Child: And, according to *Papinian*, a Teſtament is of no Weight or Moment; when the Son, who was in the Father's power, is paſſed by †. And the Lawyer *Caius* thereupon obſerves; that, among other Things which are neceſſarily requir'd to the ordaining of a Will, the principal Thing is the Teſtator's Power, either in appointing his Children to be his Heirs, or elſe in Diſinheriting them ||: For if the Son, who is in the Father's power, be paſſed by in Silence, the Teſtament is of no Uſe or Advantage to the Teſtator's Deſign of making it a Teſtament. We have likewiſe a Proof of this Law in the *Juſtinian* Code, where 'tis ſaid, That if a Father ſhall in ſilence

† C. 6. 23. 29.

* J. 2. 20. 34.

† D. 38. 5. 1.

|| D. 28. 2. 30.

paſs

paſs by his Son in making his Will, no Advantage ſhall accrue to him from thence: So that if the Son dies during the Father's Life-time, the Father can have no Heir exiſting from that Will; becauſe it was not a legal Will *ab initio*. And, hence it appears what this paſſing by of an Heir means, *viz.* 'Tis the Teſtator's Silence in reſpect of the Perſon not expreſly appointed, or by Name not diſ-inherited: For a Son, by the *Civil* Law, ought either to be expreſly made an Heir by Name, or elſe to be expreſly diſinherited.

Having thus far ſpoken of a *perfect* Teſtament, I ſhall next conſider what we call an *imperfect* one; or in other Terms, a *Codicil*, from the *Latin* Word *Codex*, which ſignifies any haſty or ſudden Epiſtle, according to *Serv. Sulpitius* on *Cicero*'s familiar Epiſtles *: And here ſhew the Difference between a *Codicil* and a *Teſtament*, which is manifold. As *firſt*, becauſe an Heir or Executor muſt be inſtituted and appointed in a Teſtament, as aforeſaid: But in a Codicil, an Heir is neither appointed, nor revoked †; unleſs ſome one has a Privilege granted him of making an Executor by a Codicil (for ſo I ſhall ſtile an Heir in this Place) as this Privilege is granted to Soldiers by the *Civil* Law ‖. For Soldiers have many Privileges in making Wills according to *Jul. Clarus*, who ſays, that theſe Priviledges are extended even to ſuch as are found in an Enemy's Quarters, and in the Camp, tho' they do not fight there. *2dly*, There are ſeveral more Things required to the making of a Teſtament than to the making of a Codicil: For in the firſt, ſeven Witneſſes of fourteen Years of Age (at leaſt) are neceſſary, and theſe muſt be Males, and ask'd to give Teſtimony thereunto (as already hinted;) but in a Codicil four Witneſſes are enough, and it matters not whether they are Males or Females *, or ask'd or not. And, therefore, a *Codicil* is defin'd to be a Laſt Will, veſted with fewer Solemnities than a Teſtament, whereby a Perſon orders and diſpoſes of that which he would have done after his Death, it being publiſh'd and declar'd in the Preſence of five Witneſſes ſubſcribing the ſame. Beſides, in a Teſtament, the Subſcription of all the Witneſſes in Writing, and likewiſe all their Seals thereunto, are held neceſſary: But in Codicils, the Subſcriptions of the Witneſſes alone without their Seals are ſufficient †. Again, there is another Difference, *viz.* That a Perſon may die with ſeveral Codicils by him, provided they do not contradict each other: But he cannot die with more Teſtaments than one by him; becauſe the latter deſtroys and revokes the former. Laſtly, If a Perſon dies after he has made his Teſtament, he is ſaid to die *Teſtate*, tho' he has made no Codicils: But he, who dies after he has made Codicils, and without making a Teſtament, is ſaid to die *Inteſtate*; and, conſequently, his *inteſtate* Heirs, whom we call *Adminiſtrators*, do ſucceed to his Eſtate; and muſt fulfil what he has ordain'd and diſpos'd of by theſe Codicils. And thus a Codicil is not properly a Teſtament.

* In Lib. 4. cap. 12 & lib. 6. c. 18.

† 1 J. 25. 2.

‖ D. 29. 1. 5.

* C. 6. 36. 8.

† C. 6. 36. 8.

Now only thoſe Perſons can make Codicils, who have the Power of making Teſtaments ‖; becauſe the ſame Power ſeems neceſſary for the one as for the other: And the neceſſary Form and Solemnity of a Codicil, according to the *Civil* Law, is, that it ſhould be made by the Application of five Witneſſes (as aforeſaid) thereunto; but by our Law two Witneſſes are ſufficient. Yea, when a Codicil is not made by *Nuncupation*, but ſolemnly and in writing, which is called a *cloſe Codicil*, or a *Codicil*, the Subſcription of theſe five Witneſſes is abſolutely required thereunto *. But this is not neceſſary in *military* Codicils; for theſe only require the ſame Solemnity as *military* Teſtaments; a greater Solemnity not being demanded in a Codicil than in a Teſtament. *2dly*, This Exception holds good

‖ D. 29. 7. 2. 3. D. 29. 7. 6. 3. C. 6. 36. 5.

* C. 6. 36. 8.

good in Codicils relating to Children: For in such Codicils as these, two Witnesses are enough even by the *Civil* Law, as two Witnesses are sufficient in a Testament relating to Children *. The third Exception is in respect of blind Men making of Codicils; and in respect of these only, the same Solemnity is required as is necessary in making of Testaments: And, consequently by the *Civil* Law, seven Witnesses and a Notary are necessary † hereunto; or else some other Person, that supplies the Place of a Notary.

Codicils may be made four several ways, and at several Times. *First*, Before a Testament; when the Testator has made Codicils in the first Place, and afterwards thinks fit to make a Testament: And these Codicils do not fall to the Ground on the Account of a subsequent Last Will and Testament; unless they be therein expresly revoked ‖. *2dly*, A Codicil may be in the Testament itself, as when any one makes a Testament, wherein he adds a Codicillary Clause, in order to be the more certain of the Validity of his Disposition: As that, *if the Testament be not valid as a Testament, it should be valid as a Codicil*; or, *omni meliori Modo, &c.* For tho' a Testament of this kind wants the Solemnity necessary unto a Testament, yet 'tis supported by a Codicil; provided, it has the Qualities requisite to a Codicil: And, consequently, Legacies contain'd in such a Codicil are valid *. And this I affirm, in opposition to the Gloss on the third Law of the Digests, as quoted in the Margin †: where it is said, 'That if a Testament does not subsist as a *Principal*, a Codicil does 'not subsist as an *Accessory*.' But this is a very weak Reason given by the Gloss; because a Codicil is not supported as an Accessory, but as some principal Thing by virtue of the Codicillary Clause. But this ought yet to be understood in a limited Sense, *viz.* Provided, The Testament be not invalid through a Defect of a Will in the Testator; or invalid on the Account of Fraud, Fear, or the like; but only on the Account of some Defect in point of Solemnity. For a Defect of Will cannot be assisted or salved by any Remedy of Law, since the Power of a Last Will and Testament entirely depends on the Will of the Testator. *3dly*, A Codicil may be made after a Testament: For he that has forgot to dispose of any Thing in a Testament, may, after a Testament is made, dispose of that Thing in a Codicil ‖. *4thly*, A Codicil may be made without any Testament either antecedent or subsequent to such Codicil: And then the Person deceased, charges the Heir *ab Intestato* or Administrator without any Testament to do that which he in such Codicil orders to be done; as the Payment of the Legacies, and the restoring the Inheritance to Persons expresly nam'd in such Codicil *. From whence we may infer by the bye: That tho' a Person cannot be directly appointed Heir in a Codicil †; yet he may be indirectly so appointed, by commanding the Heir, *ab intestato*, or the Administrator to restore the Inheritance to another. But though such Heir or Administrator so named in the Codicil or Will annex'd, shall be oblig'd to restore the Inheritance to that Person; yet such Heir or Administrator may retain the fourth part of the Inheritance to himself, which we call the *Pars Trebellianica*; unless in the Codicil or Will annex'd, he shall be prohibited so to do: For the *Pars Trebellianica* may be deducted; provided, it be not particularly forbidden ‖.

An imperfect Testament in Writing among Children is valid, if the Father shall with his own Hand, in clear and undoubted Letters, write down the Names of his Children, and the Number of Ounces or Parts (for the *Romans* divided the Inheritance into twelve Parts) that he designs to give them, and shall distinctly point out their Dividend and the Legacies bequeath'd to them *: But this is otherwise, if it be done by Signs and Characters. And such a Will first made by the Testator, shall not

* C. 3. 36. 26.

† C. 6. 23. 21.

‖ D. 29. 7. 8.

* D. 29. 7. 8

† J. 2. 25. 2.

* Mantic. lib. 3. Tit. 14. N. 11.

† In l. 3. D. 28. 2.

‖ Molin. Disp. 124. Col. 3. Oinotom. in Inst. 2. 25. 1. N. 26.

* C. 6. 23. 21.

be deſtroy'd, unleſs the Teſtator ſhall afterwards, in the Preſence of ſeven Witneſſes, expreſly declare, that ſuch Will is not valid; and makes a ſecond Will that is perfect, or makes an unwritten perfect Will.

Though among other Things which are neceſſarily required in making Laſt Wills and Teſtaments, the Witneſſes ought to be ask'd to give their Teſtimony * as aforeſaid; yet it is not neceſſary to ask them to be preſent at the Will as Witneſſes, but 'tis enough to ask them to be preſent as Witneſſes in general. The Number of Witneſſes, according to *Baldus* †, does not conſtitute the Form, but only the Solemnity of a Will: And the ſame Perſon ſays again, that the Subſtantial Form of a Will does not conſiſt in the Number of the Witneſſes, but only the accidental Form thereof, which the ſaid *Baldus* calls the extrinſick Solemnity of a Will. For the Number of ſeven Witneſſes cannot be the Subſtantial Form of a Will, becauſe the Subſtantial Form thereof cannot be chang'd in any wiſe either by Law or Cuſtom. But no one doubts but that the Number of Witneſſes to a Will may be increas'd or diminiſh'd both by Law and Cuſtom: Therefore the Number of Witneſſes cannot be underſtood to be of the Subſtantial Form of a Will. Nor is the Law in the Code any Objection hereunto, ſince it proves the contrary, by ſaying, That the Number of Witneſſes appertains to the Solemnity of a Will ‖. But it may be urg'd, That a Will is defective, if one of the ſeven Witneſſes is wanting, becauſe it cannot be legally prov'd *. For it muſt be admitted, that the Subſtantial Form of a Will is a Matter introduced by *Civil* Law, which may be alſo chang'd and remov'd by another *Civil* Law: the Subſtantial Form of a Will being in no wiſe founded on the Law of Nations, which is perpetual and immutable. But the Queſtion here is, Whether the Witneſſes made uſe of in a Will may be preſum'd to have been ask'd, if this be not expreſs'd in the Will? To which I anſwer in the Negative, becauſe this is an extrinſick Solemnity which cannot be preſum'd †. All the *Italian* Doctors do agree, that it is enough, if ſuch Witneſſes have been ask'd by any extraneous Perſon: But then this ought to be done in the Preſence of the Teſtator, ſuffering and permitting the ſame; becauſe the Teſtator himſelf is then underſtood to order and command the ſame. For Witneſſes ought to be ask'd either by the Teſtator himſelf, or elſe by ſome other Perſon that repreſents him herein, according to *Alexander* in his *Conſilia*; and other Doctors are of ſame Opinion. If a Notary ſhall *ſimply* ſay in Writing, that the Will was made in the Preſence of the Witneſſes within-written, ſuch Witneſſes, according to *Speculator*, are not preſum'd to have been ask'd.

* C. 6. 23. 21.

† In l. 21. C. 6. 23.

‖ C. 6. 23. 21.

* C. 6. 23. 12.

† Mantic. ut ſupr. cap. 11.

A Teſtament and a Laſt Will are not the ſame Thing, becauſe a Laſt Will is of a larger Extent and Signification than a Teſtament. Yea, a Laſt Will is at were a *Genus*, containing under it a Teſtament as a *Species*. For the Doctors reckon up ſeveral *Species* of a Laſt Will. The *firſt* is a Teſtament. The *ſecond* is a Codicil. The *third* is an Epiſtle, wherein a *Fidei-Commiſſum* is left to any one *. The *fourth* is a Legacy. The *fifth* is a *Capio, mortis Causâ* ‖; and ſome reckon a Donation *mortis Cauſâ*. Every one may make a Laſt Will and Teſtament, unleſs the Law prohibits him ſo to do; provided, he has a ſufficient Uſe of his Reaſon, and a free Adminiſtration of his Goods and Eſtate: Becauſe every one may diſpoſe of his own as he pleaſes; provided, he be not hindered and forbidden by ſome Law. Now ſeveral Perſons are prohibited from making a Laſt Will and Teſtament. As *firſt*, an Idiot and a Madman, that has not his lucid Intervals †: Yea, theſe Idiots and Madmen are not only hindered from making a Will to *profane*, but even to *pious* Uſes. For the Act of making a Will is a human Act, which ought to be executed *humano modo*:

* C. 3. 36. 26.

‖ D. 39. 6. 18 & 31.

† C. 6. 22. 9.

But

But a human Act cannot be executed by him, that has not a ſufficient Judgment, and Will to make a Teſtament: Wherefore a Perſon that has begun to make a Will, and falls into a Frenzy or Madneſs before he has perfectly finiſh'd the ſame, makes an invalid Will; and ſo 'tis decreed in the Law above-quoted in the Margin *: For he that has not the Uſe of Reaſon, and a ſound Underſtanding, cannot exerciſe a human Act. If it be a Doubt, whether a Perſon has the uſe of Reaſon ſufficient to make a Will, we muſt have recourſe to Witneſſes and other Circumſtances; there being no better Rule laid down and aſſign'd to diſtinguiſh herein. But if this cannot be diſcern'd or known by Witneſſes or by Circumſtances; and 'tis ſtill doubtful, whether he that appear'd to be an Idiot or Madman, has his lucid Intervals ſufficient to make a Will, it ought to be preſum'd, that he has not; becauſe there is a *Conſtat* of his Ideocy or Madneſs, but none of a Return to his Senſes again †. But if it cannot be collected from Circumſtances that the Will was made in the time whilſt he was in his right Senſes, I think, we ought to judge thereof according to the Form of the Diſpoſition of the Will. For if the Form of the Diſpoſition was prudently made, the Will or Teſtament is preſum'd to be made during the time that he was in his right Senſes: And the Perſon averring it to be in the time of his Madneſs or Lunacy, ought to prove the ſame; becauſe there is a *Conſtat* of an Act prudently done and manag'd ‖. *Secondly*, A Perſon that is together Deaf and Dumb from the Time of his Birth, cannot make a Laſt Will and Teſtament to *profane* Uſes *; except it be ſuch a Perſon as is render'd capable of making a Will by the Grant of the Prince; for ſuch a Perſon's Will is valid, if he can ſufficiently expreſs his Mind by Signs and Tokens †. And a ſecond Exception hereunto is in the Caſe of a Soldier, whoſe Will is valid by reaſon of the Privilege granted to Soldiers, if he has clearly expreſs'd the ſame by Signs ‖. I ſay *Deaf* or *Dumb*, becauſe if he is only thick of Hearing, or ſlow of Speech, his Will is good, and ſhall not be irritated by Law. But if a Perſon be not Deaf and Dumb at the ſame time, he may make a valid Will; becauſe 'tis enough if he can point out the Heir or Executor, and declare what he would have become of his Goods after his Death *. And ſuch Perſon muſt be Deaf and Dumb together from the time of Birth, or naturally ſo; becauſe if a Perſon be only ſo by Accident, he may make a good Will if he knows how to write †: For a Perſon, that is only Deaf by Accident, can expreſs the Sentiments of his Mind, which a Perſon Deaf by Nature cannot do. But if ſuch Will of a Deaf and Dumb Man be made to *pious* Uſes, it is valid for the Good of the Church; ſince the Solemnity of the *Civil* Law is not neceſſary in a Diſpoſition *ad Cauſas pias* ‖. Perſons that are Blind; or under the Age of Puberty; or Servants to Puniſhment; as Perſons condemn'd to Death, or to ſuffer Baniſhment, and the like, cannot make their Wills *.

The Interpretation of a Laſt Will and Teſtament belongs to the Judge, before whom it was prov'd, or to ſome other lawful Judge; and to him we muſt have recourſe for the Conſtruction thereof: But the Judge ought to obſerve this Order and Method in expounding the ſame. *Firſt*, He ought to conſider the Teſtator's Mind and Intention, if poſſible. But if this does not plainly appear, then he ought, *2dly*, To conſider what is moſt likely, and probable to be th Teſtator's Meaning; which Probability is inferr'd from many Circumſtances. But if this Probability does not appear, he ought then, *3dly*, to have Recourſe to the proper Signification of the Words; and if the Words bear ſeveral Acceptations, *viz.* One a *proper*, and the other an *improper* Senſe, he ought to adhere to the proper Signification thereof †. There is no Concluſion more commonly known

* C. 6. 22. 9.

† Tuſch. Tom. 8. Conc. 104.

‖ Mant. de Conj. ult. Vol. Tit. 5. Maſcard. de Probat. *Concl. 825. N. 13. C. 6. 22. 10.

† C. 6. 22. 10.

‖ J. 2. 11. 2. C. 6. 22. 10.

* C. 22. 10. 2.

† C. 6. 22. 10.

‖ Tuſch. Tom. 8. Concl. 120. N. 13.

* J. 2. 12. 1, 2, 3, 4, &c.

† D. 6. 3. 1. Gloſs. ibi.

known in our Law-Books than this, *viz.* That the Wills of all Teſtators ought to be underſtood and taken according to the Diſpoſition of the Laws; and that every Perſon is preſum'd to have willed that which the Law itſelf ordains and directs *: And as a Teſtator is only ſuppos'd to conceive and think of that which the Law appoints; ſo a Judge in the Interpretation of a Will ought to have a great Regard to the Laws, and not to his own Fancy and Pleaſure. And that Interpretation, whereby the Common Law is preſerv'd, is in every Diſpoſition deem'd a favourable Interpretation; and, therefore, it ought to be embrac'd and follow'd: And every Diſpoſition, which is expreſs and *ſimply* pronounc'd, is cloath'd by the Common Law; and ought to be reſtrain'd and extended according to the Rules of the ſaid Law; and all doubtful Words ought to be referr'd to the Meaning and Senſe thereof. In Laſt Wills and Teſtaments, Words of a doubtful Signification may be explain'd and declar'd in Codicils: But where Words are clear of themſelves, there is no room for Interpretation. But to proceed:

* Bart. in l. 57. D. 36. 1. 1.

There are ſome derogatory Words inſerted in a Laſt Will and Teſtament; and, therefore, I ſhall conſider them in the next Place. Now derogatory Words herein inſerted may be of a threefold kind: For there are ſome Words which are derogatory to the Act of making a Teſtament; ſome which are derogatory to the Solemnity of a Teſtament; And ſome, which are derogatory unto the Mind and Will of the Teſtator himſelf. For *Firſt*, If a Man ſays in his firſt Will, *That he will not make any other Laſt Will and Teſtament*, theſe Words are derogatory to the Act of making another Will: or, *2dly*, If he ſhall ſay thus, *viz. If any other contrary Will appears, his Will is that the ſame ſhall not be valid:* And theſe Words are alſo derogatory to the Act of making another Will. But if he ſhould ſay, *That if any other contrary Will ſhould appear, he would not have the ſame to be valid, unleſs it had ſuch and ſuch Words literally expreſs'd therein, as a PATER NOSTER, and an AVE MARIA*, and the like (which are uſual among the *Papiſts*): Theſe Words (I ſay) are only derogatory to the Solemnity of the Will. But if he has already declar'd in his Will, *That if he ſhould make another Will or Teſtament contrary to the preſent, he would have this not valid, nor to be look'd upon as a Will made by him:* The Words are derogatory to the Will itſelf.

A Notary, where Notaries are made uſe of in Laſt Wills and Teſtaments, may be compell'd to publiſh the firſt Will or Teſtament of a Perſon deceas'd, tho' the Teſtator has revok'd the ſame by his Laſt Will: for it may be the Intereſt of a Perſon to have that Will alſo produced; becauſe (perhaps) he has a mind to impeach it of Forgery, or of a Nullity and the like. And ſuch Notary ought not to tear it even at the Requeſt of the Teſtator himſelf: For the Office of the Notary is ſuch, that tho' the Teſtator ſhould cancel the ſame, yet the Notary is ſtill oblig'd to keep a Copy of it. If a Teſtament ſhould appear to be cancell'd by Interlineations, yet I may deſire to have the ſame publiſh'd; and the Notary ought to publiſh it with the Interlineations and Raſures, and to make mention of them too. A Confeſſion made in a Laſt Will and Teſtament in the Preſence of the Party, who accepts thereof, is irrevocable, tho' ſuch Teſtament be afterwards render'd null and void, or be even revok'd by the Teſtator: I mean ſuch a Confeſſion, whereby any Perſon acquires a Right, and which is made in the Preſence of the Party that acquires this Right; or in the Preſence of another that acts for him. But if ſuch a Confeſſion made in a Teſtament be not accepted before a Revocation of the Teſtament, the Confeſſion ſhall afterwards be revocable. And ſuch a Con-

Confeſſion made of a Debt by the Teſtator in his Will, ſhall induce a ſufficient Proof of ſuch Debt, if it was made in the Preſence of the Party, or ſome one accepting of ſuch Confeſſion in his Behalf. 'Tis preſum'd by a Tradition or Rule of Law, that a Laſt Will and Teſtament, which is found cancell'd in the Cuſtody and Poſſeſſion of the Teſtator, was cancell'd either by the Teſtator himſelf, or elſe by the Means of his own Order *. Though a Will ſhall not be revoked by doubtful Words; yet it might be revoked by ſufficient Words, and without Writing too, before the Statute of *Frauds* and *Perjuries* †: And before that Statute, it might be revoked by a ſubſequent Will, which was void in itſelf; for it was good to revoke a former Will. But a ſubſequent Will which does not appear, ſhall not be a Revocation of any Will in Writing which does appear: But a ſubſequent Will, tho' not made in purſuance of the Statute of *Frauds* and *Perjuries*, *&c.* ſhall be a Revocation of a former Will, if it appears; yet a Will ſhall not be revoked by a ſubſequent Writing, unleſs ſuch Writing be alſo a good Will in its Circumſtances. A ſecond Will does not toll and revoke the firſt, according to ſome Men's Opinions, unleſs ſome ſpecial mention be made of a Clauſe inſerted in the firſt Will: For the firſt Will is valid and binding when two Wills are exiſting, though it be, in ſome reſpects, derogatory unto the ſecond, unleſs in renewing of the ſaid Will ſome ſpecial mention be made thereof.

* Jaſ. &c. in l. 12. c. 6. 23.

† 29 Car. 2. c. 3.

The Effect and Conſequence of a Laſt Will and Teſtament is, That a Sentence ought to be pronounc'd in purſuance thereof; which is call'd the Probate or Approbation of ſuch Will; and a Man ought to abide entirely by it if it be juſt; for this is only a Sentence of *common Form*, unleſs the Will be controverted in point of its Validity; and then ſuch Sentence is only demanded to Execution, *quouſq; &c.* For ſome Teſtaments are ſaid to be unlawful or invalid in reſpect of the Will and Mind of the Teſtator himſelf, as becauſe his Will is irrational or contrary to good Manners, or becauſe the Teſtator was not of a ſound and perfect Mind or Memory at the time of making his Will *: For 'tis not by Law ſufficient, that the Teſtator be of Memory (when he makes his Will) to anſwer to uſual and ordinary Queſtions, but he ought to have a diſpoſing Memory, ſo as that he is able to make a Diſpoſition of his Eſtate with Reaſon and Underſtanding, and this is ſuch a Memory as is call'd a *ſound and perfect Memory*; and if he has not ſuch a Memory, his Will ought not to be prov'd by a ſolemn Sentence, or demanded to Execution. For if the Eccleſiaſtical Court ſhall proceed to the Probate of ſuch a Will, where Lands are concern'd therein, a Prohibition lies at the Common Law, generally to ſtay all the Proceedings in the Spiritual Court, as to the Probate of the Will, *&c.* till this Suggeſtion be try'd at the Common Law ‖. Some Wills are alſo unlawful in reſpect of ſome Solemnity not obſerv'd therein: But ſuch Wills ought, notwithſtanding, to be demanded to Execution *. The *Canon* Law ſays, Thoſe of *common right*, are ſtiled *lawful Wills*, which a Man makes touching his own proper Goods and Eſtate, *viz.* Such as he has not acquired in Contemplation of the Church †, tho' it be otherwiſe by ſpecial Cuſtom: For by Cuſtom, a beneficed Clerk may make a Will, and thereby diſpoſe of the Goods and Eſtate he has acquir'd even in Contemplation of the Church; which, by that Law he cannot otherwiſe do ‖. If a Teſtator dying ſhall have Goods in divers Dioceſſes or Juriſdictions, and his Executor ſhall have prov'd his Will before an Eccleſiaſtical Judge of one of thoſe Dioceſſes or Juriſdictions, 'tis ſufficient as to the Probate thereof, according to the *Canon* Law, if it has been once prov'd before a competent Judge; eſpecially, if it has been prov'd before the Ordinary of the Place where the Teſtator died *. Nor is it needful that

* X. 3. 27. 3. Lindw. Lib. 3. Tit. 13. c. 1. v. *Legitima teſtamenta.*

‖ Cok. 5. Rep. fol. 23.

* Anton. de Butrio in c. 19. X. 3. 26. in fin.

† X. 3. 26. 1. 7. & 9.

‖ Lindw. Lib. 1. Tit. 3. c. 2. v. *Legata.*

* Othob. Con. Tit. 14.

such Will should be proved again. But though, in respect of granting Letters of Administration of Goods, and of Auditing and Passing an Account, *&c.* every Ordinary of a Place, where the Goods are found, may intromit him by the *Canon* Law *: yet at this Day, in *England*, the Archbishop of *Canterbury*, in his Province, has the dispatch of all these Matters, as well in respect of the Probates and Registring of Wills of this Kind, as in granting of Letters of Administration, and in Auditing and Passing Accounts, where the Persons have *Bona Notabilia* in several Dioceses of his Province †; and a Person is so said to have *Bona Notabilia*, who has Effects in different Dioceses to the Value of 100 Shillings and upward in each Dioceſs. For, according to the Laws and Constitutions of several Popes, and other Persons, publish'd on this Account, those Things are not stiled *Bona Notabilia*, whereby a Person still remains a *Pauper*, tho' he has acquired the same: And in regard of the Canon or Constitution quoted in the Margin, who is not worth of his own Money or Goods a hundred Shillings Sterling, or more.

* X. 3. 26. 17 & 19.

† Lindw. Lib. 3. Tit. 13. c. 5. v. *Laicis.*

Tho' the Probate of Wills does of *common Right* belong to Bishops, according to the *Canon* Law ‖; yet, according to *John de Athon*, on a *Legatine* Constitution, this Power may accrue to inferior Ordinaries, and hence 'tis, that Archdeacons, Deans of Churches, and Abbots, sometimes have the Probate of Wills, *&c.* and now Lords of Mannors with us in Right of the Abbots. This Probate, according to *Bartolus* †, may be made by an Instrument in a *Nuncupative* Will, and so likewise it may in a Testament that is not *Nuncupative* (at least) as to proving the Solemnity, tho' not as to the Proving of the Will itself. For a Will may be proved *per Testes*, when two Witnesses of Integrity are produc'd thereon, and do clearly depose touching the same *. For 'tis enough in respect of a Canonical Equity, that a *Constat* be made of the Will of the deceas'd by two Witnesses of Integrity being Superior to every Exception, to the end that the same should be demanded to Execution, whether it be made to *pious* Uses or not. It has been already said, that a Woman cannot be a Witness to a Last Will and Testament, though a Person of never so honourable a Condition and Reputation for Integrity †: yet *Panormitan* says; that, according to the *Canon* Law, both Men and Women may become good Witnesses thereunto, in the common Opinion of all the Doctors: For the *Canon* Law reduces the Solemnity of a Will to the Law of Nations, which does not distinguish between the Testimony of a Man, and that of a Woman. But *Alexander*, *Albert*. *Brunus* and *Tiraquel* declare; That the Testimony of a Woman in respect of some Wills is barr'd and excluded even by the *Canon* Law ‖. But the *Canon* Law, besides the Solemnity of the Law of Nations, requires the Presence of the Parish-Priest at the Attesting of Wills; and if the Parish-Priest, or some other Priest (at least) cannot be had, then four Witnesses are requisite unto a Last Will and Testament. This seems to be an Invention of the Church to get the Clergy admitted to Persons in their last Hours, in order to procure Legacies, and the like, to be left to the Church, or to the Parish-Priest himself, who is their Confessor and Ghostly Father that must remit their Sins, if he pleases so to do; or else they are sent to Hell by a Curse of the Church, as is commonly practis'd in the *Roman* Communion.

† In l. 21. D. 28. 1.

* X. 3. 26. 10.

† D. 28. 1. 20. 6.

‖ Covar. Tom. 1. fol. 23.

The Insinuation or Registring of Wills is the Publication of Wills at the Acts of Court *; and, according to the Custom of *England*, this belongs to the Ecclesiastical Courts, that is to say, to the Bishops and their Officials; and by the like Custom, so does the Approbation of them too †: Tho', by the *Civil* Law, a Lay Judge is a competent Judge in his own Jurisdiction, to grant the

* C. 6. 23. 2.

† Ottobon. Con. Tit. 14.

the Probate of a Will *. *Hoſtienſis* obſerves, That in Eccleſiaſtical Eſtates, ſuch Approbation and Inſinuations belong to Eccleſiaſtical Judges; but in Temporal Eſtates, the Matter appertains to the Temporal Judge †: But this Diſtinction is not regarded with us. And ſuch Approbation and Inſinuation may be made by a Perſon that is not an Ordinary Judge, but even by a Commiſſary, and a delegated Judge, provided he has a ſpecial Mandate or Commiſſion for this End and Purpoſe; for a general Commiſſion is not ſufficient. But then, according to *Hoſtienſis*, when the Eſtate of the deceas'd is both Eccleſiaſtical and Temporal, it ought to be done by both Judges, *viz.* *Firſt*, By the Eccleſiaſtical, and then by the Temporal Judge. In *England*, Wills relating to Lands in Freehold are prov'd in the Court of *Chancery*, and all other Wills in Eccleſiaſtical Courts.

* C. 6. 23. 18. & 23. C. 1. 3. 41.
† In c. 16. X. 2. 22.

By the *Civil* ‖ and *Canon* Law †, the ſpace of a Year is allow'd and preſcrib'd for the Execution of Laſt Wills and Teſtaments; and this time runs from the Day that the Judge decrees his Monition or Order touching the ſame: But by the *Novels* only ſix Months are allow'd for the Execution thereof *; and this Time commences and is current from the Day that ſuch Laſt Will and Teſtament was prov'd, regiſtred and engroſs'd. But by another *Novel* Conſtitution, five Years are indulged and appointed for this Purpoſe. Now, for the better underſtanding of this Head, I ſhall propound ſome Axioms As, *Firſt*, The Teſtator's Will ought to be demanded to Execution within the Time preſcrib'd and limited by the ſaid Will; and this is current from the Day of the Executor's taking on himſelf the Executorſhip. *2dly*, If the Teſtator has fix'd no Time for the Execution of his Will, the Law appoints the Heir or Teſtamentary Executor one whole Year for the Payment of all Legacies whatſoever, which are not bequeath'd to Pious Uſes; and likewiſe to execute the Will in all other Reſpects †. And after the Lapſe of a Year, the Right of executing Wills is transferr'd, and devolves itſelf to the Biſhop of the Dioceſs ‖; unleſs the Teſtator ſhall, in caſe of ſuch Negligence, have ſubſtituted another Executor; and this ſpace of a Year, runs from the day of the Monition made by the Judge, as aforeſaid.

‖ C. 1. 3. 28.
† X. 3. 26. 3.
* Nov. 99.
† C. 1. 3. 28.
‖ X. 3. 26. 19.

Of Witneſſes, and their Depoſitions.

AMONG all the ſeveral Species of Proof, that is deem'd moſt effectual which is made by Witneſſes, whoſe Credit and Evidence is invoked for the Confirmation of ſome doubtful Matter *. Now thoſe Perſons are called Witneſſes, whoſe Depoſitions the Plaintiff or Defendant makes uſe of, to procure Proof and Evidence to ſome doubtful Matter, and to render the ſame Credible †. Thus a Witneſs is a Perſon cited or called into a Court of Judicature to declare to the Judge what he knows touching ſome Matter of Fact, which is under the preſent Examination of the Court ‖: And his Declaration is ſtiled his Teſtimony or Depoſition. If fit and proper Witneſſes are not produced, the whole Cauſe or Buſineſs of the Suit drops and comes to nothing: And the Judge may in virtue of his Office repel and ſet aſide unfit and improper Witneſſes. Among Witneſſes, Conſpirators are deem'd the ſame as capital Enemies; and, therefore,

* X. 2. 22. 10.
† Socin. Conſ. 34. N. 10. Vol. 1.
‖ X. 2. 21. 1.

* X. 2. 27. 22. fore, ought to be ſet aſide, and their Teſtimony to be diſallow'd of *: But yet in ſome Caſes they may be admitted; becauſe Witneſſes that are *minus idonei*, are admitted, where other Witneſſes cannot be had. The adverſe Party ought to be cited to ſee the Witneſſes produced and ſworn: And regularly this is indiſtinctly true in all Caſes except three, *viz.* *Firſt*, Where the Fact is notorious, and the Judge only admits Witneſſes for his own Information. 2*dly*, Where the Diſpute or Controverſy is *de informatione Perſonæ*, *viz.* Whether he be fitly qualify'd for a Dignity or not. And 3*dly*, When the Proceſs is by way of *Inquiſition*. But the *Abbot* thinks this laſt way not to be legal, for the Laws do not diſtinguiſh between Inquiſition and other Methods of Proceſs in relation to the Admiſſion of Witneſſes. But the Party need not be cited to appear *ad audiendum teſtes*, ſince they ought to give their Depoſitions in ſecret, according to the *Civil* and *Canon* Law. For the Meaning of *ad audiendum teſtes* in a Citation, is, *Firſt*, that the Party *Litigant* ſhould come and hear them ſworn. And 2*dly*, That after Publication he ſhould come and hear the Depoſitions read, or elſe receive Copies thereof. He that will produce Witneſſes that come a great Diſtance, ought to tender and allow them their Expences: But the Perſon againſt whom theſe Witneſſes

† C. 4. 20. 11. are produced, is not bound to bear any part of theſe Expences †, tho' the Witneſſes ought to give their Teſtimony for both ſides, as far as is conſiſtent with Truth; and ought likewiſe to give an Anſwer to the *Miniſtrants* Interrogatories. And theſe Expences ought to be tendered and adminiſtred to them, before they depart from the Place of their Abode or Habitation, without any regard had to what ſuch Witneſſes might have ſpent in their own Houſes: But it ought to be conſider'd, what their Journey and Travelling Expences may ſtand them in. And if ſuch Witneſs ſhall receive Expences for ten Days, and ſhall be diſpatch'd in five, he ſhall be oblig'd to reſtore the Overplus or Reſidue to the citing Party.

That Witneſſes be accounted *Idoneous*, they ought firſt of all to be Perſons of a free Condition, and not Bondmen or Servants. 2*dly*, The Sex of the Witneſs ought to be conſider'd, *viz.* Whether ſuch Witneſs be a Man or a Woman. 3*dly*, We ought to regard the Age of the Witneſs: For if

‖ D. 22. 5. 3. 5. he depoſes in a Civil Cauſe, he ought to be above fourteen Years of Age ‖; and full twenty Years of Age, if he depoſes in a Criminal Cauſe, unleſs in a Cauſe of Treaſon. 4*thly*, He ought to examine and enquire into the Fame and Reputation of a Witneſs, *viz.* That he be not an infamous Per-

* X. 2. 20. 54. D. 22. 5. 3. 5. ſon, and the like *. 5*thly*, The Fortune and Circumſtances of a living Witneſs ought to be conſider'd, whether he be a *Pauper*, and an indigent Perſon or not. 6*thly*, We ought to regard the Religion of a Witneſs, *viz.* Whe-

† C. 1. 5. 21. X. 2. 20. 21. ther he be a Pagan, Infidel, Heretick, Chriſtian, or the like †. 7*thly*, No Credit ought to be given to Witneſſes that may reap any Advantages to themſelves from their own Depoſitions: For where the Conſequence of the Evidence may redound to the Benefit and Advantage of the Witneſs, ſuch Witneſs ſhall always be rejected. 8*thly*, Accomplices in any Crimes, in *Latin* called *Participes criminis*, cannot be Witneſſes in the ſame

‖ C. 4. 20. 11. Crime ‖, unleſs it be in ſome particular Caſes. As for Example, if there be four Perſons that have been Accomplices together in the Commiſſion of ſome particular Crime or Miſ-demeanor; and, upon enquiry made thereinto, three of them ſhould be willing to excuſe the fourth by ſaying, that he was not guilty: In this Caſe (I ſay) no Credit ſhall be given to his Depoſitions. So on the contrary, if they ſhould ſay, that only the fourth was guilty, and neither of them, no Credit ought to be given to ſuch Evidence. If one Man commits one Homicide, and another commits another, they ſhall not be Witneſſes for each other; becauſe they ſeem,

ſeem, in ſome meaſure, to be Accomplices in the ſame ſpecifick Crime: But the Gloſs holds the contrary Opinion, becauſe the Text ſpeaks of one and the ſame Crime *Identically:* But 'tis otherwiſe in different Crimes; eſpecially when one of the Parties accus'd is acquitted, and not render'd *Infamous.* But this Law does not hold in the Caſe of a Conſpiracy, which is acted in Secret, and cannot be prov'd but by one of the Accomplices or Partakers in ſuch Crime.

As a Judge ought not to admit any Poſition or Article, that is not pertinent to the Matter in Suit: ſo neither ought he to ſuffer any Witneſs or Perſon to be interrogated on ſuch an impertinent Article or Poſition; nor ought he to ſuffer Witneſſes to be examined or interrogated on any other Articles or Poſitions, than thoſe on which they are produc'd *. And as a Judge ought not to ſuffer the Party, that is willing to prove any Thing *extra Cauſam*, to proceed thereon: So neither ought he to ſuffer Witneſſes to depoſe *extra Articulum* †. Now in order to examine Witneſſes, three Things are frequently required, *viz.* a *Citation*, *Admiſſion*, and a *Judicial Compulſion.* For this is a general Maxim, *viz. That all Perſons, that are not particularly forbidden to give Evidence, and whom ſome Law or other does not excuſe from giving their Teſtimony, ought to be cited, admitted and compelled* ‖. But there are ſome Perſons, tho' they are nam'd by the Party in Court as Witneſſes, yet for ſome Reaſon or other are not admitted: And if they are admitted, yet they are not cited: And if they are cited, yet ſometimes they are not compelled to give their Teſtimony. Touching the firſt of theſe, we read theſe Verſes in *Hoſtienſis* *, *viz.*

* Gloſs. in l. 7. D. 5. 3. Bart. tract. teſt. §. *qualiter.* N. 3.

† Gloſs & Dd. in c. 29. X. 2. 20. & in l. 7. D. 5. 3.

‖ X. 2. 21. 1. & 3. D. 22. 5. 1.

* §. *quis poſſit*, eod. tit.

Conditio, Sexus, Ætas, Diſcretio, Fama,
Et Fortuna, Fides, in teſtibus iſta requires.

In order prove the Defendant's Innocency in a Criminal Cauſe, Witneſſes may be examin'd after a Concluſion in the Cauſe, and immediately before Sentence on Articles exhibited not directly contrary to former Articles. The Examination of Witneſſes is valid, tho' they be not examin'd on Interrogatories †.

† C. 4. 20. 4. Dd. ibi.

An Exception againſt the Perſon of Witneſſes ought to be made touching the *principal* Matter in Suit, or (at leaſt) it ought to have an oblique Reſpect and View to ſuch *principal* Matter: And all Exceptions or Proteſtations againſt Witneſſes ought to be made *ante Aperturam atteſtationum, viz.* before the Publication of their Depoſitions. All Perſons, by the *Civil* Law, of what Sex ſoever may be Witneſſes, whether Men or Women ‖; provided, no Exception be made againſt them. But Women, regularly ſpeaking, according to the *Canon* Law, ought not to be produced as Witneſſes in Criminal Cauſes by reaſon of their Modeſty, the Imbecillity of their Sex and Judgment; unleſs it be in ſuch Caſes wherein other Witneſſes cannot be had; or where the Greatneſs and Importance of the Cauſe requires it *: And this proceeds in all other Caſes. In *England*, by the Common Law, the Wife cannot be admitted to give Evidence againſt her Husband in any Caſe, unleſs it be in Treaſon; nor the Husband againſt the Wife. Tho' by the *Julian* Law a Pupil cannot be a Witneſs; yet when he is out of his Non-age, he may give his Teſtimony touching thoſe Things, which he knew and ſaw in his Minority, or during his Pupillary Age †: But this only proceeds touching ſuch Things as he knew and ſaw, when he came to the Age of Puberty. And the Reaſon why a Perſon cannot be a Witneſs of ſuch Things as he knew and ſaw in his *Infancy*, is, becauſe ſuch Age of Infancy, generally ſpeaking, has neither Knowledge or Underſtanding ſufficient to judge of Things. The Teſti-

‖ D. 22. 5. 1.

* 15 Q. 3. 1.

† D. 22. 5. 3.

mony of a Perſon not yet arriv'd at the Years of Puberty, is (therefore) null and void *, tho' nothing be objected to or againſt his Perſon: And the ſame thing may be ſaid of a Bondman or Vaſſal †. All Perſons are preſum'd to be *idoneous* Witneſſes, unleſs it be ſuch as are found to be prohibited by ſome Law or Statute: For there is a *permiſſory* Edict, whereby every one is allow'd to give his Teſtimony; unleſs it be ſhewn, that the Law does particularly provide againſt ſuch Evidence.

* D. 22. 5. 3.
† X. 5. 40. 10.

Now Witneſſes are reprobated and diſallow'd of in Law, on the Account of a twofold Defect, *viz.* either on the Account of ſome Fault or Defect which ariſes from their Depoſitions: As for Example, becauſe their Depoſitions are *contrary*, *obſcure*, *impoſſible*, or the like, of which more hereafter: or elſe on the Account of ſome Fault or Defect, which ariſes from their Perſons. *Firſt*, then, Witneſſes are reprobated on the Account of ſome Defect ariſing from their Perſons: as becauſe they are *infamous* Perſons *, and the like. For, without doubt, Infamy of Law repels and ſets aſide the Perſons ſo ſtigmatiz'd, not only in Criminal, but even in Civil Cauſes †; ſince a good Name and Reputation for Credit and Integrity is the Foundation of all Teſtimony *. But an *infamous* Perſon ſtands in need of ſuch a good Name and Reputation, the good eſtate thereof being diminiſh'd on the ſcore of his Crimes, which render him infamous: And he is declar'd to be ſo *ipſo Facto*, or by way of Sentence. For this Reaſon, Perſons guilty of Forgery, Inceſt, Adultery, Keeping of Concubines, and Perſons condemn'd of any Crime againſt the Publick ‖, are ſet aſide, and not admitted to give Evidence or Teſtimony in any Cauſe. Nay, the Law has ſuch a Deteſtation to Infamy, that an infamous Perſon, tho' join'd with another credible Witneſs, does not make full Proof or Evidence in a Cauſe. Nor is Credit given to a Witneſs, who in his laſt exit or extremity of Life, has ſaid, That he has born falſe Witneſs in any Matter: But a Witneſs may be examin'd and interrogated as a Witneſs even in the laſt extremity of his Life, and his Evidence ſhall be valid, if he be a Perſon of an honeſt Reputation. For tho' he that can make a Laſt Will and Teſtament at the point of Death, may alſo be examin'd as a Witneſs at that Article of Time; yet his Depoſition may be reprobated for certain Reaſons, becauſe every dying Perſon is not preſum'd to be a St. *John* the Evangeliſt.

* D. 22. 5. 3.
† Q. 2. 7. 39.
* X. 2. 20. 23.
‖ X. 2. 20. 13.

Tho' a Witneſs convicted of any Crime objected to him, or otherwiſe confeſſing the ſame, may be ſet aſide from giving his Evidence: yet he ſhall not be puniſh'd for ſuch a Crime on ſuch a Conviction, unleſs it concerns the principal Matter in Suit †; ſuch Crime being objected by way of Exception only, and not by way of Action or Accuſation. And ſuch Crime ought to be prov'd, before it be determin'd by a Sentence: For Witneſſes ought to be free from all Infamy and Defamation of Infamy *, as aforeſaid: Nay, they ought to be free from the leaſt Suſpicion thereof, and to be without any manifeſt Stain or Blemiſh in their Reputation, in order to render their Teſtimony effectual †. But Witneſſes cannot be ſet aſide as criminous Perſons after a Sentence or Concluſion in the Cauſe: For a Sentence is a Term that excludes and bars the Proof of an Exception afterwards objected againſt the Perſons of Witneſſes. From what has been already obſerv'd, it therefore appears, that to the end a Witneſs may be ſaid to be of an entire Fame and good Integrity, he ought to be entirely free from four Things, *viz.* *Firſt*, From any Crime itſelf *. 2*dly*, From the Infamy and Defamation of any Crime †. 3*dly*, From the Suſpicion of any Crime or Enmity to the Perſon againſt whom he is produc'd. And, *Laſtly*, He ought to be free from every manifeſt Stain and Blemiſh in his Life and Converſation ‖. Now this laſt may be underſtood in a twofold Senſe

† X. 2. 25. 1.
* 2 Q. 7. 39.
† X. 2. 25. 1.
‖ 2 Q. 7. 39.

Senſe and Meaning, *viz. De Maculâ animæ*, which ought to be more regarded then any Defect and Imperfection, becauſe the Soul is of greater Price and Value than the Body: For if there be any Spot or Blemiſh therein, it differs not from a Crime.

The Judge may, by Virtue of his Office, aſſign a Term-Probatory common to the Parties in Suit for the Production of their Witneſſes: and moreover 'tis to be obſerv'd, That a Witneſs ought not, of his own accord, to offer himſelf, but ought rather to expect the Citation of the Judge, or the Requeſt of the Party litigant: For without ſuch a Requeſt, or judicial Compulſion, ſuch Witneſs is deem'd as a Perſon ſuſpected *. If a Witneſs refuſes to come and give Evidence, either on the Party's Requeſt made to him, or on the Judge's Citation, the Judge may compel him hereunto *indictâ mulctâ*, that is to ſay, by laying a Mulct or Fine on him ‖: yet this is otherwiſe in ſome certain Perſons, as aforeſaid, who cannot be compell'd hereunto contrary to their Wills †. The adverſe Party ought alſo to be cited or admoniſh'd (if preſent in Court) to appear and ſee the Witneſſes themſelves produced and ſworn ‖, and ought likewiſe (if he thinks it his Intereſt) to exhibit and adminiſter ſuch Interrogatories to them, as he conceives to be proper; otherwiſe the Examination is null and void *: I ſay *ſworn*, becauſe it is provided both by the *Civil* and *Canon* Law, That all Witneſſes ſhould be ſworn before they give their Depoſitions, in what Rank or Station of Honour ſoever they appear ‖: Becauſe, tho' in reſpect of God there is no difference between an Oath and a *ſimple* Declaration, yet in reſpect of a Court of Law, there is this difference, *viz.* That he is puniſh'd more ſeverely that acts contrary to an Oath, than he who acts contrary to a ſimple Declaration or Affirmation of a Thing. The Party that produces Witneſſes, ought to tender them their neceſſary Expences, and the Charges of their Journey †. And this the Judge ought to take care of and ſee perform'd. Note, 'Tis one Thing to be produced and ſworn *ſub Capitulis*, and another to be produced and ſworn on the Merits of the whole Cauſe. The Admiſſion of Witneſſes made againſt a Perſon not cited to ſee them produced, is null and void: And a Witneſs is ſaid to be admitted as ſoon as he is ſworn.

* D. 3. 3. 25; C. 4. 20. 19.

‖ X. 2. 21. 10. X. 2. 21. 2.

† Vide Specular.

‖ X. 2. 20. 2.

* X. 2. 20. 2. 3. 2. 9. 2.

‖ X. 2. 20. 51.

† Cyn. in l. 11. C. 4. 20.

In Civil Cauſes, a Judge cannot regularly proceed to the Examination of Witneſſes *ex officio*, that is to ſay, unleſs it be at the Inſtance and Requeſt of the Party *producent* *: But 'tis otherwiſe in Criminal Cauſes, wherein he may proceed *ex officio*, in virtue of an Inquiſition; for therein he takes on himſelf the Perſon and Office of a Party, and may proceed of himſelf without the Requeſt or Inſtance of any Party †. By the *Canon* Law every Perſon, who gives his Teſtimony, ought to do it Faſting ‖: But this is not practis'd here in *England*.

* Bart. in l. 4. D. 39. 2. 8. & in l. 68. D. 5. 1.

† D. 48. 18. 1. 27.

‖ X. 2. 20. 1.

When both Parties are together, and ready at the ſame time to produce Witneſſes, the Plaintiff ought to have the Precedency, if he pleaſes: But if the Defendant deſires Diſpatch, he ſhall always have the Precedency in point of Production, if he pleaſes; becauſe the Time for Production of Witneſſes is common to both Parties. And Witneſſes produced, ought to depoſe in common, for the Benefit of both Parties, according to the Truth and the beſt of their Knowledge *; and not for the *Producent* only, as it too often happens: For hereunto they are oblig'd by Oath. He that produces a Witneſs, is preſum'd to approve of the Perſon of ſuch Witneſs from the very Production of him: And tho' a Witneſs depoſing *de Credulitate*, be no Evidence againſt the Perſon of him, againſt whom he is produced; yet the Depoſition of ſuch a Witneſs is good Evidence againſt the *Producent*. Nay, one Witneſs proves a Thing

* 14. Q. 5. 15.

Thing againſt the Party *Producent:* Therefore, let every one be careful what Witneſſes he produces. If I produce a Witneſs againſt my Adverſary, and he be alſo produced againſt me, I cannot reprobate ſuch Witneſs, though he ſhould appear to be an *infamous* Perſon, or one guilty of Perjury: And his Evidence ſhall be deem'd good againſt me. For, ſays *Juſtinian*, if any one ſhall make uſe of Witneſſes, and the ſame Witneſſes ſhall afterwards be produced againſt him in another Suit or Cauſe, it ſhall not be lawful for him to except againſt the Perſons of ſuch Witneſſes; unleſs he ſhews, that there have ſince aroſe great Enmities between him and them. And theſe Enmities ought to be ſuch for which the Laws do command Witneſſes to be ſet aſide. Or unleſs they muſt have committed ſome Fact or Crime, ſince he made uſe of them, for which the Law repels them as Witneſſes. If the adverſe Party produces Witneſſes on one Head; and afterwards the other Party deſires, that they may be examin'd on the reſt of the Heads or Articles of any Matter exhibited in Judgment, he thereby ſeems to approve of them in ſuch a manner, as that he cannot then diſallow of them *; but if the Party neither approves nor reprobates Witneſſes produced againſt him, he may reprobate and diſallow of ſuch Witneſſes produced againſt him in another Cauſe, ſince he is not from hence preſum'd to approve of them, becauſe he has not reprobated them. Therefore, tho' he has renouuc'd the Power of reprobating them in one Cauſe; yet he does not from hence ſeem to have renounc'd this Power in another Cauſe. If the adverſe Party, againſt whom a Witneſs is produced, ſhall proteſt againſt the Perſon of ſuch Witneſs as an improper Witneſs, and this Witneſs ſhall afterwards depoſe in Favour of the Perſon thus Proteſting, in ſuch a Caſe (I ſay) his Evidence ſhall not be taken in favour of the Perſon Proteſting, if the Party *Producent* accepts of ſuch Proteſtation †: But it is otherwiſe, if the *Producent* ſhall not accept of and ratify ſuch Proteſtation, which yet is to be underſtood with ſome Ampliation, *viz.* if ſuch Proteſtation be made againſt the Perſon and Validity of ſuch Witneſs: But 'tis otherwiſe, if it be only made againſt the undue Admiſſion of him.

* Bart. Tract. de Teſtib.

† Farinac. Tract. de Teſtibus.

It has been ſaid, that Witneſſes are introduced to this End and Purpoſe, *viz.* To give a full, true, and faithful Evidence for both of the Parties in Suit, according to the beſt of their Knowledge *: And this Teſtimony or Evidence ought firſt of all to be given and founded on ſome principal Corporeal Senſe of their own, according to the Nature and Quality of the Fact, as on their Sight, Hearing, Touching, Taſting, or Smelling; and not on the Corporeal Senſe of another Perſon †. So that the Reaſon, which ſuch a Witneſs gives for his Depoſition, ought to conclude *rightly* to the Purpoſe of the Party *Producent*; becauſe more Regard is ſhewn to the Reaſon given by ſuch Witneſs, than to his ſimple Saying or Depoſition ‖: And thus Witneſſes ought to depoſe appoſitely *de proprio ſuo ſenſu*, and not *de ſenſu alieno* *. If a Witneſs ſays, That he has heard an Inſtrument read, yet he is not hereby ſaid to have underſtood the ſame: For this does not neceſſarily conclude and follow, becauſe to hear and underſtand are different Acts and Things; for a Perſon may only hear the nude and ſimple Sound of the Words, and not underſtand the Import and Efficacy of them. But, according to *Baldus*, if a Witneſs ſhould ſay, *I know it becauſe I was preſent*, ſuch would be good Evidence; the Word *Preſent* including a Senſe and Underſtanding thereof.

* 14 Q. 5. 15.

† 3 Q. 9. 15 & 16. Innoc. in cap. 37. X. 2. 20.

‖ X. 2. 20. 29.

* 3 Q. 9. 15 & 16. Gloſs & Inn. in c. 37. X. 2. 20.

Tho' Witneſſes may be compell'd to give their Evidence, yet a Witneſs is not bound to give an anſwer to a Poſition or Interrogatory which is of a criminous Nature in reſpect of himſelf †; nor ought a Witneſs to be ask'd

† Abb. in c. 37. X. 2. 20. N. 13.

ask'd or interrogated about any Matters, unleſs they are ſuch as are pertinent to the Articles on which he is examin'd *: And thoſe Things are ſaid to be pertinent, which either reſpect a Declaration or an Interpretation of ſuch Articles as the Perſon is examin'd on; or elſe relate to ſuch Things as are connected and incident to them. And 'tis the ſame Thing, if they be their Appendages, and do any wiſe whatever belong to them, no matter how lightly and ſlenderly; becauſe they adminiſter ſome adminicular Proof. But it has been a Queſtion, Whether ſuch a Declaration may be admitted after a Publication of Witneſſes? And 'tis held, that it may; provided, ſuch Declaration be probable and likely to be true. After the Publication of Depoſitions, regularly ſpeaking, other Witneſſes ought not to be produced in Civil Cauſes thro' fear of Subornation of them, and alſo becauſe the Parties do, by way of Concluſion, renounce all further Production of Witneſſes †: But in Criminal Cauſes, other Witneſſes may be produced in Favour and Defence of Innocence, notwithſtanding ſuch a Publication of the Depoſitions of Witneſſes ||. For, in Criminal Cauſes on the Defendant's part, the Cauſe is never ſaid to be concluded till after Sentence: And, therefore, he may prove his Intention at any Time whenever he pleaſes; yea, even till a Definitive Sentence *excluſively*. But Witneſſes may, in ſome ſpecial Caſes, be produced a ſecond Time, even after a Publication of their Depoſitions: For a Judge may, for his own Information, *ex officio* *, repeat Witneſſes that have not been rightly and duly examin'd, yet he is not oblig'd to do it.

* Spec. de interrogationibus. §. 3.

† X. 2. 20. 18.

|| Abb. in c. 17. X. 2. 20. N. 4.

* X. 2. 20. 53.

In ſuch Matters as are uſually committed and done, Witneſſes are admitted that are otherwiſe *inhabiles ad teſtimonium perhibendum*: And Credit is likewiſe given to a *Non-idoneous* Witneſs, if he has a *Conteſtis* or Fellow-Witneſs with him in point of Evidence. One Witneſs proves a Thing againſt the Party *Producent*; and Credit is given to one Witneſs depoſing touching his own Fact, if there be any concurrent Indications or Conjectures contributing thereunto. In a Matter of Antiquity, more Credit is given to Witneſſes advanc'd in Years, than to others; and the older the Witneſſes are, the more Regard and Preference is given to them, being more likely to know the Truth thereof than others that are younger than themſelves. Witneſſes cannot prove a Negative touching a Deed; but they may have ſufficient Notice and Knowledge of an Affirmative. On the Plaintiff's Contumacy, and at the Defendant's Inſtance and Petition, Witneſſes may be examin'd, and a Sentence pronounc'd thereupon; yea, according to ſome, tho' Suit be not conteſted: But this, in my Opinion is wrong Practice. Tho' regularly, ſingle Witneſſes make no Proof according to the *Civil* and *Canon* Law †, nor yet ſo much as half Proof by theſe Laws; unleſs ſuch ſingle Witneſs's Depoſition be given upon the principal Fact or Matter in Controverſy: yet this Rule does not proceed in the Proof of Juriſdiction, or in the Proof of Servitude, which may both be prov'd by one Witneſs. And, moreover, this Rule ought to be limited and reſtrain'd in reſpect of a Nobleman's Evidence; the Opinion of his Integrity being ſo great among all Men, that it induces the Judge to a Belief of his Teſtimony.

† X. 1. 6. 32.

'Tis an Objection againſt a Witneſs, that he was heretofore, and at preſent is an Enemy to the Perſon, againſt whom he is produc'd *; and that he will now revenge himſelf: or, that he cohabits with Enemies and the like. Which is a good Exception, if ſuch Perſon be a Capital Enemy, or a Conſpirator againſt the Party *Excipient*; for then he ſhall never be admitted †: But 'tis otherwiſe, if he be only an Enemy on the Account of ſome Criminal Suit or Proſecution commenc'd againſt him; yet in this Caſe, he ſhall not be admitted till the end of ſuch Suit; and at the time of

* D. 22. 5. 3.

† X. 2. 28. 22. X. 5. 3. 35.

of *Informations* it ſhall be diſcuſs'd, whether he ought to be credited or not. Therefore, a Witneſs that is an Enemy by an outragious Enmity, ſhall be repell'd and ſet aſide *: But 'tis otherwiſe, if his Enmity be light and Moderate. And as an Enemy cannot be a Witneſs; ſo neither can a Friend, if ſuch Friendſhip be very great and obliging: But elſe he may. For a Friend is not repelled, unleſs it be on the ſcore of ſuch Friendſhip and Affection, as is between Parents and Children, Husband and Wife, and the like Relations †. For 'tis an Objection to a Witneſs to alledge, that he is the Parent or Father of the Perſon producing him, who cannot give Evidence either for or againſt his Son, nor the Son either for or againſt the Father or Parent, tho' both are willing it ſhould be ſo ||. And the ſame is under ſtood of the Mother compriz'd under the Appellation of a *Parent*; and alſo of the Daughter. And, according to the *Civil* Law, this is true of Aſcendants and Deſcendants *in infinitum*, whether they be under the Power of the Father, or have receiv'd *Emancipation*. Note, The Grandfather, by the Mother-ſide as well as the Mother, is alſo ſtiled a Parent: But Collaterals and Kindred in a remote degree, may be reciprocally Witneſſes for and againſt each other, if they pleaſe; but not againſt others in Behalf of themſelves. The Father, Mother, and Children, are neither admitted to be Witneſſes in Behalf of each other, nor againſt one another ||. For the Voice of the Father and of the Son is the ſame Thing, repreſenting, as it were, one and the ſame Perſon. But this is otherwiſe in the following Caſes. For, *Firſt*, A Father may be a Witneſs to the Laſt Will and Teſtament of his Son or Daughter. *Secondly*, A Mother may be a Witneſs, if a Queſtion ariſes touching the Age, Stock, or Lineage of her Children. *Thirdly*, 'Tis otherwiſe in Matrimonial Cauſes, *viz.* When the Queſtion is, Whether Matrimony may be had and contracted with them or not, by Reaſon of their Conſanguinity or Affinity: But if the Queſtion be, Whether Matrimony be contracted or not, the Bride affirming it to be contracted, and the Bridegroom denying the ſame, the Father and Mother in this Caſe are not admitted as Witneſſes, if the Bride or Bridegroom be either of them Perſons of greater Riches, Honour, Power or Nobility than the other: But if they be equal or inferior in either or all theſe Reſpects, they ſhall be admitted in favour of Matrimony. Yet ſome ſay, that if they are equal in theſe Points, the Father and Mother ſeem to be ſuſpected Perſons in point of Evidence. But if the Husband and Wife are in this reſpect unequal to each other, as Things exceeding, and Things exceeded, that is to ſay, if the Husband be richer, and the Wife a Perſon of greater Power, Honour, and Nobility, in ſuch a Caſe, a good Judge ought to eſtimate how great the Husband's Riches are, and conſider, whether the Wife be of higher Honour and Nobility, and the Husband only of mean Extraction; ſo that it is not likely for the Witneſſes to be prevail'd on by the Riches of the one, or the Nobility of the other: and according to this it ſhall be interpreted, whether their Teſtimony ſhall be ſuſpected or not.

* Nov. 90. c. 7. X. 5. 3. 31.

† C. 4. 20. 6.

|| D. 22. 5. 9.

|| Gloſs in l. 4. D. 22. 5.

A Witneſs that has an Intereſt in a Cauſe, is not a fit and proper Witneſs therein *, no one being an *idoneous* Witneſs in his own proper Cauſe: For when any Credit is given to a Witneſs, he ought to be ſuperior to every lawful Exception. And for this Reaſon, the Judge *à Quo*, cannot be Witneſs before the Judge *ad Quem*, becauſe he has a kind of Intereſt or Concern in the Cauſe of Appeal. Now he is ſaid to be an *idoneous* Witneſs, and ſuperior to every Exception, againſt whom no legal Exception can be objected. Thus the Teſtimony of a Brother or Siſter, is, in Law, ſtiled *teſtimonium inutile*; becauſe their Perſons are liable

* D. 22. 5. 3.

liable to Exceptions. Witneſſes ought not to be hired for a Price to give their Evidence; for ſuch Witneſſes as are hired cannot be ſaid to be faithful and idoneous Witneſſes in giving their Teſtimony †. But a Perſon induced to give his Evidence at the Requeſt of the Party, is not ſaid to be hired or corrupted; and therefore 'tis ſaid, that Prayers and kind Intreaties may intervene, tho' no Price or Reward ought. For a Witneſs may ſooner be corrupted with a Price than with Prayers and Intreaties, conſidering the Avarice of Men: And, therefore, the Parties *litigant*, may uſe Prayers and Intreaties to induce a Witneſs to come and give his Evidence, provided no Corruption enſues thereupon. Nay, the Parties producing Witneſſes, may not only ask and intreat them to give their Evidence for the Diſcovery of the Truth, but are obliged ſo to do before they can have a Citation *: wherefore a Witneſs produced by a *Litigant*, without a Requeſt or Citation, may be recus'd (as aforeſaid) as a ſuſpected Perſon, or as one that intrudes and thruſts himſelf into the Buſineſs of giving Evidence †. No Credit ought to be given to a Witneſs depoſing *ad ſui exonerationem*; nor to Witneſſes, that have been inſtructed by the Party *Producent*, or his Advocate, Proctor, and the like, how and in what manner they ought to Depoſe in point of Evidence; unleſs they be only inſtructed in ſuch Matters as are Matters of Law: As that they ‖ ought to give a concluſive Reaſon for their Sayings or Depoſitions; or unleſs they are only ſimply admoniſh'd by the Party to ſpeak the Truth. Nor is a Perſon ſaid to be a proper Witneſs, when either Praiſe or Diſpraiſe may be aſcrib'd to him from his Depoſitions. By the Common Law of *England*, a Counſel, Attorney, or Sollicitor ought not to be examin'd as a Witneſs againſt his Client; becauſe he is bound to keep his Secrets: And this holds good, when they, or either of them, diſcovers a Fact done after they are retain'd *. By the *Canon* Law, a Biſhop or Preſbyter cannot be produced, or (at leaſt) compelled to be a Witneſs, unleſs it be in a Cauſe which cannot be otherwiſe known and diſcover'd; becauſe the Prieſthood (ſays that Law) is hereby diſhonour'd †: But a Biſhop or Presbyter, who thus gives his Evidence by way of Neceſſity, ought not, according to that Law, to ſwear, as other Perſons do, on the Bible, but need only ſee the ſame. And by this Law, a Biſhop or Preſbyter may, in the place of an Oath, give Evidence by his Conſecration, and on the Word of a Prieſt ‖: But this is not good Law here in *England*.

† D. 22. 5. 3.

* C. 4. 20. 18. Nov. 90. c. 2.

† Arg. D. 3. 3. 25. Dd. in l. 19. c. 4. 20. & in c. 22. X. 2. 20.

‖ 4 Q. 3. 1.

* Vent. Rep. pt. 1. p. 147.

† 11 Q. 1. 9.

‖ 2 Q. 5. 4 & 5.

By the *Canon* Law, a Layman cannot be a Witneſs againſt a Clergyman in a Criminal Cauſe *; not only (ſays the Law) becauſe Laymen are uſually Enemies to Clergymen, as envious of their Privileges; but alſo on the account of that Reverence which is due to them: and foraſmuch as a Layman is not, in the Eye of that Law, of equal Dignity with a Clergyman, nor of equal Converſation. Under ſuch artful and ſelf-intereſted Pretences did the Clergy, in antient Times, fortify themſelves againſt the Juſtice of the Laity; and commit various Crimes without being queſtion'd for them: a Doctrine ſome of them would like well enough even in theſe Days. By the ſame Law, a Heretick may be a Witneſs for a Chriſtian againſt a Heretick, but not againſt a Chriſtian †.

* X. 2. 20. 21.

† X. 2. 20. 21.

A Witneſs that gives falſe Evidence, ought to be puniſh'd with much Sharpneſs and Severity ‖, becauſe he offends againſt three Perſons: For, *Firſt*, He renders himſelf obnoxious to God, whom he contemns. *2dly*, He becomes obnoxious to the Judge, whom he deceives. And *3dly*, He grows obnoxious to the innocent Perſon, whom he injures by his Depoſitions *. Witneſſes that ſay a Man has been in daily Poſſeſſion of a Thing, are not deem'd falſe Witneſſes, tho' there ſhould have been

‖ 3 Q. 8. 16.

* X. 5. 20.

Days

Days or Intervals of Time, wherein he was not in Poſſeſſion, *&c.* And it is the ſame Thing, if they depoſe touching a Man's daily Reſidence on ſuch a Benefice, or in ſuch a Place: for this Evidence is not vitiated, if there be ſome ſmall Intervals of Time, wherein he has not thus reſided: For ſuch Words ought to be underſtood in a civil Acceptation. And 'tis the ſame Thing of theſe Words, *viz. omni tempore, aſſidue, jugiter, indeſinenter, &c.* Nor are Men render'd falſe Witneſſes, that ſay they *all did ſo and ſo,* and one of them is excepted. If a Witneſs, ſhall upon one Article give falſe Evidence, and on another ſpeak the Truth, his whole Evidence ſhall be naught and vicious; becauſe he is guilty of Perjury *: and, conſequently, his Evidence ought to be ſet aſide.

* X. 2. 20. 9.

Time immemorial ought to be prov'd by Witneſſes, which ought to be old Men, depoſing, *That they have thus and thus ſeen it themſelves, and have ſo receiv'd it from their Parents and Anceſtors of old Times; and that ever ſince their Remembrance it was thus done and obſerv'd, and never otherwiſe to their knowledge:* For as often as any Matter of Antiquity or antient Fact comes in queſtion to be prov'd, recourſe ought always to be had to Men of Age and Seniority. Thus old Men in the Neighbourhood are preſum'd to have Knowledge of the Bounds and Limits of Lands: And, therefore, they are deem'd to be good Witneſſes touching the ſame †: For they are preſum'd to be better acquainted with the ſame, who are (as it were) always preſent. *Baldus* ſays ||, that in proving the Boundaries of Lands or Diſtricts, we ought to abide by the Credit and Depoſitions of old Men that live in the Country, and are produced as Witneſſes: And hereunto he ſubjoins, that in Matters of this kind, the Evidence of Fame prevails much, if nothing has been heard of contrary thereunto *.

† X. 2. 23. 8.

|| Conſ. 154.

* D. 22. 3. 28.

When 'tis ſaid in our Books, that more Credit is given to two Witneſſes affirming a Thing to be ſo and ſo, than to a hundred denying it ||, this ought not to have Place in a *Negative* Evidence well coarcted with Circumſtances, but only in a *Negative* Evidence founded on Credulity or Purgation. For whenever a *Negative* falls under the Corporeal Senſe of a Witneſs as an *Affirmative*, ſuch a *Negative* may be directly prov'd. As for Example, if I ſee you not to have a Cap or Hat on your Head, I may give my Depoſition thereof in a direct Manner, as if I would prove an *Affirmative:* For I do as directly perceive that you have no Cap or Hat on, as if I ſaw you had, in Caſe you had a Cap or Hat on your Head.

|| Gloſs. in l. 27. D. 4. 8. 3.

In the Cauſe of a Corporation, *extraneous* Witneſſes are required; and not ſuch Perſons as are of the Corporation or Body Politick †: nor ought the Names of Perſons belonging to a Corporation to be uſed and ſet down in a Deed or Inſtrument as Witneſſes thereunto, if ſuch Deed or Inſtrument concerns the Corporation; becauſe they ought not to be Parties and Witneſſes to the Tenor and Authority of ſuch Deed or Inſtrument: And by a Parity of Reaſon, the ſame may be ſaid of other Acts ſped and executed by a Corporation.

† Papienſ. aurea prax. Tit. 12. Gloſs. 11. N. 4.

Teſtimony is not only *verbal* and by Word of Mouth, but 'tis alſo a *real* Thing, it being made by Evidence of Fact *: And herein two or three Witneſſes are ſufficient for the Proof of any Fact, unleſs it be in ſome particular Caſes, wherein a greater number of Witneſſes are neceſſary †. Witneſſes that are concordant and agreeing in the principal Buſineſs, do make full Proof, tho' they vary in Acceſſaries. 'Tis the receiv'd Opinion of the Doctors, that in Criminal Caſes two Male Witneſſes of good Fame and Integrity, and ſuperior to every legal Exception, giving their Evidence touching thoſe Things which they have heard or ſeen, do make full and ſufficient Proof: it being ſaid, That in the Mouth of

* 28. Diſt. 4. 82. Diſt. 2.

† X. 2. 20. 23.

of two Witneſſes, every Word ſhall be eſtabliſh'd ‖. But no one in ſuch Cauſes ſhall be condemn'd on the bare Teſtimony of a ſingle Witneſs *. Note, By the *Canon* Law, more Credit is given to Male than Female Witneſſes, for the Reaſon abovemention'd. Again, in Criminal Cauſes, the pure and free Confeſſion of the Party himſelf is full and ſufficient Evidence: For there can be no firmer Proof of a Thing, than the Confeſſion of a Man's own Mouth. For the Fact being confeſs'd, there can be no Queſtion made of ſuch Evidence: But then it ought to be a *judicial* and free Confeſſion made out of Priſon, and without any juſt Fear of Danger †. But becauſe Credit is not always given to him that confeſſes an Offence; (for ſometimes a Man makes his Confeſſion for ſome End or Reaſon reſpecting himſelf alone;) therefore every Confeſſion of the Party in Criminal Cauſes is not ſufficient for Condemnation; unleſs the ſame be free, ſpontaneous, conſtant, and the like. For a Confeſſion made by Conſtraint, and on the account of Neceſſity, is no Proof ‖: And it is a wicked Injuſtice for a Judge, to pronounce a Sentence founded on ſuch an extorted Confeſſion.

‖ 2 Cor. c. 13. v. 1.

* Deut. c. 19. v. 15.

† X. 2. 18. 2.

‖ X. 1. 29. 16.

Regularly, the doubtful and ambiguous Depoſition of a Witneſs, ought to be conſtrued and interpreted againſt the Party *Producent*, ſo that it ſhall make no Proof for him *, becauſe it does not relieve him. And hence it follows, that the Depoſition of Witneſſes ought not to be literally concordant with the Averment of the Party *Producent*, unleſs ſuch Concord and Agreement be probable and likely, and that they have been examin'd on the Interrogation of the Party *Producent*: For as an Anſwer ought to be made and underſtood, according to the Interrogation and Queſtion put; ſo ought alſo the Depoſitions and Teſtimonies of Witneſſes to be underſtood, according to the Articles produc'd and exhibited by the Party. The Depoſitions of Witneſſes are not valid, if a due Courſe of *judicial* Proceedings has not been previouſly obſerv'd: But the Examination of Witneſſes is valid, tho' they be not examin'd to Interrogatories. The Uſe of Depoſitions is infinite according to the infinite Multitude and Variety of Events, which may become neceſſary to prove a Fact, whether it be in Civil or Criminal Matters.

* Gail. lib. 1. obſ. 82. N. 5.

It has been ſaid, that regularly, every Perſon is admitted to be a Witneſs; unleſs he be expreſly reprobated by Law †. Now to *reprobate* in Law, is to propound ſome Exceptions either againſt Facts, Perſons, or Things, *viz.* to alledge ſuch Deeds or Inſtruments not to have been duly and lawfully executed; or that they are ſuch Perſons as ought not to be heard. For, as I have already ſhewn, Witneſſes produced may be ſet aſide on the ſcore of Infamy, Crimes committed by them, Affection to the Party *Producent*; and on the Account of any private Advantage accruing to themſelves. Or, laſtly, they are ſuch Things as ought not to be admitted ‖. Therefore, *Reprobation* is threefold. *Firſt*, In reſpect of Deeds or Inſtruments. 2*dly*, In reſpect of Perſons. And, 3*dly*, In reſpect of Things. Others divide *Reprobation* in this Manner. *Firſt*, Into *Reprobation* in reſpect of Productions reprobated. 2*dly*, In reſpect of Witneſſes. And, 3*dly*, In reſpect of Titles and Letters produced againſt themſelves. And all theſe Things are reprobated two ſeveral ways, *viz.* either by *Reprobations* of Law, or by *Reprobations* of Facts: which in other Terms are ſtiled Contradictions of Law, and Contradictions of Fact. In all *Reprobations*, a general Proteſtation ought to be made, and particularly before the Examination of Witneſſes; leſt the Perſon againſt whom they are produced ſhould ſeem to approve of their Perſons and Depoſitions †: And if ſuch a Proteſtation be not then made, the Perſon proteſting, ſhall not afterwards be heard; unleſs he makes Oath, that he

† vi. 2. 10. 2.

‖ Papienſ. aur. prax. Tit. 10. Gloſs. 9.

† X. 2. 20. 31.

was, at that Time, ignorant of their Defects *. For the Perſon of a Witneſs being once approv'd of either *tacitly* or *expreſly*, he cannot be afterwards reprobated by him that has thus approv'd of him, whether ſuch Approbation be made by the Party *Producent*, or by him, againſt whom ſuch Witneſs was produced †; or whether produced in the ſame or in another Cauſe, unleſs ſome new Cauſe of Reprobation ſupervenes ‖. Nay, if the Witneſſes produced have been reprobated by the Judge as vicious Perſons, and then another Perſon produces them againſt me in another Cauſe, I cannot even then reprobate them; becauſe I have once approved of them: which Approbation has its Effect and Operation in another Cauſe, as well as between other Perſons †. Reprobations of Witneſſes do not hinder their Examination, unleſs the Cauſes of ſuch Reprobations are to be prov'd by Perſons that are infirm, and of great Age, or elſe by ſuch as are about to be abſent, *&c.* whereby great Danger may accrue to ſuch Perſons as reprobate ſuch Witneſſes *. But if there be no Delay, then the Examination of the Witneſſes produced on the principal Cauſe, ſhall not be delay'd and put off: Becauſe a Reprobation or Contradiction is preſum'd to be made *animo litem protelandi* †. But after the Witneſſes have been examin'd and publiſh'd on the principal Cauſe, the Crimes and Defects of the Witneſſes ſhall then be prov'd, if any ſuch have been objected againſt their Perſons or Depoſitions *.

* vi. 2. 10. 2.

† C. 4. 20. 17.

‖ Cyn. in l. 17. C. 4. 20. Inn. in c. 14. X. 2. 25.

† Cyn. in l. 17. C. 4. 20.

* X. 2. 6. 5.

† D. 2. 12. 1.

* Gail. Prax. lib. 1. obſ. 105.

A Perſon ſuborn'd and corrupted ſhall be reprobated, and not allow'd to give any Evidence in a Cauſe †. Now *Subornation* is a *latent* and *ſecret* ſeducing of Witneſſes from diſcovering the Truth in a Cauſe, by inſtructing them in Falſhood: For the Verb *ſuborno*, in *Latin*, ſignifies the ſame as *falſum aliquem inſtruo, ſemotis arbitris*, being always uſed in an ill Senſe. You have an Inſtance or two of this in the *Digeſts* ‖. Thus *Subornation* is ſaid to be, when any one applies himſelf *ſecretly* to a Witneſs, either to expreſs and declare ſomething that is falſe, or to conceal ſomething that is true, in the giving of his Evidence *. For they are ſaid to ſuborn a Witneſs, that do in a *ſecret* manner inſtruct ſuch a Witneſs, what he ought to give in Evidence by his Depoſitions, as well as they who bribe and corrupt him to depoſe that which is falſe †. *Subornare* (ſays a certain Author) is *quaſi ſubtus in aure alicujus ipſum male ornare* ‖.

† X. 2. 19. 9.

‖ D. 48. 2. 9. & 12. 2. 33.

* Wilh. in c. 2. Cl. 2. 8. v. *ſubornatio.*

† X. 2. 19. 9.

‖ Gloſs. in c. 2. Cl. 2. 8.

Though a Witneſs may *incontinently* correct himſelf and amend his Depoſitions before the Judge or Notary has perfected the Examination of him, and before he leaves the Preſence of the Judge; yet ſuch Witneſs cannot correct himſelf *ex intervallo*, or after any Diſtance of Time, and a Publication made of his Depoſitions; and this through a Fear of Subornation *. But a Witneſs may correct himſelf not only before the Notary has reduced the Anſwer of ſuch Witneſs into Writing, which he afterwards corrects; but even after the Notary has taken the ſaid Anſwer down in Writing; provided he does it before he the ſaid Witneſs has ſubſcrib'd himſelf to the Examination; becauſe then ſuch Correction and Amendment is ſaid to be made *incontinently* and not *ex intervallo* †. Nay, a Witneſs may correct himſelf after his Examination is ended and finiſh'd; provided it be done before he has had any Diſcourſe and Converſation with the Party in Suit *: But 'tis otherwiſe, if he has ſince had Diſcourſe with the ſaid Party, becauſe this might induce Subornation. Wherefore, if a Witneſs be always kept in Priſon in ſuch a ſecret manner, that he cannot have any Diſcourſe with the Party, he may correct himſelf at any Time whatſoever; tho' *Boſſius* ſeems to be of a different Opinion in this Matter, by reaſon of the eaſy way of Corrupting Jaylors in this point.

* Cl. 2. 8. 2.

† Abb. in c. 3. X. 2. 18. N. 22.

* X. 2. 21. 7. Dd. ibi. X. 2. 20. 53. & ibi Notata.

FINIS.

A CATALOGUE of the Monaſteries and Religious Houſes in *England*, diſſolv'd by a Statute in King *Henry* the VIIIth's Time, explaining the Lands of ſuch Houſes as were diſcharg'd from the Payment of Tithes in virtue of their ſeveral Orders; as *Knights Templars*, *Hoſpitallers*, and the *Ciſtercians* were in their Times. Thoſe mark'd with an Aſterisk * were Mitred Abbots called to Parliament, and exempt from Epiſcopal Juriſdiction.

The Names of Monaſteries, and Priories.	*In what Counties.*	*When Founded, Ann.*	*Of what Order.*	*Of what Value per Ann.* l.	s.	d.
* Abingdon, Ab.	Berkſ.	821	Benedictines	187	00	00
Abbotsbury.	Dorſet	1016	Benedictines	390	19	02
* St. Albans, Ab.	Hertford.	793	Benedictines	413	14	11
Ambresburg, A.	Wilts	1177	Benedictines	494	15	02
St. Andrews, Pr.	Northam.	1067	Cluni	263	07	01
Aſhrugg, Coll.	Bucks	*Edw.* 1.	Can. St. Auſt.	416	16	04
Barndney, Ab.	Lincoln	712	Benedictines	366	06	01
Barnewelt, Pr.	Kent	*Hen.* 1.	Can. St. Auſt	256	11	10
Bartholomew.	Smithfield	1102	Can. St. Auſt.	653	15	00
Bath, Abbey.	Somerſet	*Hen.* 3.	Benedictines	617	02	08
Berking, Ab.	Eſſex	680	Benedictines	862	12	02
Bellavalla, Pr.	Nottingh.	16 *E.* 3.	Carthuſians	227	08	00
Belland, Ab.	York	1134	Ciſtercians	238	09	04
Bermondſey, Ab.	Surry	7 *Hen.* 1.	Can. St. Auſt.	474	14	04
Birlington.	York	*Hen.* 1.	Can. St. Auſt.	547	06	11
Bodmin, Priory.	Cornwall	936	Can. St. Auſt.	270	00	11
Bolton in Craven.	York	*Hen.* 1.	Can. St. Auſt.	212	13	04
Bordeſly, Ab.	Worceſter	1138	Ciſtercians	388	09	10
Boxley, Ab.	Kent	1114	Ciſtercians	204	04	11
Bradſtock, Pr.	Wilts	*T. Conq.*	Can. St. Auſt.	212	19	03
Brewton, Ab.	Somerſet	*T. Conq.*	Can. St. Auſt.	439	06	08
Briſtol, Ab.	Glouceſter	*Hen.* 1.	Can. St. Auſt.	670	13	11
Buckland, Pr.	Somerſet	*Edw.* 1.	Ciſtercians	223	07	04
Buckfaſt, Ab.	Devon	*Hen.* 2.	Ciſtercians	466	11	02
Burton on Trent, Ab.	Stafford	K. *Edr.*	Benedictines	267	14	03
Buſleſham, Ab.	Berks	13 *E.* 3.	Can. St. Auſt.	285	00	00
Butley, Ab.	Suffolk	1171	Can. St. Auſt.	318	17	02
Carliſle, Pr.	Cumberl.	*W. Ruf.*	Can. St. Auſt.	418	03	04
Caſtle Ave, Ab.	Norfolk	1092	Cluni	306	11	04
Cerne, Ab.	Dorſet	K. *Edg.*	Benedictines	515	17	10
Charter-Houſe.		1372	Carthuſians	726	02	07
Chertſey, Ab.	Surry	666	Benedictines	659	10	08

The

The Names of Monasteries, and Priories.	*In what Counties.*	*When Founded,* Ann.	*Of what Order.*	*Of what Value* per Ann. *l.*	*s.*	*d.*
Chicksand, Pr.	Bedford	*Wm.* 2.	WhiteCanons	212	03	05
* Cirenceſter, Ab.	Glouceſter	*Hen.* 1.	Can. St. Auſt.	1051	07	01
St. Clare.	Wt. Algate	1292.		1418	08	02
Clerkenwell, Pr.		K. *Step.*	Benedictines	262	19	00
Colcheſter, Ab.	Eſſex	*Hen.* 1.	Can. St. Auſt.	523	17	00
Comb, Ab.	Warwick	K. *Step.*	Ciſtercians	371	15	01
Combermere, Ab.	Cheſhire	1134	Ciſtercians	225	09	07
St. Croſs, Ab.	Stafford	1153	Ciſtercians	227	05	00
* Croyland, Ab.	Lincoln	716	Benedictines	1803	15	01
Croxden, Ab.	Leiceſter	*R.* 1.	Præmonſtr.	385	00	10
Croxden, Ab.	Stafford		Ciſtercians			
St. Cuthbert, Ab.	Durham	842	Benedictines	523	17	00
Darby, Abby.	Derbyſh.	*Hen.* 2.	Can. St. Auſt.	258	14	05
Dartford, Ab.	Kent	43 *E.* 3.	Can. St. Auſt.	380	00	00
Dinkſwell, Ab.	Devon	1201	Ciſtercians	294	18	06
Dorcheſter, Ab.	Oxon	635	Can. St. Auſt.	219	12	00
Dunſtable, Ab.	Bedford	*Hen.* 1.	Can. St. Auſt.	344	13	03
Edington, Pr.	Wilts	1352	Can. St. Auſt.	442	09	07
* Edmondsbury, Ab.	Suffolk	1020	Benedictines	1659	13	11
Einſham, Ab.	Oxon	K. *Eth.*	Benedictines	441	12	02
Elmeſton, Ab.	Bedford	*Wm.* 1.	Benedictines	284	12	11
Epworth.	Lincoln	*W. R.* 2.	Carth. Monks	237	15	02
Fair-place, Ab.	Hampſh.	1204	Ciſtercians	326	13	02
Farley.	Wilts	1125	Cluni	217	00	04
Feverſham, Ab.	Kent	1147	Cluni	286	12	06
Ford, Abby.	Devon	1133	Ciſtercians	374	10	06
Fountain, Ab.	York	1132	Ciſtercians	998	06	08
Furnes, Ab.	Lincoln	1127	Ciſtercians	805	16	05
St. Germains, Ab.	Cornwall	*Athelſt.*	Can. St. Auſt.	243	08	00
* Glaſſenburg.	Somerſet	300	Benedictines	3311	07	04
* Glouceſter, Ab.	Glouceſter	680	Benedictines	1946	00	00
Gisborn, Ab.	York	K. *Step.*	Can. St. Auſt.	628	03	04
Godſtow, Ab.	Oxon	K. *Step.*	Benedictines	294	05	10
Hales, Abby.	Glouceſter	1246	Ciſtercians	257	07	08
Hales-Owen, Ab.	Worceſter	K. *John*	Præmonſtr.	282	13	04
Hales-Owen, Ab.	Salop	K. *John*	Præmonſtr.	337	15	06
Haghmond, Ab.	Salop	1100	Can. St. Auſt.	259	13	07
Hertland, Ab.	Devon	*Hen.* 2.	Ciſtercians	294	18	06
* Hide, Abby.	Hampſh.	K. *Alfr.*	Benedictines	865	18	00
Hinton, Pr.	Somerſet	*Hen.* 3.	Carthuſians	248	19	02
Holmeoltron, Ab.	Cumberl.	1135	Ciſtercians	427	19	03
Holynell.	Lond. *&c.*	1318	Black Monks	347	15	06
Hulme, Abby.	Norfolk	K. *Can.*	Benedictines	583	17	00
Jervall, Ab.	York	K. *Step.*	Ciſtercians	234	18	05
John of Jeruſalem.		*Hen.* 1.		2385	12	08
Ixworth, Pr.	Suffolk	*T. Conq.*	Can. St. Auſt.	280	09	05
Keynſham, Ab.	Somerſet	*Hen.* 1.	Can. St. Auſt.	419	14	03
Kennelworth, Ab.	Warwick	*Hen.* 1.	Can. St. Auſt.	538	19	00
Kingſwood.	Glouceſter	680	Benedictines	244	11	02
Kirkham, Ab.	York	*Hen.* 1.	Can. St. Auſt.	239	09	04
Kirkſtall, Ab.	York	*Hen.* 1.	Ciſtercians	329	02	11
Kirkſted, Ab.	Lincoln	1139	Ciſtercians	286	02	07

The

The Names of Monaſteries, and Priories.	*In what Counties.*	*When Founded,* Ann.	*Of what Order.*	*Of what Value* per Ann. *l.*	*s.*	*d.*
Lacock, Ab.	Wilts	1232	Can. St. Auſt.	203	12	05
Lanthony, Pr.	Glouceſter	1136	Can. St. Auſt.	649	19	11
Landa, Ab.	Leiceſter	*W. Ruf.*	Can. St. Auſt.	399	03	03
Launceſton, Ab.	Cornwall	*W.* 1.	Can. St. Auſt.	354	00	11
Ledis, Priory.	Kent	1119	Can. St. Auſt.	362	07	07
Lenton, Priory.	Nottingh.	*Hen.* 1.	Cluni	329	05	10
Leiceſter, Abbey.	Leiceſter	1143	Can. St. Auſt.	951	14	05
Lillyſhall, Ab.	Salop	*Adelfled* K. of *Mercia.*		229	03	01
Lincoln, Priory.		*Hen.* 2.		202	05	00
London Minors		*Edw.* 1.	Benedictines	318	08	05
London Houſe		*Edw.* 3.	Carthuſians	642	00	04
* Malmesbury, Ab.	Wilts	670	Benedictines	803	17	07
Malvern, Ab.	Worceſter	1083	Benedictines	308	01	05
St. Mary Biſh. Pr.		1187		478	06	06
St. Mary Ov. Ab.		7 *Hen.* 1.	Can. St. Auſt.	624	06	06
* St. Mary York, Ab.	York	*W. Ruf.*	Benedictines	1550	07	00
Mauling, Ab.	Kent	K. *Edm.*	Benedictines	218	04	02
Maulton, Ab.	York	K. *Step.*		237	07	00
Melſam, Ab.	York	1136	Ciſtercians	299	06	04
Merrival, Ab.	Warwick	1148	Ciſtercians	254	01	08
Merton, Priory.	Surry	1121	Can. St. Auſt.	957	19	05
St. Mich. Hull.	York	1377	Carthuſians	231	17	03
Midleton, Ab.	Dorſet	*Ethel.*	Benedictines	578	17	11
Michelney, Ab.	Somerſet	740	Benedictines	447	04	11
Miſſenden, Ab.	Bucks	1293	Benedictines	261	14	06
M. Burton, Ab.	York	1186	Cluni	239	03	06
Mountgrace, Ab.	York	1396	Carthuſians	323	02	10
Neots, Abby.	Hunting.	*Hen.* 1.	Benedictines	241	11	04
Newark, Pr.	Surry			258	11	11
Newham, Ab.	Devon	1246	Ciſtercians	227	07	08
Newburg, Pr.	York	1145	Can. St. Auſt.	367	08	03
Newnham, Pr.	Bedford	*Hen.* 1.	Can. St. Auſt.	293	05	11
Newſted, Pr.	Nottingh.	*Edw.* 3.	Can. St. Auſt.	219	18	08
Noteley, Ab.	Bucks	*Hen.* 1.	Can. St. Auſt.	437	06	08
Noſtel, Ab.	York	*Hen.* 1.	Can. St. Auſt.	492	18	02
Nuneaton, Mon.	Warwick	*Hen.* 2.	Benedictines	258	14	05
Oſney, Priory.	Oxon	*Hen.* 1.	Can. St. Auſt.	654	10	02
Oſwick, Ab.	Eſſex	1120	Can. St. Auſt.	677	01	02
Oxford, Pr.	Oxon	Ant. Conq.		224	04	08
* Peterborough, Ab.	Northam.		Benedictines	1721	14	00
Perſhore, Ab.	Worceſter	1138	Ciſtercians	643	04	03
Pipewell, Ab.	Northam.	1143	Ciſtercians	286	11	08
Plimpton, Ab.	Devon	*Edw.* 1.	Ciſtercians	241	17	09
Pomfret, Ab.	York	*T. Conq.*	Cluni	337	14	08
* Ramſey, Ab.	Hunting.	968	Benedictines	1716	12	04
* Reading, Ab.	Berkſ.	*Hen.* 1.	Benedictines	1988	14	03
Reverly, Ab.	Lincoln	1142	Can. St. Auſt.	287	02	04
Rival, Ab.	York	1132	Ciſtercians	278	10	02
Rithal.	York			351	14	06
Rocheſter, Ab.	Kent	600	Benedictines	486	11	05
Rock, Ab.	York	1147	Ciſtercians	224	02	05
Rumſey, Ab.	Hampſh.	907	Benedictines	293	10	10

The Names of Monasteries, and Priories.	*In what Counties.*	*When Founded,* Ann.	*Of what Order.*	*Of what Value* per Ann. *l.*	*s.*	*d.*
Selby, Ab.	York	*T. Conq.*	Benedictines	729	12	10
Sempringham, Ab.	Lincoln	1048	Gilbertines	317	04	01
Shafton, Ab.	Dorset	941	Benedictines	1166	08	09
Shene, Pr.	Surrey	1414	Carthusians	777	12	00
Sherborne, Ab.	Dorset	370	Benedictines	682	14	07
* Shrewsbury, Ab.	Salop	1081	Can. St. Aust.	615	04	03
Sibeton, Ab.	Suffolk	1150	Cistercians	250	15	07
Sion, Ab.	L. & M.	*Hen.* 5.	Can. St. Aust.	1731	08	04
Smithfield E. Ab.		34 *E.* 3.	Cistercians	602	11	10
Southwick, Pr.	Hampsh.	*Hen.* 1.	Can St. Aust.	257	04	04
Spalling, Ab.	Lincoln	1052	Benedictines	761	08	11
Stratford, Ab.	Essex	511	Cistercians	511	16	03
Sulby, Ab.	Northam.	K. *Step.*	Præmonstr.	258	08	05
Strata Florida.	Cardigan	*T. Conq.*		1226	06	00
St. Swithin's.	Wincheſt.	634	Benedictines	1507	17	02
Tarrent, Ab.	Dorset	*Hen.* 3.	Cistercians	214	07	09
* Tavistock, Ab.	Devon	961	Benedictines	902	05	07
Taunton, Pr.	Somerset	*Hen.* 1.	Can. St. Aust.	386	08	10
Thame, Ab.	Oxon	*Hen.* 1.	Cistercians	256	13	11
* Tewxsbury, Ab.	Glouceſter	715	Benedictines	1598	01	03
Thetford, Ab.	Norfolk	1103	Cluni	312	14	04
* Thornley, Ab.	Kent	972	Benedictines	411	12	11
Thornton, Ab.	Lincoln	1139	Can. St. Aust.	594	07	10
Thurgarton, Pr.	Nottingh.	*Hen.* 1.	Can. St. Aust.	259	09	04
Titchfield, Ab.	Hampsh.	*Hen.* 3.	Præmonstr.	242	16	01
Tinmouth, Pr.	Durham			397	11	05
Tinmouth.	Northum.	A Cell to St. Albans.		511	04	01
Torre, Ab.	Devon	*Rich.* 1.	Præmonstr.	369	11	00
Twineham, Pr.	Hampsh.	1042	Can. St. Aust.	326	13	02
Vale of Holy Croſs.	Denbysh.	*Edw.* 1.	Cistercians	214	03	05
Walton, Ab.	York	K. *Step.*	Gilbertines	360	16	10
* Waltham, Ab.	Essex	1060	Can. St. Aust.	904	04	03
Walden, Ab.	Essex	1136	Benedictines	372	18	01
Walsingham, Ab.	Norfolk	K. *Step.*	Can. St. Aust.	391	11	07
Walter, Priory.	York	*Hen.* 1.	Can. St. Aust.	221	03	10
Warden, Ab.	Bedfordsh.	4 *Step.*	Cistercians	389	16	06
Warson, Pr.	Nottingh.		Can. St. Aust.	239	10	05
Welbeck, Ab.	Nottingh.	K. *Step.*	Can. St. Aust.	249	06	08
Wenlock, Pr.	Salop	1181	Cluni	401	07	00
St. Wereburg.	Cheshire	1095		1103	05	11
West Deerham.	Norfolk	*Hen.* 2.	Præmonstr.	228	00	00
* Westminster.		K. *Edg.*	Benedictines	3471	00	02
Westacre, Ab.	Norfolk	*W. Ruf.*	Cluni	260	13	07
Whale, Ab.	Lancast.	1172	Cistercians	331	09	01
Whitby, Ab.	York	*T. Conq.*	Benedictines	437	02	09
Whorwill, Ab.	Hampsh.	K. *Edg.*	Benedictines	339	08	07
Wigmore, Ab.	Salop	1172	Can. St. Aust.	267	02	10
Wilton, Ab.	Wiltshire	K. *Eth.*	Benedictines	601	01	01
* Winchcomb, Ab.	Glouceſter	787	Benedictines	391	18	02
Witham, Pr.	Somerset	*Hen.* 2.	Carthusians	215	15	00
Wooburn, Ab.	Bedford	K. *John*	Cistercians	391	18	02
Wymundham, Ab.	Norfolk	1139	Benedictines	211	16	06

A

TABLE

Of the FEES belonging to the Officers of the *Eccleſiaſtical Courts*. At firſt ſet forth by the Moſt Reverend Father in GOD, *JOHN WHITGIFT*, Lord Archbiſhop of *Canterbury*, M.D.XCVII.

Fees due to the Judge.

	s.	d.
Literæ Teſtimoniales	05	00
Commiſſio	10	00
Exemplificatio	10	00
Significavit	10	00
Quietus eſt	10	00
Adminiſtratio cujuſlibet defuncti cujus bona extendunt ultra 40 *l.*	10	00
Literæ ad colligenda bona	06	08
Sequeſtratio fructuum	06	08
Commiſſio Tutelæ	06	08
Licentia Solemnizandi Matrimonium abſque Bannis	06	08
Sententia	06	00
Examinatio proceſſus	03	04
Decretum interlocutorium	03	04
Examinatio cujuſlibet Computi	03	04
Admiſſio Reſignationis	03	04
Licentia prædicandi, deſerviendi & docendi	02	00
Inhibitio in cauſa Matrimoniali	01	08
Suſpenſio	00	08
Abſolutio ejuſdem	00	09
Excommunicatio	00	08
Abſolutio ejuſdem	00	09
Certificatorium de abſolutione	00	08
Citatio	00	05
Decretum	00	10
Productio partis principalis	00	09
Productio primi teſtis	00	09
Productio cujuſlibet reliquorum	ob.	00 04
Pro die ad exhibendum Inventorium	01	00
Pro parte purgata	00	09
Pro primo Compurgatore	00	09
Pro quolibet reliquorum	ob.	00 04
Literæ intimatoriæ ſive proclamatoriæ	01	00
Admiſſio cujuſlibet exhibiti	00	04
Caveat pro Teſtamentis & Adminiſtrationibus	00	06
Caveat pro Inſtitutione ſive Matrimonio	01	00
Dimiſſio cujuſlibet cauſæ incontinentiæ & inſtantiæ poſt litis Conteſtationem	00	05
Pro interrogatoriis miniſtratis	00	09
Licentia Solemnizandi Matrimonium tempore prohibitionis de Bannis edendis	02	00
Pro exhibitione conjuſlibet procuratorii pro qualibet cauſa	02	00
Literæ Interdictoriæ	02	00
Commiſſio ad abſolvendum quempiam	02	00
Teſtamenta & Adminiſtrationes prout in ſtatuto 21 Hen. 8. c. 5.	00	00
Tranſmiſſio proceſſus & ſigillo	06	00
Licentia ſectandi extra Juriſdictionem	05	00

Fees due to the Regiſter.

Literæ Teſtimoniales		06	08
Inſtitutio cum Mandato		06	08
Commiſſio		06	08
Exemplificatio præter ſcriptionem materiæ exemplificatæ		06	08
Significavit		06	08
Quietus eſt		06	08
Literæ ad Colligendum bona		03	04
Pro ſcriptione Computi		06	08
Sequeſtratio fructuum		03	04
Sententia		06	00
Licentia Solemnizandi Matrimonium abſque Bannis		03	04

Licentia

	s.	d.
Licentia deſerviendi vel docendi	01	04
Inhibitio in cauſa Matrimoniali	01	08
Suſpenſio	00	08
Abſolutio ejuſdem	00	09
Excommunicatio	00	08
Abſolutio ejuſdem	00	09
Schedula Excommunicationis ex Officio	00	06
Certificatorium de Abſolutione	00	08
Citatio	00	05
Decretum	00	10
Productio partis principalis	00	09
Productio primi teſtis	00	09
Productio cujuſlibet reliquorum ob.	00	04
Pro parte purgata	00	09
Pro primo Compurgatore	00	09
Pro quolibet reliquorum ob.	00	04
Literæ intimatoriæ ſive proclamatoriæ	01	00
Commiſſio Tutelæ	03	04
Admiſſio cujuſlibet exhibiti	00	04
Caveat pro Teſtamentis & Adminiſtrationibus	00	06
Caveat pro Inſtitutione vel Matrimonio	01	08
Decretum interlocutorium	01	08
Dimiſſio cujuſlibet cauſæ incontinentiæ & inſtantiæ poſt litis Conteſtationem	00	05
Pro interrogatoriis miniſtratis	00	09
Licentia Solemnizandi Matrimonium tempore prohibitionis de Bannis edendis	01	04
Pro quolibet actu	00	04
Licentia ſectandi extra Juriſdictionem	05	00
Pro qualibet Obligatione	01	00
Pro copia cujuſlibet materiæ exhibitæ ſecundum quantitatem	00	00
Pro literis Diaconatus ordinis	03	04
Pro literis Presbyteratus ordinis	03	04
Pro licentia prædicandi, deſerviendi & docendi	01	04
Pro exhibitione literarum Diaconatus ordinis tempore Viſitationis	00	04
Pro exhibitione literarum Presbyteratus eodem tempore	00	04
Pro exhibitione Inſtitutionis cum Mandato	00	04
Pro exhibitione cujuſlibet Diſpenſationis	01	00
Pro exhibitione cujuſlibet procuratorii tempore Viſitationis	02	00
Pro exhibitione cujuſlibet billæ detectionis eodem tempore	00	04
Literæ Interdictoriæ	01	04
Licentia non reſidendi	01	04
Commiſſio pro Abſolutione alicujus	01	04
Teſtamenta & Adminiſtrationes prout in ſtatuto prædicto	00	00
Pro exhibitione cujuſlibet procuratorii pro Teſtamentis	01	04
Adminiſtratio cujuſlibet defuncti cujus bona extendunt ultra 40 *l.*	06	04
Pro exhibitione cujuſlibet procuratorii	01	04
Admiſſio Reſignationis	02	06
Tranſmiſſio proceſſus quantum taxatur per Judicem	00	00
Scrutinium factum in Regiſtro	01	00

Fees due to the Procurator.

PRO Conſilio	02	00
Pro quolibet die Juridico	01	00
Pro ſchedula excommunicationis	00	06
Pro ſchedula expenſarum	01	00
Pro feodo ad probandum Teſtamentum	01	00
Pro libello	05	00
Pro qualibet materia	03	04
Pro interrogatoriis	03	04
Pro Conceptione Computi	03	04
Pro Conceptione Sententiæ	03	04
Pro Conceptione cujuſlibet reſponſionis perſonalis	02	06

Fees due to the Apparitor.

FOR execution of every Citation of Inſtance, Excommunication and Decree *per* Mile	00	02
For every Detection	00	04
For every intimation upon purgation *per* Mile	00	02
For every Suſpenſion, Excommunication *& viis & modis ex officio per* Mile	00	02
For every Teſtament or Adminiſtration above 5 *l.*	00	06
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AN

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